

**BEFORE THE OREGON LIQUOR CONTROL COMMISSION
OF THE STATE OF OREGON**

In the Matter of the Service Permit Held by:)	FINAL FINDINGS OF FACT
)	CONCLUSIONS OF LAW
)	AND ORDER
)	
LISA VEDACK)	OLCC-12-V-049
Service Permit No. 315049)	

HISTORY OF THE CASE

On August 15, 2012, the Oregon Liquor Control Commission (OLCC or Commission) issued a Notice of Proposed Service Permit Suspension/Civil Penalty to Lisa Vedack alleging that on June 11, 2012 she knowingly sold, gave, or made an alcoholic beverage available to a visibly intoxicated person, in violation of ORS 471.410(1). The OLCC also alleged, alternatively, that on June 11, 2012, Ms. Vedack allowed a visibly intoxicated person to consume alcoholic beverages on the licensed premises after observing that the person was visibly intoxicated, in violation of ORS 471.412(1). In the Notice, the OLCC proposed a 10-day service permit suspension or a civil penalty of \$250.

On September 10, 2012, Ms. Vedack timely requested an administrative hearing. On September 20, 2012, the OLCC referred the hearing request to the Office of Administrative Hearings (OAH). On December 13, 2012, the OLCC issued an Amended Notice of Proposed Service Permit Suspension/Civil Penalty to Ms. Vedack alleging that the alleged violations occurred on or about June 9 and 10, 2012.

On December 20, 2012, Senior Administrative Law Judge Jennifer H. Rackstraw of the OAH convened a contested case hearing in Tualatin, Oregon. Ms. Vedack represented herself at the hearing. Anna Davis represented the OLCC. The following persons testified: Ms. Vedack; Clackamas County Sheriff's Deputy Richard Sheldon; Erika Scortino; OLCC Inspector Jackie Paul; OLCC Inspector Jason Tallmadge; Denny's server Kristopher Walker; and Denny's assistant manager Jose Benitez. OLCC Inspector Jeff Bell observed the hearing but did not participate. The record closed at the conclusion of the hearing on December 20, 2012.

The Administrative Law Judge considered the record of the hearing and the applicable law and issued a Proposed Order mailed February 1, 2013.

No Exceptions to the Proposed Order were filed within the 15-day period specified in OAR 845-003-0590.

The Commission adopts the Proposed Order of the Administrative Law Judge as the Final Order of the Commission and enters the following based on the preponderance of the evidence:

EVIDENTIARY RULINGS

Ms. Vedack's Exhibits P7 and P8 and OLCC Exhibits A1 through A12 were admitted into the record without objection. Ms. Vedack's Exhibits P1 through P6 (decisions regarding unemployment insurance benefits) were excluded, pursuant to ORS 657.273(2).¹

ISSUES

1. Whether Ms. Vedack violated ORS 471.410(1) by selling, giving, or otherwise making available, alcoholic liquor to a person who was visibly intoxicated.

Alternatively, whether Ms. Vedack violated ORS 471.412(1) by allowing a person to consume alcoholic beverages on the licensed premises after observing that the person was visibly intoxicated.

2. If a violation of ORS 471.410(1) or 471.412(1) is proven, what is the appropriate sanction?

FINDINGS OF FACT

1. The OLCC issued Ms. Vedack a service permit on September 2, 2008. The permit expires on August 22, 2013. (Ex. A1; test. of Tallmadge.) The OLCC has never previously charged Ms. Vedack with a liquor law violation. (See Amended Notice of Proposed Service Permit Suspension/Civil Penalty.)

2. Ms. Vedack has been a bartender for approximately 15 years. (Test. of Vedack.) At all times pertinent to this matter, Ms. Vedack was employed as a bartender at Denny's, located at 30175 SW Parkway Avenue in Wilsonville, Oregon. (Ex. A2; test. of Vedack.)

3. On June 9, 2012, Ms. Vedack worked a bartending shift from 3:45 p.m. to 1:30 a.m. (on June 10, 2012). (Ex. P8 at 1.) She was the only bartender working that evening. (Test. of Vedack.)

4. Patron Erica Scortino arrived at Denny's just prior to 3:45 p.m. on June 9, 2012. (Ex. A8 at 1; test. of Vedack.) Ms. Scortino joined another patron, Rick. (Test. of Scortino.) Ms. Vedack served Ms. Scortino an alcoholic beverage upon her arrival, even though Ms. Vedack

¹ ORS 657.273(2) provides:

[T]he decisions, findings, conclusions, final orders and judgments that arise out of hearings under ORS 657.270, review proceedings under ORS 657.275 and judicial review proceedings under ORS 657.282:

* * * * *

(2) Are not admissible as evidence in any other civil action or proceeding other than civil actions or proceedings under this chapter or in determination of eligibility for public assistance or supplemental nutrition assistance[.]

was still counting her money prior to the official beginning of her work shift, because she did not want Ms. Scortino to have to wait for service. (Ex. A8 at 1.) Prior to coming to Denny's that day, Ms. Scortino had been at another establishment and had consumed a club sandwich, four jalapeno poppers, and french fries. (Test. of Scortino.)

5. Approximately once or twice per week, Ms. Scortino came to Denny's to drink alcoholic beverages during "happy hour." (Test. of Vedack.) Ms. Vedack has previously served alcohol to Ms. Scortino at Denny's on several occasions without incident. Ms. Scortino has a loud and boisterous personality. She tends to be temperamental and very opinionated. (*Id.*; Ex. P8 at 1.) One or more individuals have warned Ms. Vedack that Ms. Scortino can "get out of control or crazy." (Ex. P8 at 1.)

6. Between approximately 11:15 and 11:30 p.m., Ms. Scortino ordered hot wings from Ms. Vedack. Ms. Vedack initially forgot to place the order for the hot wings. Ms. Vedack served the hot wings to Ms. Scortino sometime between 11:30 and 11:40 p.m. Because Ms. Scortino complained that the hot wings were cold, Ms. Vedack obtained approval from a manager to "comp" the wings. (Test. of Vedack; Ex. P8 at 1.) At 11:46 p.m., Ms. Vedack closed out Ms. Scortino's tab for the hot wings at a \$0 balance. (Ex. A5 at 3.)

7. On the evening in question, between approximately 3:45 p.m. and 1:00 a.m., Ms. Vedack served eight rum and Coke drinks and one shot of tequila to Ms. Scortino.² (Ex. A5; test. of Vedack.) Ms. Vedack was aware that she had served nine drinks to Ms. Scortino. (Test. of Vedack.)

8. Between approximately 1:00 and 1:15 a.m., Ms. Vedack called "last call" for alcoholic drinks. At that time, Ms. Scortino, Rick, and/or Dave ordered a round of tequila shots (*i.e.* three shots). Ms. Vedack served the three shots, believing that each individual would drink one shot. Ms. Scortino drank her tequila shot, and while Dave was outside of the premises smoking a cigarette, she drank his tequila shot too. (Test. of Vedack; Ex. P8 at 1.)

9. In hindsight, Ms. Vedack believes she may have used questionable judgment in continuing to serve alcoholic beverages to Ms. Scortino up until "last call," but she believed that Ms. Scortino was staying at the hotel next door and would not be driving. (Test. of Vedack.)

10. After drinking the two tequila shots, Ms. Scortino went into the Denny's restroom for a few minutes and then went out to the Denny's parking lot. She intended to let her dog out of her parked car so the dog could relieve itself. Rick had requested that she do the same with his dog. For unknown reasons, Rick's dog snapped at Ms. Scortino when she went to remove the dog from Rick's vehicle. The dog caused some injury to Ms. Scortino. In response, Ms. Scortino began beating the dog. (Ex. P8 at 1; test. of Vedack.)

11. Dave came inside Denny's shortly thereafter and reported to everyone that Ms. Scortino was "killing" Rick's dog. (Ex. P8 at 1; test. of Vedack.) Ms. Vedack looked outside and saw that Ms. Scortino had the dog by the scruff of its neck and was punching it. Rick went

² Ms. Scortino made three debit card purchases at Denny's on the evening in question: a \$12 purchase for three rum and Coke drinks that she consumed; a \$26 purchase for five rum and Coke drinks that she consumed; and a \$27 purchase for a tequila shot she consumed, a tequila shot that Rick consumed, and a bourbon drink that another patron, Dave, consumed. (Ex. A5 at 1-4; test. of Vedack.)

outside and got his dog away from Ms. Scortino. Ms. Vedack then went outside and observed Ms. Scortino chasing after and trying to kick the dog. After Ms. Vedack saw Ms. Scortino shove Rick and hit Dave, Ms. Vedack got her manager, Jose Benitez. Mr. Benitez instructed Ms. Vedack to call the police. Ms. Vedack complied and was told by a dispatcher that police were already on their way because Ms. Scortino had called them. (Ex. P8 at 1; test. of Vedack.)

12. In response to the reports involving Ms. Scortino, sometime shortly before 1:33 a.m., Clackamas County Sheriff's Deputy Richard Sheldon arrived at Denny's. At approximately 1:33 a.m., Deputy Sheldon made contact with Ms. Scortino. Deputy Sheldon observed that she was belligerent, arguing with bystanders, repeating herself, and refusing to cooperate with emergency medical personnel who were attempting to treat her. She refused to be transported to a hospital and she became increasingly angry when police would not shoot the dog that she claimed had bitten her. Deputy Sheldon observed that Ms. Scortino "had bloodshot watery eyes, slurred speech, strong odor of an alcoholic beverage, droopy eyelids, and [she] was repeating the same statements over and over again." (Ex. A8 at 1; test. of Sheldon.)

13. Deputy Sheldon has been trained to identify the signs of visible intoxication. (Test. of Sheldon.) He informed Ms. Scortino that she could not drive her car and that if she did, he would arrest her for Driving under the Influence of Intoxicants (DUII). Ms. Scortino walked away from the scene towards Guest House Suites on Citizens Drive. As Ms. Scortino was walking away, Ms. Vedack asked Deputy Sheldon why Ms. Scortino was not being arrested for hitting the dog. As they discussed this, Ms. Vedack told Deputy Sheldon that she wished she would have "cut off Scortino earlier from any more alcoholic beverages due to her now apparent high level of intoxication." (Ex. A8 at 2.) Ms. Vedack informed Deputy Sheldon that she had served Ms. Scortino approximately five rum and Coke drinks and three shots of Patron tequila shots, starting at 4:30 p.m. (*Id.* at 6.)

14. After a bystander told Deputy Sheldon that he wished to press charges against Ms. Scortino because she had hit him, Deputy Burdette located Ms. Scortino and transported her back to Denny's. Ms. Scortino subsequently turned down repeated offers for a courtesy ride to a safe location for the night. After being given the option of going somewhere safe or being taken to a detox center for the night, Ms. Scortino indicated that she would walk to the adjacent hotel and get a room for the night. Deputy Sheldon watched her walk towards the hotel, and he pulled his car to a nearby parking lot to wait to see whether Ms. Scortino might return to her parked car and attempt to drive somewhere. Ms. Scortino soon returned to her car and started driving. After she drove over the curbs dividing the Denny's parking lot and the hotel parking lot, Deputy Sheldon stopped her. (Ex. A8 at 2-3.)

15. After approaching Ms. Scortino in her now parked car, Deputy Sheldon observed that her eyes remained bloodshot and watery, her speech was slurred, her eyelids were droopy, and she still had the strong odor of alcoholic beverage on her person. Deputy Sheldon believed that she was physically and/or mentally impaired to a noticeable and perceptible degree. He asked if she would perform field sobriety tests and she eventually agreed to do so. (Ex. A8 at 3.)

16. While taking the field sobriety tests, Deputy Sheldon observed that Ms. Scortino was swaying front to back while standing, she was talking with slurred speech, she had the strong odor of alcoholic beverage, she could not keep her balance on one occasion, she made an improper turn on one occasion, she missed a "heel-to-toe walk" on multiple occasions, she had to

be reminded to look at her foot and to point her toes straight ahead, and she continually told Deputy Sheldon that she was on private property. (Ex. A12; test. of Sheldon.)

17. Deputy Sheldon arrested Ms. Scortino for DUII. She was then taken into custody and transported to the Clackamas County Jail. On the way, Deputy Sheldon continued to smell the strong odor of alcoholic beverage on Ms. Scortino. Once at the jail, Ms. Scortino initially refused to exit the police car, and she repeatedly yelled that she wanted an attorney. (Exs. A7, A8 at 4, A13.) Deputy Sheldon administered a breath test to Ms. Scortino at approximately 4:42 a.m. on June 10, 2012.³ The test revealed that Ms. Scortino had a blood-alcohol content (BAC) of 0.12 percent. Deputy Sheldon wrote her a citation for DUII. (Exs. A8 at 5-6, A10, A11; test. of Sheldon.)

18. There are multiple factors that affect how long it takes an alcoholic beverage to enter a person's blood stream. One of those factors is food consumption. (Test. of Sheldon.) Typically, after a person stops consuming alcohol, the person's BAC continues to rise for one hour. After approximately one hour, the person's BAC begins to decrease approximately .015 percent for every hour thereafter. OLCC Inspector Jason Tallmadge opines that at approximately 1:30 a.m. on the evening in question, Ms. Scortino's BAC was likely to have been around .13 percent. Mr. Tallmadge also opines that, given all of the relevant circumstances, more likely than not Ms. Scortino would have had visible signs of intoxication prior to Ms. Vedack serving those last shots of tequila to Ms. Scortino and her fellow patrons. Mr. Tallmadge opines that Ms. Vedack would have observed Ms. Scortino at approximately the same level of intoxication as Deputy Sheldon observed when he arrived on the scene at approximately 1:30 a.m. on the evening in question. (Test. of Tallmadge.)

19. On June 13, 2012, Ms. Scortino sent an email to James Lynch of the OLCC stating that she had been a patron at the Wilsonville Denny's on June 10, 2012. She reported that on the night at issue Ms. Vedack had forgotten to place her food order, continued to serve her alcohol, and lied to the police. Ms. Scortino requested that the OLCC investigate the incident. (Ex. A3.)

20. On June 26, 2012, OLCC Inspectors Jackie Paul and Jason Tallmadge interviewed Ms. Scortino regarding her complaint against Ms. Vedack. (Ex. A2 at 4; test. of Paul.) Ms. Scortino provided the inspectors with Denny's receipts from June 9 and 10, 2012, as well as a bank statement showing Denny's transactions. (Test. of Tallmadge; *see* Exs. A5, A6.) Ms. Paul believed that, during the interview, Ms. Scortino underestimated how many drinks she had consumed on the night in question and that Ms. Scortino also overestimated the degree to which she was victimized that night. (Test. of Paul.)

21. On June 27, 2012, Mr. Tallmadge interviewed Ms. Vedack about the incident involving Ms. Scortino on June 9 and 10, 2012. Ms. Vedack informed Mr. Tallmadge that her judgment with regard to serving Ms. Scortino alcoholic beverages and observing signs of intoxication may have been more lax than usual because she had believed that Ms. Scortino was staying at the hotel next store to Denny's and that she would not be driving that evening. Ms. Vedack told Mr. Tallmadge that prior to serving Ms. Scortino the last alcoholic beverage of the evening, Ms. Vedack saw Ms. Scortino dancing near her table, although there was no dance floor. Ms. Vedack admitted to Mr. Tallmadge that Ms. Scortino started showing signs of

³ This was approximately three hours after his initial contact with Ms. Scortino. (Test. of Sheldon.)

intoxication later in the evening and that she should not have served Ms. Scortino the last alcoholic beverage. (Test. of Tallmadge; Ex. A2 at 5-6, 8.)

CONCLUSIONS OF LAW

1. Lisa Vedack violated ORS 471.410(1) by selling, giving, or otherwise making available alcoholic liquor to a person who was visibly intoxicated.

The alternative charge under ORS 471.412(1) should be dismissed.

2. The appropriate penalty for the violation of ORS 471.410(1) is a 10-day service permit suspension or a civil penalty of \$250.

OPINION

1. Violation

The OLCC contends that Ms. Vedack made an alcoholic beverage available to a visibly intoxicated patron, Erika Scortino, in violation of ORS 471.410(1). Alternatively, the OLCC contends that Ms. Vedack violated ORS 471.412(1) by allowing Ms. Scortino to consume alcohol after observing that she was visibly intoxicated. As the proponent of these contentions, OLCC bears the burden to prove its allegations by a preponderance of the evidence. ORS 183.450(2) (“The burden of presenting evidence to support a fact or position in a contested case rests on the proponent of the fact or position”); *Harris v. SAIF*, 292 Or 683, 690 (1982) (general rule regarding allocation of burden of proof is that the burden is on the proponent of the fact or position); *Metcalf v. AFSD*, 65 Or App 761, 765 (1983) (in the absence of legislation specifying a different standard, the standard of proof in an administrative hearing is preponderance of the evidence). Proof by a preponderance of the evidence means that the fact finder is persuaded that the facts asserted are more likely than not true. *Riley Hill General Contractor v. Tandy Corp.*, 303 Or 390, 402 (1987).

ORS 471.410(1) provides: “No person shall sell, give or otherwise make available any alcoholic liquor to any person who is visibly intoxicated.”

The OLCC has determined that persons who sell alcoholic beverages have an affirmative duty to observe whether individuals purchasing alcohol from them are visibly intoxicated. *Kelsey’s Korner Market* (OLCC, Final Order, 97-V-009, October 1997). The OLCC has determined that signs of visible intoxication include, but are not limited to, the following: slurring; a heavy odor of alcohol; difficulty in handling money or lighting cigarettes; staggering, swaying, stumbling, or falling; bloodshot, watery, or glassy eyes; disruptive, loud, or argumentative behavior; clumsiness, such as spilling drinks or bumping into things; and extreme mood swings. *Jody’s Restaurant & Lounge* (OLCC, Final Order, 97-V-015, August 1977). OLCC has further concluded that a visibly intoxicated person is one whose physical and mental control is diminished by alcohol or drugs to a point where such diminished control can be seen or observed. *Portland Civic Stadium* (OLCC, Final Order, 85-V-032, January 1986).

The *prima facie* elements of a violation of ORS 471.410(1) are as follows: (1) the sale, service or making available alcoholic liquor; (2) by an on-duty licensee, permittee or agent of licensee; (3) to a person who was showing visible signs of intoxication before the service; (4) the

licensee, permittee or agent knew the person was visibly intoxicated; and (5) the person was actually intoxicated. “A ‘knowing’ sale to a visibly intoxicated person is met where, prior to the sale or service of alcohol, the patron demonstrated signs of visible intoxication, the server had the opportunity to observe the signs, and the server either actually observed the signs (*i.e.*, interaction with patron while displaying signs) or knew of the presence of a circumstance from which knowledge could be inferred.” *Cheers to You* (OLCC, Final Order, 00-V-070, October 2001). OLCC calls these latter circumstances knowing “flag factors.” The server’s state of mind is a question for the trier of fact to be determined in view of the circumstances as shown by the evidence. *Aloha Station* (OLCC, Final Order, 99-V-034, August 1999); *Plaid Pantry No. 55* (OLCC, Final Order, 98-V-063, October 1998).

Here, on the night in question, Ms. Vedack served Ms. Scortino eight rum and Coke drinks, one shot of tequila, and one order of hot wings between approximately 3:45 p.m. and 1:00 a.m. At approximately 1:15 a.m., Ms. Vedack served Ms. Scortino and her two companions three more shots of tequila. Ms. Scortino drank two of the shots. Within approximately 23 minutes of Ms. Scortino consuming those final two tequila shots, Ms. Scortino sustained a dog bite injury, began beating and chasing a dog around the Denny’s parking lot, shoved a patron, and hit a patron. During that same time period, Sheriff’s Deputy Sheldon observed that she had bloodshot and watery eyes, droopy eyelids, slurred speech, and a strong odor of alcoholic beverage on her. Deputy Sheldon also observed that Ms. Scortino was angry, belligerent, argumentative, repetitious, and uncooperative with medical personnel. Ms. Scortino subsequently failed a field sobriety test and, approximately three and one-half hours after Ms. Vedack served those final tequila shots, Ms. Scortino had a BAC of .12 percent.

On the night in question, Ms. Vedack admitted to Deputy Sheldon that she should have cut off Ms. Scortino from receiving any more alcoholic beverages earlier. On June 27, 2012, Ms. Vedack informed OLCC Inspector Tallmadge that her judgment with regard to serving Ms. Scortino alcoholic beverages and observing signs of intoxication may have been more lax than usual because she had believed that Ms. Scortino was staying at the hotel next store to Denny’s and that she would not be driving that evening. Ms. Vedack admitted to Inspector Tallmadge that Ms. Scortino started showing signs of intoxication later in the evening and that she should not have served Ms. Scortino the last alcoholic beverage.

At hearing, Ms. Vedack disputed that she observed any visible signs of intoxication prior to serving those final tequila shots to Ms. Scortino and her companions. However, Ms. Vedack admitted that her belief that Ms. Scortino was staying at the adjacent hotel that evening factored in to her decision to continue serving Ms. Scortino alcoholic beverages.

Given the totality of the circumstances, I conclude that more likely than not, Ms. Scortino had visible signs of intoxication prior to Ms. Vedack serving tequila to her at approximately 1:15 a.m. on the evening in question. Moreover, I find that Ms. Vedack’s statements to Deputy Sheldon and Inspector Tallmadge establish that, more likely than not, Ms. Vedack actually observed that Ms. Scortino had visible signs of intoxication prior to serving the tequila to her. Therefore, the OLCC has proven that Ms. Vedack violated ORS 471.410(1).

Because a violation of ORS 471.410(1) has been established, the alternative charge alleging that Ms. Vedack allowed a person to consume or to continue to consume alcoholic beverages in violation of ORS 471.412⁴ should be dismissed.

2. Penalty

A violation of ORS 471.410(1) is a Category III violation. OAR 845-006-0500(7). The standard penalty for a service permittee's first Category III violation is a 10-day suspension or a civil penalty of \$250. *Id.* The OLCC has cited to no aggravating or mitigating circumstances for this violation and recommends that the standard sanction be imposed—specifically a 10-day suspension. Ms. Vedack essentially sought mitigation by contending that she did not intend for Ms. Scortino to consume Dave's tequila shot and that she did not believe that Ms. Scortino would be driving that evening. However, neither of those contentions provides a basis for mitigation of the standard penalty. Thus, I find that the standard penalty is appropriate.

FINAL ORDER

The Commission orders that based on a violation of ORS 471.410(1), the Commission shall suspend Lisa Vedack's service permit for 10 days or impose a civil penalty of \$250. The alternate charge under OAR 471.412(1) is dismissed.

If you choose to pay the fine, it must be paid within ten (10) days of the date of this Order; otherwise, the suspension must be served.

It is further ordered that notice of this action, including the reasons for it, be given.

Dated this 4th day of March, 2013

/s/ Merle Lindsey

Merle Lindsey

Interim Executive Director

OREGON LIQUOR CONTROL COMMISSION

Mailed this 5th day of March 2013

THIS ORDER IS EFFECTIVE ON THE DATE MAILED. Any monetary fine or civil penalty set out in the order shall be due and payable 10 days after the date of mailing.

NOTICE: You are entitled to judicial review of this Order. Judicial review may be obtained by filing a petition for judicial review within 60 days from the service of this Order. Judicial review is pursuant to the provisions of ORS Chapter 183.

⁴ ORS 471.412(1) provides:

A licensee or permittee may not allow a person to consume or to continue to consume alcoholic beverages on the licensed premises after observing that the person is visibly intoxicated.