

IN THE CIRCUIT COURT OF THE STATE OF OREGON  
FOR THE COUNTY OF LANE  
125 E. 8th Ave. Eugene Oregon 97401

Case No: 18CV28947

BRANDY DALBECK

Plaintiff

**ORDER**

v.

BI-MART CORPORATION

Defendant

THIS MATTER came before the Court on March 11, 2019 on cross motions for summary judgment on what appears to be a matter of first impression. The issues before the court were well briefed by both parties and after oral argument the Court took the matter under advisement to further review the points and authorities cited by Counsel. The Court now being fully advised in the premises whereof, rules as follows;

While the Court finds there is a triable question of fact on the issue of Plaintiff's standing to bring this action against Bi-Mart for failing to sell her a firearm at the age of 18, the Court must first address whether the evidence before the Court demonstrates a valid claim under the Oregon Public Accommodation Act (OPAA). Unfortunately, this 1953 statutory provision has been repeatedly amended by the legislature to the point that it is now extremely difficult to both navigate and construe. Since there is little guidance from the appellate courts in addressing the issue before the Court, the two parties, not surprisingly, have come to dramatically different conclusions regarding the substantive, and procedural aspects of the statutory formula – neither of which is without merit. The first issue the Court must address is the proper interpretation of this confusing statutory scheme.

**A) Plaintiff is not in a protected class under ORS 659A.303**

When the Oregon legislature first enacted the OPAA it did not include age as a protected class but was primarily enacted to “prevent operators and owners of businesses catering to the general public” from engaging in racial discrimination, *King v. Greyhound Lines, Inc.* 61 Or. App 197, 203 (1982). The 2003 legislature added age as a protected class and renumbered the provisions to be included in ORS chapter 659A. Specifically, ORS 659A.403(1) then provided “all persons within the jurisdiction of this state are entitled to the full and equal privilege of any place of public accommodation without any distinction, discrimination or restriction on account of . . . age if the individual is 18 years of older.” The legislature included in the 2003 amendment section (2) of the statute that clarified the new age provision did not apply to laws regarding age limitations for alcohol or special benefits to senior citizens.

In 2015, the legislature again amended ORS 695A.403 by deleting “18 years” in subsection (1) and replacing it with the phrase “if the individual is of age, as described in

this section, or older.” The same amending bill added a reference to “21 years of age” in the context of access to and consumption of marijuana.

The plain language of the statute after the 2015 amendment clearly eliminates 18 to 20 years of age as a protected class. As the Defendant points out, it is the role of a judge in interpreting a statute to simply ascertain what in terms or substance is contained therein and not to insert what has been omitted or to omit what has been inserted. Plaintiff urges the Court to find that the phrase “of age” is 18 and older but such a finding would require the Court to reinsert a reference after the legislature had expressly removed it.

### **B) Plaintiff has no separate right of recovery under ORS 659A.885 (7)**

Plaintiff alternatively argues that she is entitled to statutory relief under ORS 659A.885(7) as a standalone right of recovery. While that is not an unreasonable argument based upon an isolated reading of the statutory subsection, it becomes more problematic upon review of the statute as a whole and in context of its placement in Chapter 659A. To say that ORS 659.885 is unartfully drafted is an understatement. The first section appears to simply enable civil remedies for violations of certain substantive provisions within Chapter 659A. That is to say, Subsection 659A.885(1) provides a civil action in circuit court for actions for injunctive relief, equitable relief, damages, costs, and fees, if the violation arose from a statutory provision set forth in section (2). However, ORS 659A.303 is not included among the statutory provisions set forth in section (2). Read in this context, it is unclear whether section (7) [now renumbered (8)] provides a separate statutory right of recovery for statutory violations of Chapter 659A provisions not enumerated in section (2), or whether it represents an additional measure of relief for civil claims qualifying under subsection (1). Either interpretation bars a recovery in this case based upon the court’s conclusion that 18 to 20 year olds are no longer a protected class under ORS 659A.303.

What is clear to the Court is that subsection (7) is not a standalone statutory remedy because it does not address statutory exceptions limiting alcohol and marijuana sales to individuals under 21 referenced in ORS 459A.403(2) or a myriad of statutory limitations addressing individuals under 21.

### **C) The OPAA, if applicable, allows unenumerated reasonable age-based exceptions**

Indeed, assuming arguendo that the Court accepted Plaintiff’s analysis that ORS 659A.303 applied to 18-20 year olds, Plaintiff’s further argument that the statutory exceptions set forth in ORS 659A.403(2) for alcohol and marijuana are exclusive rather than inclusive does not address the obvious problem posed by numerous other non-enumerated statutes cited by Defendant that allow age restrictions for car rental agreements, possession of explosives, food/alcohol service, gaming, commercial driving, insurance, as well as rules and disqualifications to serve as a state representative, security guard, the purchase of hand guns, obtaining a concealed weapon permit, or serving as a youth hunting mentor. All of these provisions restrict the rights, and

therefore “discriminate” against 18-20 year olds and in numerous cases relate to firearm use and ownership. Even if the court had accepted Plaintiff’s argument of a protected status I cannot find the legislature, by enacting the cited provisions in ORS Chapter 659A, intended to invalidate all of the above age restrictive provisions.

Further, if a public body provides services to the public regardless of whether that service is commercial in nature, it is considered to be a “public accommodation” under the OPAA, ORS 659A.400(1)(c). Surely the granting of certificates for security professionals and concealed weapons permits are clearly a public service provided by a public body. The statutory provisions for these services – ORS 166.291, ORS 181A.855 – existed before the legislature added age as a protected class. Knowledge on the part of the legislature of earlier enactments is presumed. *State v. Waterhouse*, 209 OR 424, 438 (1952). The only way to harmonize the failure of the legislature to create exceptions for these pre-existing statutes with the OPAA is the conclusion that the legislature intended to allow implied exceptions to the prohibition against age discrimination, for public health or if safety is at issue, be it tobacco, marijuana, alcohol, gaming, transportation, or firearms.

The Court agrees with Defendant’s contention that once it is acknowledged that age-based exceptions to the OPAA exist that are not expressed, it must also be presumed that the legislature intended for the OPAA to allow for other reasonable age-based restrictions or distinctions that reasonably serve a compelling and lawful societal interest. A contextual and historical review of the language of ORS 659A.003(2) also supports this conclusion.

In arriving at its decision in this case the Court expressly does not endorse the Defendant’s risk-analysis argument regarding firearms and 18-20 year olds. Most members of this age group interact with firearms in a safe and appropriate manner. Undoubtedly for this reason, Oregon law and Bi-Mart’s policy does not preclude parents or guardians from purchasing firearms for use by their children under the age of 21.

However, the Court is also mindful coming to this conclusion that Bi-Mart’s age policy reflects the current state of the law in two adjoining states and Oregon includes this age restriction for certain classes of firearms. In resolving this case, the Court accepts the tenant that the fundamental purpose of the OPAA is to eliminate anti-social discriminating practices rather than practices that attempt to address socially desirable ones. When all is said and done, the Court simply cannot find that a seller of firearms is legally precluded from reasonably restricting such sales to individuals 21 years or older.

Now, therefore; IT IS HEREBY ORDERED as follows:

- 1) Defendant's Motion for Summary judgment is GRANTED, and
- 2) Plaintiff's Motion for Partial Summary Judgment is DENIED, and,
- 3) Due to the unsettled and confused state of the law, the Court finds that each party shall bear their own costs and attorney fees.

Signed: 3/25/2019 10:39 AM

A handwritten signature in black ink, appearing to read 'CD Carlson', written above a horizontal line.

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**Charles D. Carlson, Circuit Court Judge**