

EMPLOYMENT APPEALS BOARD DECISION
2016-EAB-0790

Affirmed
No Disqualification

PROCEDURAL HISTORY: On May 13, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 152618). Claimant filed a timely request for hearing. On June 20, 2016 ALJ Dorr conducted a hearing, and on June 21, 2016 issued Hearing Decision 16-UI-62243, reversing the Department's decision. On July 7, 2016, the employer filed an application for review with the Employment Appeals Board (EAB).

The employer submitted a written argument, but failed to certify it provided a copy of the argument to claimant as required by OAR 471-041-0080 (October 29, 2006). For that reason, EAB did not consider the employer's written argument when reaching this decision.

FINDINGS OF FACT: (1) Voice Box employed claimant from February 10, 2014 until March 31, 2016, last as bartender and bar lead.

(2) The employer expected claimant to adhere to the regulations of the Oregon Liquor Control Commission (OLCC) when he was on duty and serving alcohol. Claimant held a server's permit issued by the OLCC, was aware of the substance of the OLCC regulations, and understood he was expected to comply with OLCC regulations when he was working.

(3) As bartender, claimant sometimes created new cocktails to serve to the employer's customers. It was a regular practice of the employer's bartenders to have the newly created cocktails sampled by on duty employees and management to determine if those cocktails were acceptable to offer to customers. Sometimes, these employees and managers went behind the bar to sample the cocktails. Claimant was not advised that employees and managers were not permitted behind the bar when sampling cocktails.

(4) On March 28, 2016, while claimant was on-duty, he experimented with creating a gin and chipotle pepper infusion to be used in cocktails. At the end of his shift when he left work, the gin was not sufficiently infused with chipotle pepper flavor and claimant left the peppers in the gin. Later that

evening, claimant returned as a guest to the Voice Box to attend a party on the premises and intended to check the gin to determine if the infusion was complete. Claimant was not on duty. Shortly after entering the Voice Box, claimant went behind the bar to sample the gin infusion he had started earlier to evaluate whether the peppers should be removed from the gin. Claimant drank approximately an ounce of the gin, determined the infusion was complete and removed the peppers.

(5) On March 31, 2016, the employer discharged claimant for sampling infused alcohol behind the bar on March 28, 2016, believing that by doing so, claimant violated OLCC regulations and the employer's policies that incorporated OLCC regulations.

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. Isolated instances of poor judgment and good faith errors are not misconduct. OAR 471-030-0038(3)(b). The employer carries 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).

While the employer contended that it discharged claimant because his actions on March 28, 2016 violated both its policies and OLCC regulations, it provided no information about what its policies were and how, if at all, its policies differed from OLCC regulations. Audio at ~11:27, ~12:47, ~25:37. Absent such information, we are limited to considering only whether claimant violated OLCC regulations on March 28, 2016.

Although OLCC regulations plainly provide that an on-duty server is prohibited from consuming alcohol during his or her shift, it was not disputed that claimant was not on-duty when he went behind the bar and sampled the infused gin. OAR 845-006-0345(1) (December 1, 2013); Audio at ~11:27, ~29:09. OAR 845-006-0345(1)(b) sets forth the circumstances under which a server who is acting outside of a scheduled shift and not receiving pay for his activities may be still considered "on duty" and subject to the OLCC regulations. It requires, among other things, that the server have the "authority to put himself or herself on duty" and be "performing acts on behalf of the [OLCC] licensee" or the employer. OAR 845-006-0345(1)(b). While it seems obvious that claimant was sampling the gin infusion on behalf of the employer, since he was trying to create a new cocktail to sell to customers, the employer took the position at hearing that only a manager, not claimant, was allowed to place claimant or others on or off-duty. Audio at ~14:37. Because claimant did not meet the second prong of the regulatory test, he should not be considered "on duty" when he returned to the Voice Box on the evening of March 28, 2016. Since claimant was a bar guest, the OLCC regulations allowed him to consume alcohol when he sampled the gin on March 28, 2016 and he did not run afoul of OAR 845-006-0345(1). OAR 845-006-0345(11) further prohibits a server or licensee from allowing any patron or guest to serve alcohol to him or herself, and is the closest in language to what the employer's witness appeared to contend was an absolute OLCC prohibition against an off-duty employee going behind the bar to serve him or herself. Audio at ~11:27. However, OAR 845-006-0345(11) prohibits only an on-duty permittee (e.g., a server) or licensee from allowing a patron or guest to go behind the bar and does not penalize or

prohibit the patron or guest from going behind it. Claimant also did not appear to run afoul of this regulatory provision by going behind the bar when he was a guest and not on duty as a server. No other of the OLCC regulations appear even remotely applicable to the circumstances under which claimant went behind the bar on March 28, 2016.

The lack of a clear regulatory prohibition on what claimant did on March 28, 2016 gives credence to his contention that he did not think he was violating the employer's policies since on-duty employees and managers often sampled new cocktails that a bartender was creating and might go behind the bar to do so. Audio at ~27:09, ~20:40. Significantly, the employer's witness did not dispute claimant's contention about the frequency with which this practice occurred in the workplace, or that managers engaged in it and by their behavior condoned it. In *Goin v. Employment Department*, 203 Or App 758, 126 P3d 758 (2006), the court held that a claimant's behavior in violation of the employer's objective standards may be excused as a "good faith error" under OAR 471-030-0038(3)(b) if it results from a mistake made with an honest belief that one is acting rightly, claimant's conduct is not unconscionable and the known circumstances do not require claimant's further investigation. Here, claimant's actions in going behind the bar while a guest was not contrary to OLCC regulations, and was not unconscionable. Given the prevalence with which other employees and managers had historically engaged in such behavior, there was no basis for claimant to investigate whether that behavior was inconsistent with the employer's policies. Assuming the employer actually had a policy prohibiting employees from going behind the bar to consume alcohol when they were not on-duty, the employer did not show that claimant's belief that he was allowed to do so was implausible or that it was not honest or sincere. As such, on this record as it exists, claimant's behavior on March 28, 2016, if it was contrary to the employer's standards, is excusable as a good faith error.

Although the employer discharged claimant, it did not show that it did so for misconduct under ORS 657.176(2)(a). Claimant is not disqualified from receiving unemployment benefits.

DECISION: Hearing Decision 16-UI-62243 is affirmed.

Susan Rossiter and D. P. Hettle;
J. S. Cromwell, not participating.

DATE of Service: August 11, 2016

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. 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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