

**EMPLOYMENT APPEALS BOARD DECISION**  
**2015-EAB-0133**

*Affirmed*  
*No Disqualification*

**PROCEDURAL HISTORY:** On December 16, 2014, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 123119). Claimant filed a timely request for hearing. On February 2, 2015, ALJ Triana conducted a hearing and issued Hearing Decision 15-UI-32774, reversing the Department's decision. On February 9, 2015, the employer filed an application for review with the Employment Appeals Board (EAB).

**FINDINGS OF FACT:** (1) Vineyard Steak House Corporation employed claimant as a bartender from June 28, 2014 until November 25, 2014.

(2) The employer generally expected claimant to keep the business open until 1:00 a.m. on Mondays through Thursdays, and 2:00 a.m. on Saturdays and Sundays. When there were few or no customers in the bar toward the end of business hours, the employer allowed claimant to close the bar 30 minutes earlier than the scheduled time. "Last call," the time after which customers would not be allowed to purchase any additional alcoholic beverages, was 15 minutes before the time the bar closed. Claimant understood the employer's expectations. Transcript at 11, 12. Claimant understood that she was expected to lock the doors to the bar after she announced the "last call." Transcript at 36, 37. The employer also expected claimant to comply with Oregon Liquor Control Commission (OLCC) rules by prohibiting customers from bringing liquor obtained outside the bar into the bar.

(3) On November 17, 2014, a claimant observed that a customer who had not ordered any beers from the bar had an open bottle of beer next to him while he was playing a video poker lottery game in the lottery room. Claimant approached the customer and asked him about the beer. The customer admitted that he had brought the bottle of beer into the bar and it was open when he did so. Transcript at 31. Claimant told the customer that he had violated OLCC rules and needed to leave the bar, said he was "done for the

day," and confiscated the bottle of beer. Transcript at 32. The customer refused to leave the bar and claimant asked him to do so two more times. When the customer still adamantly refused after the third request, claimant cashed out his video poker tickets and gave him the cash that was owed. The customer left the bar. Later that evening, claimant spoke with the bar manager about what action the bar should take since the customer had so stubbornly refused to leave the bar until he was forced. The manager agreed that the customer should be banned from entering the bar for the next 30 days. Transcript at 32.

(4) By November 21, 2014, the employer's owner had received complaints from some customers that they had tried to enter the bar before it was scheduled to close and the doors were locked. On November 22, 2014, when claimant was at work, the owner approached claimant and asked her when she was announcing "last call." Transcript at 38. Claimant told the owner that she was making the last call 15 minutes before the bar closed and 15 minutes earlier than that if the bar was slow that night and was going to close early. The owner told claimant that he had received customer complaints that the bar was closing early and he was going to review the bar's surveillance video to learn when she actually was closing the bar.

(5) On November 24, 2014, claimant was working when the customer who had been banned on November 17<sup>th</sup> came into the bar. Claimant approached the customer and told him he was barred from entering the premises for 30 days due to his behavior on November 17, 2014. The owner, who was in the bar at the time, intervened in the discussion, and told claimant that the customer should have received only a warning for his actions on November 17, 2014 and should not have been barred from entering the bar because it was the customer's first violation. Claimant advised the owner that she did not agree with this approach because of the customer's behavior on November 17, 2014. The owner disagreed and the customer was allowed to remain in the bar. Later that night, the owner told claimant he was considering discharging her for "kicking out" the customer. Transcript at 35. Claimant asked the owner if she was actually fired, and the owner did not respond to her questions.

(6) On November 25, 2014, when claimant came to work, the owner told claimant that he was discharging her for excluding the customer from the bar on November 17, 2014 and for closing the bar early on several occasions. Transcript at 39, 40.

**CONCLUSIONS AND REASONS:** The employer discharged claimant but not for misconduct.

ORS 657.176(2)(a) requires a disqualification from unemployment insurance benefits if the employer discharged claimant for misconduct. OAR 471-030-0038(3)(a) (August 3, 2011) defines misconduct, in relevant part, as a willful or wantonly negligent violation of the standards of behavior which an employer has the right to expect of an employee, or an act or series of actions that amount to a willful or wantonly negligent disregard of an employer's interest. The employer has the burden to show claimant's misconduct by a preponderance of the evidence. *Babcock v. Employment Division*, 25 Or App 661, 550 P2d 1233 (1976).

Although the owner testified that he discharged claimant for failing to apologize to him after he criticized how she had done her job, and we agree with the ALJ that any failure to apologize on claimant's part was not the type of willful or wantonly negligent behavior on which a disqualification from benefits may be based, the record fails to show that the owner discharged claimant because she failed to apologize to him. Claimant testified that when the owner told her on November 25, 2014 that

she was being discharged the reasons he gave her for the discharge included closing the bar early and excluding the customer on November 17, 2014. Transcript at 16, 24, 25, 26, 39, 40. The owner testified extensively about his extreme displeasure with claimant over those incidents, and it appears unlikely that he would have discharged her for an alleged failure to apologize for those incidents rather than for the actual incidents themselves, especially given that the record fails to show he ever notified her that she was expected to apologize in order to keep her job. Transcript at 11-25. We therefore focus our analysis on claimant's conduct, and not her failure to apologize, as the cause of her discharge.

The owner did not dispute claimant's explanation she understood that she was to lock the doors to the bar not when she actually closed it, but when she announced last call. Transcript at 37. Although the owner testified that he received complaints about the bar closing early, based on the customers encountering locked doors when they tried to enter, and he observed on the bar's surveillance videos that claimant "closed" the bar early, the owner did not present evidence about the dates and the actual times in the morning when he contended that claimant closed the bar early. Transcript at 14, 15. The owner's testimony did not rule out that on the particular dates when the bar was allegedly closed early it was a "slow day," when claimant was allowed to close early, or that the complaining customers tried to enter the bar within 15 minutes of the scheduled closing, after claimant had announced the last call at the appropriate time and locked the bar's entry door. The record therefore fails to show that claimant violated the employer's expectations when she closed the bar when she did. Even if claimant had been mistaken about the employer's last call procedures or closing time expectations, given her understanding of the employer's expectations, her conduct was not willful or wantonly negligent.

The owner did not dispute that the employer had no clear policy about when a customer should receive a warning rather than being excluded from the premises. The owner testified that decision to warn or to ban a customer was "kind of a common sense thing." Transcript at 20, 24. The owner also did not dispute that claimant had spoken with the bar manager on November 17, 2014 and the manager had concurred that the customer should be excluded from the bar for 30 days after November 17, 2014. Transcript at 32. In light of the reasons that claimant and the bar manager decided on November 17, 2014 that the customer should be banned from the premises, that he had steadfastly refused to leave the bar after violating OLCC standards, it cannot be concluded that their decision to ban the customer from the bar was unreasonable or defied common sense. Nor can it be concluded that claimant's response when the customer entered the bar on November 24, 2014 was unreasonable since the bar manager, claimant's supervisor, had expressed agreement on the apparent behalf of the employer that the customer was barred from entering the bar for 30 days. On these facts, the employer did not establish, more likely than not, that claimant's actions in excluding the customer from the premises of the bar on November 17, 2014 was, more likely than not, a wantonly negligent violation of an employer standard of which she was reasonably aware.

The employer discharged claimant but not for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits.

**DECISION:** Hearing Decision 15-UI-32774 is affirmed.

Tony Corcoran and J. S. Cromwell;  
Susan Rossiter, not participating.

**DATE of Service: March 24, 2015**

**NOTE:** You may appeal this decision by filing a Petition for Judicial Review with the Oregon Court of Appeals within 30 days of the date of service listed above. *See* ORS 657.282. For forms and information, you may write to the Oregon Court of Appeals, Records Section, 1163 State Street, Salem, Oregon 97310 or visit the Court of Appeals website at [courts.oregon.gov](http://courts.oregon.gov). Once on the website, use the 'search' function to search for 'petition for judicial review employment appeals board'. A link to the forms and information will be among the search results.

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