

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

In the Matter of the Full On-Premises Sales License held by:	) <b>FINAL FINDINGS OF FACT</b>
	) <b>CONCLUSIONS OF LAW</b>
	) <b>AND ORDER</b>
Hristos Koukoumanos, LLC	)
Hristos Koukoumanos, Managing Member	) OLCC-13-V-015
PO Box 86703	) OLCC-13-V-015A
Portland, OR 97286	)
	)
<b>dba: Lotsa Luck Bar &amp; Grill</b>	)
2136 SE Powell Blvd.	)
Portland, OR 97202	)
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	)
	)

**HISTORY OF THE CASE**

On January 16, 2013, the Oregon Liquor Control Commission (OLCC or Commission) issued a Notice of Proposed License Suspension/Civil Penalty to Hristos Koukoumanos, LLC, Hristos Koukoumanos, Managing Member, PO Box 86703, Portland, OR 97286, dba Lotsa Luck Bar & Grill, 2136 Powell Blvd, Portland, OR 97202 (Licensee). The OLCC alleged that Licensee’s employee, Kjersti Drake, permitted disorderly activities on the licensed premises.<sup>1</sup>

Licensee made a timely request for hearing. The Commission referred the request to the Office of Administrative Hearings (OAH) on February 27, 2013. The OAH assigned the case to Administrative Law Judge (ALJ) Rick Barber and originally scheduled the hearing for June 24, 2013. The hearing was rescheduled to be held on September 26, 2013.

Hearing was held as scheduled on September 26, 2013, in Tualatin, Oregon. ALJ Barber presided. Attorney Paul Thompson represented Licensee, and Becky Voelkel represented OLCC. The following witnesses testified for OLCC: Portland Police Bureau (PPB) Patrol Officer Jennifer Pierce; PPB Patrol Officer Tim Lowry; PPB Patrol Officer Andrew Kofoed; PPB Patrol Officer Julie Stevens; and OLCC Inspector Peggy Tarkalson. Licensee called the following witnesses: Bartender Kjersti Drake; and Managing Member Hristos Koukoumanos. The record closed on September 26, 2013, and ALJ Barber took the matter under advisement.

The Administrative Law Judge considered the record of the hearing and the applicable law and issued a Proposed Order mailed November 8, 2013

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<sup>1</sup> A July 11, 2013 Amended Notice added a service permit allegation (Issue no. 2), and increased the total proposed suspension to 42 days or a civil penalty of \$6,600 and two days mandatory suspension.

Staff filed Comments on the Proposed Order on November 25, 2013. The Administrative Law Judge responded to Staff's Comments on December 3, 2013.

On February 21, 2014 the Commission considered the record of the hearing, the applicable law, the Proposed Order of the Administrative Law Judge, Staff's Comments on the Proposed Order and the Administrative Law Judge's Response to Staff's Comments. Based on this review and the preponderance of the evidence, the Commission enters the following:

### **ISSUES**

1. Whether Licensee permitted disorderly activities on the licensed premises or areas the licensee controls in violation of OAR 845-006-0347(2)(a), as defined by OAR 845-006-0347(1)(c).
2. If so, what is the appropriate sanction?
3. Whether Licensee permitted managing member Koukoumanos to mix, sell or serve alcoholic beverages, or supervise those who do, without a valid service permit issued by the Commission, a violation of ORS 471.360(1)(b).<sup>2</sup>
4. If so, what is the appropriate sanction?

### **EVIDENTIARY RULING**

Exhibits A1 through A15, offered by OLCC, were admitted into evidence without objection. Licensee's Exhibits P1 through P3 were identified but, because they were duplicates of OLCC exhibits, were withdrawn.

### **FINDINGS OF FACT**

1. Lotsa Luck Bar & Grill is located on the corner of SE Powell Blvd. and 22<sup>nd</sup>, in Portland. It shares a parking lot with Andy's Auto. Lotsa Luck has two entries for the public, one on Powell and one on the parking lot. (Ex. A2 at 1). Kjersti "KJ" Drake was a bartender for Licensee in October 2012. Drake had been a bartender for twelve years and had heard many arguments between patrons. She has 86'ed many patrons for arguments and other activities, and has called the police to prevent violence on the premises. (Test. of Drake).
2. On October 27, 2012, Drake was tending bar for Licensee during the afternoon. At about 3:30, a man and a woman in a red minivan pulled into the parking lot. The man was driving. When they arrived, Drake was standing outside the parking lot door, smoking a cigarette. Drake watched as they sat for a few moments in the van, exited the van and entered the premises through the parking lot entry. (Ex. A9). Drake noted that the two were arguing with each other, but in a normal tone of voice. Drake followed them in and served the man a soft drink. The woman did not order a drink. (Test. of Drake).

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<sup>2</sup> Licensee conceded that the service permit violation occurred as OLCC had alleged.

3. The man and woman were the only patrons in the premises at the time. While they were in the premises, the man and woman continued to argue in a normal tone of voice about “stupid stuff.” At one point, the man told the woman to “get your shit out of my car.” Their voices were not raised. (Test. of Drake). When the man told her to remove her stuff, the woman went back out the van and began looking through the rear compartment. She did not remove anything from the van. (Ex. A9). The woman went back into the premises and the couple resumed arguing. After several minutes, the man told the woman he was going to “beat your ass.” The man immediately left the premises. The woman remained inside with Drake for a few minutes, which Drake believed was a good idea in light of the man’s comment. (Test. of Drake).

4. After a few minutes, the woman returned to the parking lot. At approximately that same time, the man entered the driver’s side of the minivan, started the engine and drove off, leaving the woman in the parking lot. The minivan exited onto 22<sup>nd</sup>, then turned onto Powell and came back into Licensee’s parking lot. When the man pulled the minivan back into the parking lot, he rolled down the driver’s window, stuck a handgun in the air, and fired a shot into the sky. The woman then entered the passenger side of the minivan and they drove off. (Ex. A9).

5. Witnesses from Andy’s Auto and from across the street heard the gunshot. Drake heard a loud sound like something falling, and she came outside to see what had happened. A worker from Andy’s told her it was a gunshot from the man driving the minivan, and that they had called the police. Officer Pierce arrived within minutes. Pierce interviewed Drake while other PPB officers examined the scene and attempted to locate the red minivan. Drake did not tell Pierce or any other PPB officer that she said anything to the man after his “beat your ass” comment to the female patron. (Ex. A5; Test. of Pierce).

6. OLCC Inspector Tarkalson interviewed Drake on November 19, 2012. Drake did not tell Tarkalson that she made any comments to the man to prohibit violence. Drake told Tarkalson that she did not know the law required her to take such steps. (Ex. A4; Test. of Tarkalson).

7. The man never displayed a firearm in the premises or in the parking lot until he fired the shot into the air after he returned. (Test. of Drake).

8. Licensee also operates other premises, BC’s Bar & Grill, at 2443 SE Powell in Portland. (Ex. A1). On June 19, 2013, OLCC Inspector T. Parker entered the premises and observed a male bartender standing behind the bar. The bartender was Managing Member Koukoumanos. His service permit had expired on April 1, 2013. (Ex. A13 at 2).

### **CONCLUSIONS OF LAW**

1. Licensee did not permit disorderly activities on the licensed premises or areas the licensee controls in violation of OAR 845-006-0347(2)(a), as defined by OAR 845-006-0347(1)(c).

2. No sanction is warranted because no violation occurred.

3. Licensee permitted managing member Koukoumanos to mix, sell or serve alcoholic beverages, or supervise those who do, without a valid service permit issued by the Commission, a violation of ORS 471.360(1)(b).<sup>3</sup>

4. For the violation of ORS 471.360(1)(b), Licensee's license should be suspended for 12 days, or alternatively, Licensee should pay a civil penalty of \$1,980.00.

### OPINION

OLCC staff asserts that Licensee permitted disorderly conduct on the licensed premises on October 27, 2012, in violation of OAR 845-006-0347, and allowed Managing Member Koukoumanos to mix, sell or serve alcoholic beverages without a valid service permit issued by the Commission, in violation of ORS 471.360(1)(b). As the proponent of those contentions, OLCC bears the burden of proof. ORS 183.450(2). It must prove its case by a preponderance of the evidence. *Sobel v. Board of Pharmacy*, 130 Or App 374, 379 (1994), *rev den* 320 Or 588 (1995) (standard of proof under the Administrative Procedures Act is preponderance of evidence absent legislation adopting a different standard). Proof by a preponderance of the evidence means that the fact finder is persuaded that the facts asserted are more likely true than not. *Riley Hill General Contractor v. Tandy Corp.*, 303 Or 390 (1987).

#### **Violation One**

OLCC staff's first contention is that Licensee permitted disorderly activities on the premises on October 27, 2012. OAR 845-006-0347 states in part:

#### **Noisy, Disorderly or Unlawful Activity and Drinking Alcohol Outside the Premises**

(1) Definitions. As used in this rule:

\* \* \* \* \*

(c) "*Disorderly activities*" are those that harass, threaten or physically harm another person.

(2) Noisy or Disorderly Activity:

(a) No licensee or permittee *will permit* noisy or disorderly activities on the licensed premises or in areas the licensee controls that are adjacent to or outside the premises.

(e) Violations of this section other than those described in (2)(b), (2)(c) or 2(d) are Category III violations.

(Emphasis added).

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<sup>3</sup> Licensee conceded that the service permit violation occurred as OLCC had alleged.

This rule defines what constitutes disorderly activities, and also prohibits the “permitting” of those activities on Licensee’s premises or areas under Licensee’s control. To prove a violation, the OLCC staff must show that the disorderly activities occurred, that Drake had knowledge of the conditions that resulted in disorderly activities, and that she did not take reasonable steps to prevent the disorderly activities. *Corral Pastime* (OLCC Final Order, 89-V-165, May 1991); *The Old Hitch’en Post Restaurant & Lounge* (OLCC Final Order, 93-V-038, March 1994).

***Disorderly activities.*** OLCC staff must prove that there were disorderly activities on the premises. Although the final activity in the anonymous couple’s short visit to Licensee’s premises was a gunshot in Licensee’s parking lot—definitely a disorderly activity and definitely in an area controlled by Licensee—the gunshot is not the focus of OLCC staff’s allegations in this case.<sup>4</sup> Even if the gunshot had been the focus, the evidence clearly shows that Drake was unaware of the gun in the vehicle and could have done nothing to prevent the gunshot. A licensee does not permit disorderly activities when there is no warning that an assault (or, in this case, a gunshot) would occur. *The Old Hitch’en Post Restaurant & Lounge, supra.*

OLCC staff asserts that the argument between the man and woman was a disorderly activity, and that Drake should have intervened in the argument before it progressed to violence. Licensee contends that Drake did respond to the man’s “beat your ass” comment, but the preponderance of the evidence does not support Licensee’s contention.<sup>5</sup>

Even if Drake did not admonish the man for the comment, Licensee argues that OLCC staff is “overreaching” when it attempts to turn a nonviolent verbal disagreement into a disorderly activity sufficient to sanction Licensee. For the reasons that follow, although recognizing that in certain cases words alone could constitute a disorderly activity, the Commission agrees with Licensee that this argument between the man and woman was not disorderly activity.

Although the man and woman were never found after this event, the evidence shows that the two were arguing. Videos inside and outside the premises show that there was an ongoing verbal exchange. Drake, the only witness with personal knowledge of the argument, testified that the couple was arguing from the time they left their vehicle (Drake was outside when they arrived) and throughout the time they were on the premises. They were arguing about “stupid stuff” in normal voices, and at one point the man told the woman to “get your shit out of my car.” Drake served the man a soda on the premises and the woman had nothing to drink. At the

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<sup>4</sup> In Staff’s Comments, OLCC staff requested that footnote 4 to the Proposed Order be removed because the administrative rule cited was not enacted until May 2013 and, therefore, would not have applied to this case. The Administrative Law Judge agreed to this change in his Response to Staff Comments.

<sup>5</sup> Licensee contends that Drake did intervene, claiming that she told the man “No violence in here” after the man said he was going to “beat your ass” to the woman with him. However, Drake’s testimony in this regard is contradicted by the testimony of Officer Pierce and Inspector Tarkalson, both of whom interviewed Drake after the incident. Their reports do not record any claimed statement by Drake, and both Pierce and Tarkalson testified that Drake did not tell them she said anything to the man. For those reasons, I do not accept Drake’s testimony about making the “no violence” comment as credible.

end of their 15 or so minutes inside the premises, the man told the woman he was going to “beat your ass,” then left the premises. He went outside without the woman, and the exterior video cameras show that he drove the minivan off the premises, went around the block, came back into the parking lot, fired his handgun into the air, and the woman came out to the van. She entered the van and they drove off.

Commission staff contends that the man’s “beat your ass” comment to the woman was a disorderly activity, and that Drake did nothing to control the situation. The “beat your ass” comment could be considered a threat and could meet the definition of disorderly activities in the administrative rule quoted above. However, Drake testified that the comment was made in a normal voice, with no accompanying physical violence, and that the man left the premises immediately thereafter.<sup>6</sup> There was no evidence of an imminent threat to the woman, especially after the man left the premises.

The facts of this case are unlike other matters in which the Commission has found disorderly activities. For instance, two patrons engaging in a long and heated verbal exchange that appeared to be, and actually did, lead to a physical altercation were found to have engaged in disorderly activity. *Corral Pastime* (OLCC Final Order, 89-V-165, May 1991). In *Vickie Shafer* (OLCC Final Order, 88-V-133, May 1989), a patron who angrily and aggressively approached other patrons and threatened them engaged in disorderly activity. More recently, two groups of men who were “chest bumping” and “trash talking” with each other in the bar, leading to a fight in which at least one person was seriously injured engaged in disorderly activity. *Daniel Gruska & Gabriel Burton* (OLCC Final Order, OLCC-12-V-025, January 2013).

Conversely, earlier Commission case law indicated that mere strong or angry words may not have been enough to constitute disorderly activities.<sup>7</sup>

In the current situation, the couple’s argument at normal voice levels did not concern Drake, an experienced bartender. She was ready to call the police if the man went beyond his “beat your ass” comment to actually threaten the woman, but the man immediately left the premises. OLCC staff asserted that the couple should have been “86’ed” immediately upon arrival because they were arguing, but there is little support for that assertion in the rule. Patrons can disagree about many things: sports teams, favorite beers, and who is buying that round of drinks among them. An argument between patrons—especially when it is handled civilly and at normal voice levels—is not a disorderly activity.

The argument between the man and woman was at normal voice levels and was about “stupid stuff.” Other than the “beat your ass” comment at the very end, nothing about their

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<sup>6</sup> Staff witnesses indicated that they believed the “beat your ass” comment was made outside, at the beginning of the couple’s time on the premises. However, Drake testified that it occurred at the end, inside the premises. Because Drake is the only person with personal knowledge, the Commission accepts her timing of the events as accurate.

<sup>7</sup> The partial citation is Floyd Zimmerman, *Shamrock Tavern*, January 1983. The ALJ was unable to obtain the actual decision in this case because of its age, and believes that it was decided under a previous rule than the rule cited above, which was enacted in 1990. It is cited only to illustrate of the way the Commission has dealt with cases involving only words.

conduct inside the premises shows even a potential for disorderly activities. If two patrons arguing with normal voice levels and no physical violence constitutes disorderly conduct under the rule, then a licensee would be required to “86” patrons every time there was a dispute over a referee’s call in a football game being watched on the premises, or as to which patron was going to pay for the drinks. Commission staff have failed to show that the argument between these patrons constituted disorderly activities.

***Licensee’s/Permittee’s Knowledge.*** Even if the male patron had engaged in disorderly activity, the Commission would still be required to establish the other factors in a “permitting” violation, including that Drake had knowledge of the conditions that resulted in disorderly conduct and failed to take reasonable steps to prevent it.

As noted above, Drake was aware that the two patrons were arguing, and had been doing so since they stepped out of their vehicle in the parking lot. She heard enough of what they were arguing about that she could quote small portions of it to Officer Pierce shortly after the police arrived. However, Drake’s knowledge that the patrons were arguing did not constitute knowledge that the male patron would threaten the female patron.

Drake heard the “beat your ass” comment at the end of the patrons’ time in the premises, and resolved to call the police if there was any violence. In this case, however, the male patron left the premises alone immediately after making the comment. Thus, even if the man was actually inclined to physically assault the woman patron, his exit from the premises removed that threat.

***Reasonable Steps.*** Because The Commission has concluded that the argument between the two patrons and the male’s threat to the female did not amount to disorderly activities, determining whether Drake took reasonable steps to prevent disorderly activities is not necessary.

Furthermore, the only behavior to which Drake could have responded was the “beat your ass” comment. However, the male patron immediately left the premises and drove out of the parking lot, so there was nothing that Drake needed to do. There were no reasonable steps to be taken.

OLCC staff has failed to establish that Licensee permitted disorderly activities on the premises on October 27, 2012.

## **Violation Two**

The second violation alleged by OLCC staff was that Licensee allowed Managing Member Koukoumanos to mix, sell, or serve alcoholic beverages, or supervise those who do, without a valid service permit. Licensee has conceded that the violation occurred and the evidence supports the fact that Koukoumanos was tending bar after his service permit had expired.

