EO: 200
BYE: 201741

State of Oregon
Employment Appeals Board
875 Union St. N.E.
Salem, OR 97311

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DS 005.00

EMPLOYMENT APPEALS BOARD DECISION
2017-EAB-0281

Affirmed
No Disqualification

PROCEDURAL HISTORY: On November 22, 2016, the Oregon Employment Department (the Department) served notice of an administrative decision concluding the employer discharged claimant for misconduct (decision # 85347). Claimant filed a timely request for hearing. On February 13, 2017, ALJ Meerdink conducted a hearing, and on February 14, 2017 issued Hearing Decision 17-UI-76871, reversing the Department's decision. On March 6, 2017, the employer filed an application for review with the Employment Appeals Board (EAB).

FINDINGS OF FACT: (1) McMenamins, Inc. employed claimant from February 13, 2016 until October 15, 2016, last as an assistant manager.

(2) The employer expected claimant to exhibit positive and professional behavior at all times in the workplace and to show courtesy and respect toward coworkers and customers. The employer also expected claimant to obey the regulations of the Oregon Liquor Control Commission (OLCC) when in the workplace. Claimant understood the employer's expectations.

(3) Sometime before October 2016, claimant began experiencing anxiety attacks. Claimant consulted a physician and was prescribed anti-anxiety medicine. On approximately October 11, 2016, claimant filled the prescription and began taking the anti-anxiety medicine. Claimant did not receive any information notifying him about possible side effects of the medicine or substances to avoid while taking it. Claimant had never before been prescribed a psychotropic drug and was not aware that very moderate alcohol consumption while taking the prescribed medication could have a synergistic effect, remove his inhibitions or cause him to behave as if he were intoxicated. Until October 13, 2016, claimant did not consume alcohol while taking the anti-anxiety medication.

(4) On October 13, 2016, although claimant was not scheduled to work, he attended a managers' meeting in the afternoon at the workplace. Claimant took a dose of the anti-anxiety medicine before the meeting. At the meeting, the employer served a pitcher of beer to the six managers who were attending. Claimant drank some of the beer. Thereafter, claimant exhibited behavior that the other managers

attending the meeting thought was "unusual" for him, including that he spoke in a "very loud" voice, said "fuck" several times, and kept referring back to topics that had already been discussed. Audio at ~6:07, ~18:40. At the time, claimant did not "feel right," but did not perceive that his behavior was abnormal during the meeting. Audio at ~27:37. After the meeting, claimant had a beer at the employer's bar. A server thought claimant was behaving as if he were intoxicated and told him she needed to remove the beer and she would not serve him any more beer or other alcoholic beverages. At the time, claimant was "confused" about why the server had concluded she would not serve him any more beer and wanted to remove the beer he had. Claimant told the server to "fuck off." Audio at ~10:30. Claimant finished the beer, left the bar and went home.

(5) On October 15, 2016, the pub manager met with claimant. She described to claimant how he had acted at the meeting and after, and what he had said. Claimant explained to the manager that he thought his behavior during the October 13, 2016 managers' meeting could have been the result of an interaction between the anti-anxiety drug he had been taking and the beer the employer had served and he had consumed. The pub manager told claimant he was discharged for his behavior during and after the October 13, 2016 meeting and because that behavior had violated 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 connected with work. 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. OAR 471-030-0038(1)(c) defines wanton negligence, in relevant part, as indifference to the consequences of an act or series of actions, or a failure to act or a series of failures to act, where the individual acting or failing to act is conscious of his or her conduct and knew or should have known that his or her conduct would probably result in a violation of the standards of behavior which an employer has the right to expect of an employee. 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).

The employer's witness contended that claimant's behavior during and after the October 13, 2016 constituted misconduct both because it violated OLCC regulations and because it violated the employer's prohibition against vulgar and rude behavior. Audio at ~8:59, ~10:54, ~12:59. However, the employer's witness affirmatively testified only that claimant was not "on the clock" when the server tried to take the beer from him and never stated claimant was formally on the clock or on duty during the managers' meeting that preceded that incident.. Audio at ~10:49. While OAR 845-006-0345(1)(b) (December 1, 2016) states that no employee who holds an OLCC server's permit, like claimant, may drink or be under the influence of intoxicants while on duty and it further provides that "on duty" includes an employee working outside a scheduled shift if the employee has the authority to put himself or herself on duty and is performing acts on behalf of an OLCC licensee like the employer which involve the mixing, sale or service of alcoholic beverages, checking identification or controlling conduct on the premises. The employer did not present sufficient evidence to establish that on October 13, 2016, claimant was "on duty" within the meaning of OAR 845-006-0345(1), and therefore did not show that claimant's behavior that day, if he was under the influence of alcohol, constituted a violation of OLCC regulations. The other contentions of the employer's witness - that solely as the holder of an OLCC

server's permit, claimant had an obligation to not become visibly intoxicated on the employer's premises even if he was not on duty and had an obligation to relinquish his beer upon the instruction of a server - is not supported by the plain language of OLCC regulations prohibiting certain conduct by OLCC permit holders. *See* OAR 845-006-0345.

With respect to the employer's contention that claimant's behavior on October 13, 2016 also violated the employer's prohibitions against vulgar and rude behavior, the employer did not dispute that, rather than having been volitional, claimant's intoxicated-appearing behavior was the result of an unintended result of an interaction between the anti-anxiety medication claimant had taken and the alcohol he had consumed with the employer's permission. The employer's witness did not present any evidence suggesting or tending to suggest that claimant had consumed enough alcohol at the meeting to account for his apparently inebriated behavior. The employer's witness observed that claimant's behavior on October 13, 2016 was atypical and out of the norm for him, and did not contend that claimant's explanation for why he had behaved as he did that day was implausible or a likely fabrication. As well, there was no evidence in the record challenging claimant's testimony that his behavior during and after the meeting did not seem unusual or abnormal to him, or that he was not aware that he was violating the employer's expectations as to appropriate behavior. Audio at ~30:25, ~31:05, ~37:16. The record fails to show that an interaction between the medicine claimant had taken and the alcohol he consumed, resulting in the aberrational behavior he displayed on October 13, 2016, should have been foreseeable to claimant, and that he reasonably should have taken steps to prevent it. Nor does the record show that claimant was consciously aware that the combination of medications and alcohol he consumed would lead to intoxicated-like behaviors on October 13, 2016, including vulgarity and rudeness, or that it was wantonly negligent of claimant to fail to take precautions against the occurrence of such behaviors. Accordingly, the employer failed to show that claimant violated the employer's standards willfully or with wanton negligence, or therefore that claimant engaged in misconduct on October 13, 2016.

The employer failed to establish it discharged claimant for misconduct. Claimant is not disqualified from receiving unemployment insurance benefits based on this work separation.

DECISION: Hearing Decision 17-UI-76871 is affirmed.

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

DATE of Service: <u>April 11, 2017</u>

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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