

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

IN THE MATTER OF:) **FINAL FINDINGS OF FACT**
) **CONCLUSIONS OF LAW**
) **AND ORDER**
JULIE WONG) **OLCC-10-V-062**
Service Permit No. 268541)
)

HISTORY OF THE CASE

On November 9, 2010, the Oregon Liquor Control Commission (OLCC) issued a Violation Notice to Julie Wong that proposed to issue a letter of reprimand based on the allegation that Wong violated ORS 471.412 by knowingly allowing a visibly intoxicated person to consume an alcoholic beverage.

Wong requested a hearing and on December 2, 2010, OLCC referred the matter to the Office of Administrative Hearings for a contested case hearing. The case was assigned to James W. Han, Administrative Law Judge. On March 3, 2011, ALJ Han held a consolidated hearing of this case and of OLCC-10-V-061 involving licensee Nyquist Hospitality, Inc., doing business as Favorite Mistake. Attorney Michael Mills represented Wong and the licensee at the hearing. Wong appeared and testified. The following witnesses also testified for Wong and the licensee: the licensee’s corporate principal Roger Nyquist, Favorite Mistake’s manager Christina Myers, Java Network’s manager Chelsea Newton, and Kirk Nicodemus of the Oregon State Lottery. Anna Davis presented the case for OLCC. The following witnesses testified as OLCC’s witnesses: OLCC inspectors Chris Nolte and Christine Gittins; and Christopher Breshears, an employee of the licensee.

The Administrative Law Judge considered the record of the hearing and the applicable law and issued a Proposed Order mailed April 26, 2011.

Staff filed Comments on the Proposed Order on May 20, 2011. The Administrative Law Judge responded to Staff’s Comments on June 3, 2011.

On June 23, 2011, 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 Wong knowingly allowed patron Jeff Zeller to consume or to continue to consume alcoholic beverages on the licensed premises after observing that Zeller was visibly intoxicated. ORS 471.412.

2. If the violation is proved, what is the appropriate penalty?

EVIDENTIARY RULING

Exhibits A1 through A7, A9, P1 through P3, P5 through P9, P12, P15, P21 through P24, and P27 were admitted in evidence. The record closed on March 3, 2011.

FINDINGS OF FACT

1. In January 1995, OLCC issued a liquor license to Lake Shore Lanes, Inc., doing business as Lake Shore Lanes. In October 2005, the licensee changed its corporate name to Nyquist Hospitality, Inc., its tradename to Favorite Mistake, and its business location to 5420 Pacific Boulevard SW, Albany, Oregon. (Ex. A1.) At all times relevant to this matter, Wong was an employee of the licensee and was permitted to serve alcoholic beverages under Service Permit No. 268541. (Ex. A9.)

2. At about 11:30 p.m. on October 8, 2010, Wong was on duty as Favorite Mistake's bartender and served a pitcher of beer to patron Jeff Zeller. (Ex. A6.) A pitcher contains about four 16 ounce glasses of beer. (Test. of Nolte.) Wong served the pitcher and one glass to Zeller, who began drinking the beer at the bar. (Ex. A6.) Wong had known Zeller as a regular customer for several years. (Test. of Wong.)

3. A few minutes later, Larry Hannah and Cynthia Post sat at the bar next to Zeller. Zeller then took his pitcher and glass and left the bar area. (Ex. A6.) Zeller took his beer to the patio and sat at Christina Myers's table. Myers knew Zeller as a regular customer. To Myers, Zeller did not appear intoxicated. (Test. of Myers.)

4. About an hour after Wong served Zeller the pitcher of beer, Zeller returned to the bar with his pitcher and glass, both about half full. He sat at the bar and in the following five or six minutes twice placed his head in his hands for several seconds each time. Wong was not in Zeller's immediate area of the bar at the time. When Wong returned to Zeller's area of the bar, she talked with Zeller for several minutes. Zeller told Wong he had had a fight with his girlfriend. To Wong, Zeller appeared upset, but he did not slur his words or show signs of visible intoxication. (Test. of Wong; ex. A6.)

5. About 15 to 20 minutes after Zeller returned to the bar, Post bought Zeller a shot of alcoholic liquor, which Zeller drank. (Test. of Wong; ex. A6.) Immediately after he drank the shot, Zeller seemed to shake his head. A few minutes later, Zeller got up and went to the end of the bar where he vomited twice into a waste can on the floor. (Ex. A6.) Wong, who had moved away to tend to duties at the other end of the bar, did not see Zeller vomit. (Test. of Wong). She noticed him wiping the end of the bar with a towel. (Test. of Wong.) Zeller then went to the rest room, returned a few minutes later, asked Wong for another towel, and again wiped the bar area. He returned to his seat at the bar and drank from his beer again. A few minutes later, someone told Wong about the vomit and she disposed of the waste can's plastic trash bag. (Test. of Wong; ex. A6.)

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6. OLCC's publication entitled *50 Signs of Visible Intoxication* does not list vomiting among the signs. (Ex. P27.) The list of signs is not exhaustive. (Test. of Nolte).¹ The listed signs include being "overly animated," "overly friendly," "boisterous," "belligerent," and loud. (Ex. P27.) Although Zeller had given a couple of "high fives" to Post, Post and even Hannah appeared to be much more animated, friendly, boisterous, and loud than Zeller. (Ex. A6 and test. of Wong.) Zeller did not sway or stagger or show any of the other signs described on OLCC's list of signs. (Ex. A6; test. of Breshears.)

7. In 2002 and 2004, Wong was convicted of attempted forgery, identification theft x 6, giving false information to a police officer, and negotiating a bad check. During those years, she had been addicted to methamphetamine. She has successfully completed probation and has been clean and sober. (Test. of Wong).²

CONCLUSIONS OF LAW

1. Wong did not knowingly allow patron Jeff Zeller to consume or to continue to consume alcoholic beverages on the licensed premises after observing that Zeller was visibly intoxicated.

2. Wong is not subject to a penalty.

OPINION

The Oregon Liquor Control Act provides that "[n]o licensee or permittee shall knowingly allow a person to consume or to continue to consume alcoholic beverages on the licensed premises after observing that the person is visibly intoxicated." ORS 471.412(1).³ A violation of

¹ The agency requested this additional finding in Staff's Comments on the Proposed Order. In his Response to Staff's Comments to Proposed Order, the Administrative Law Judge (ALJ) agreed that this was an appropriate addition.

² In Staff's Comments on the Proposed Order, the agency requested that the past felony convictions of Permittee Wong be made an additional finding. In his Response to Staff's Comments to Proposed Order, the Administrative Law Judge (ALJ) agreed that this was an appropriate addition, if accompanied by her then addiction status and her recovery.

While this record of crimes involving dishonesty might ordinarily factor into a determination of the credibility of the witness, the ALJ determined that her criminal record did not significantly undermine Wong's testimony at the hearing. Further, the ALJ stated he did not base his findings and conclusions solely on Wong's testimony, but also on a careful review of the video recording of the incident. The ALJ concluded that the video supported Wong's testimony that Zeller had not displayed visible signs of intoxication and that she had not seen Zeller vomit. Response to Staff's Comments, at p. 2. While there may be some doubt, the Commission cannot affirmatively determine, on this record, that those findings of historical fact made by the ALJ are not supported by a preponderance of the evidence in the record. See OAR 137-003-0665(4).

³ ORS 471.412 provides:

(1) No licensee or permittee shall knowingly allow a person to consume or to continue to consume alcoholic beverages on the licensed premises after observing that the person is visibly intoxicated.

(2) A licensee or permittee is not in violation of subsection (1) of this section if the licensee or permittee makes a good faith effort to remove any unconsumed alcoholic

this statute requires that OLCC prove, by a preponderance of the evidence, that the permittee actually observed signs of intoxication, unless the failure to observe was due to conditions under the permittee's or licensee's control. *TJ's Fireside Dining* (OLCC, Final Order, 00-V-74 & 01-V-006, October 2001); ORS 183.450(2).⁴

Regulatory staff did not carry its burden of proof. Staff contended that Wong violated ORS 471.412 by allowing Zeller to continue drinking beer after he vomited. The evidence did not establish that Zeller displayed visible signs of intoxication or that Wong observed such signs.

OLCC has 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). Signs of visible intoxication include, but are not limited to, slurred speech, a heavy odor of alcohol, difficulty in handling money or lighting cigarettes, swaying or unsteadiness, watery or glassy eyes, disruptive or loud behaviors, argumentativeness, and spilling drinks. *Jody's Restaurant & Lounge* (OLCC, Final Order, 97-V-015, August 1997).

Based on their review of the video recording, OLCC's investigators asserted that Zeller displayed visible signs of intoxication at the bar when he placed his head in his hands, slouched, had trouble picking up a napkin, and was "loud and boisterous." Staff also argued that Wong saw or should have seen Zeller vomit because she was at the other end of the bar and must have heard him vomit.

The preponderance of the evidence did not support a conclusion that Zeller displayed visible signs of intoxication. The uncontradicted evidence showed that Zeller did not slur his words, sway, or stagger as he moved. There was no evidence that Zeller had a heavy odor of alcohol, had watery or glassy eyes, spilled drinks, or had difficulty handling money. On the contrary, the video recording showed Zeller at the bar had no difficulty handling his wallet and his cell phone and pouring beer into his glass. Although the video showed Zeller at the bar put his head in his hands twice and made a couple of attempts to grasp a napkin, his movements did not appear to be definite signs of intoxication; they could just as well have been signs of weariness, worry, or inattention. Zeller drank most of the beer in the patio at the same table with Myers, who did not see any signs of intoxication. Even when he wiped the bar after he vomited, he appeared to be steady and in control of his movements.

beverages from the person's possession when the licensee or permittee observes that the person is visibly intoxicated.

(3) Nothing in this section applies to determining liability under ORS 471.565.

(4) Notwithstanding any other provision of law, the Oregon Liquor Control Commission shall only impose letters of reprimand for the first three violations of this section within a two-year period. For license renewal purposes, the first three violations of this section in a two-year period shall not apply in determining the past record of compliance under ORS 471.313 (4)(g).

⁴ In analyzing whether a violation has occurred, the Commission generally has applied the same precedents that apply to determining whether a permittee has violated ORS 471.410(1), relating to selling alcoholic liquor to visibly intoxicated persons. However, the Commission has not applied the "knowing flag factors" identified in the analysis of ORS 471.410(1) violations to ORS 471.412. *Justin Scriber* (OLCC, Final Order, 04-V-050, August 2005).

FINAL ORDER

The Commission issues the following order:

The November 5, 2010, Violation Notice is dismissed. No letter of reprimand will be issued against Wong.

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

Dated this 5th day of July, 2011.

/s/ Stephen A. Pharo
Stephen A. Pharo
Executive Director
OREGON LIQUOR CONTROL COMMISSION

Mailed this 5th day of July, 2011.

THIS ORDER IS EFFECTIVE ON THE DATE MAILED.

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.