BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD OF THE STATE OF CALIFORNIA

AB-9295
File: 21-483888 Reg: 11074664

ZARTOSHT, INC., dba Ski Run Market
3460 Lake Tahoe Boulevard, South Lake Tahoe, CA 96150-8913,
Appellant/Licensee

v.

DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL,
Respondent

Administrative Law Judge at the Dept. Hearing: Nicholas R. Loehr

Appeals Board Hearing: July 11, 2013
Sacramento, CA

ISSUED JULY 31, 2013

Zartosht, Inc., doing business as Ski Run Market (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended its license for 15 days, with 5 days stayed, for its employee having committed vandalism by maliciously destroying personal property (a California driver's license belonging to a minor decoy), a violation of Penal Code section 594; and suspended its license for 35 days, with 10 days stayed, for its employee having willfully resisted, delayed or obstructed a Department investigator in the discharge of his duties, a violation of Penal Code section 148, subdivision (a)(1). The suspensions are to run concurrently.

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[1]The decision of the Department, dated July 17, 2012, is set forth in the appendix.

Appearances on appeal include appellant Zartosht, Inc., appearing through its counsel, Scott W. Souers, and the Department of Alcoholic Beverage Control, appearing through its counsel, Sean Klein.

FACTS AND PROCEDURAL HISTORY

Appellant's off-sale general license was issued on April 15, 2010. On March 24, 2011, the Department instituted an accusation against appellant charging that on May 22, 2010, appellant's employee committed vandalism by maliciously destroying personal property (a California driver's license belonging to a minor decoy); and willfully resisted, delayed, or obstructed a Department investigator in the discharge of his duties.

At the administrative hearing held on April 17, 2012, documentary evidence was received and testimony concerning the violation charged was presented by David Bickel and Troy Wright, Department investigators; Lori Ajax, a district administrator for the Department; Ryan Alan Row and Eun-Ju (Ester) Pak, employees of appellant; and Mehei Behmard, appellant's general manager.

The testimony established that on May 22, 2010, the Department was conducting a minor decoy operation in South Lake Tahoe, and sent a decoy into the licensed premises to attempt to purchase an alcoholic beverage. At the sales counter appellant's employee, James Lockman (the clerk) asked the decoy for her identification and she handed him her California driver's license. He then told her he was either going to destroy it or call the police. When the decoy asked him not to call the police, he cut up the license with scissors. The decoy exited the premises and reported what had happened to the investigator. The investigator then entered the premises to see what had happened, where he was confronted by the clerk in an aggressive stance with

balled up fists. The clerk yelled that the ABC investigators were not real cops, that they could not come behind the counter, and that he knew the young lady was a decoy. These actions were observed by a second investigator, who then assisted in subduing and handcuffing the clerk, during which time there was shoving and bottles fell to the floor.

The clerk was arrested, booked into jail, and later fired. He later pled nolo contendere to violating Penal Code section 594(a) for destroying the decoy's license (count 1). He was placed on probation for 12 months, ordered to pay restitution, and to write a letter of apology to the decoy. Count 2, violation of Penal Code section 148(a)(1), was dismissed.

Subsequent to the hearing, the Department issued its decision which determined that the violations had been proven and that no defense had been established.

Appellant filed a timely appeal raising the following issue: The Department abused its discretion, and did not act in a manner required by law, by imputing the actions of an employee to appellant.

DISCUSSION

Appellant contends the Department abused its discretion, and did not act in a manner required by law, when it imputed the actions of the clerk to appellant. In particular, appellant points out that the charges in count 2 were later dismissed by a criminal court, no alcohol was sold to a minor, and the actions of the employee involved a minimal nexus to the sale of alcoholic beverages.

Article XX, section 22 of the California Constitution authorizes the Department to take disciplinary action to protect the public: "The department shall have the power, in its discretion, to deny, suspend, or revoke any specific alcoholic beverage license if it

shall determine for good cause that the granting or continuance of such license would be contrary to public welfare or morals."

"In order to establish good cause for suspension or revocation of an alcoholic beverage license due to violations of law that do not involve moral turpitude, there must be a rational relationship between the offense and the operation of the licensed business in a manner consistent with public welfare and morals or there must be evidence that the offense had an actual effect on the conduct of the licensed business. (*H.D. Wallace & Associates, Inc. v. Department of Alcoholic Beverage Control* (1969) 271 Cal.App.2d 589, 593-594 [76 Cal.Rptr. 749].)

The licensee in this matter is being disciplined for its clerk's destruction of a decoy's California driver's license in violation of Penal Code section 594(a) which states: "Every person who maliciously commits any of the following acts with respect to any real or personal property not his or her own . . . is guilty of vandalism: (1) Defaces with graffiti or other inscribed material. (2) Damages. (3) Destroys." In addition, discipline is being imposed for violation of Penal Code section 148(a)(1) which states, in pertinent part, "Every person who willfully resists, delays, or obstructs any . . . peace officer . . . in the discharge or attempt to discharge any duty of his or her office or employment . . . shall be punished by a fine . . . or imprisonment. . . ." The Department argues that these actions constitute good cause for disciplinary action.

Appellant, on the other hand, maintains that the actions of the clerk in this matter should not be imputed to the licensee because no alcohol was sold to a minor, and the actions of the employee involved a minimal nexus to the sale of alcoholic beverages. (App.Br. at pp. 8-9.)

The Department reminds this Board that it may not interpose its judgment, and

that it is bound by the ALJ's findings of fact. (Reply Br. at p. 3, citing Business & Professions Code §§ 23090.1, 23090.2; *CMPB Friends Inc. v. Alcoholic Beverage Control Appeals Board* (2002) 100 Cal.App.4th 1250, 1254 [122 Cal.Rptr.2d 914]; *Laube v. Stroh* (1992) 2 Cal.App.4th 364, 367 [3 Cal.Rptr.2d 779].) We agree; this Board is not entitled to retry the facts.

This case, however, does not present a factual dispute, but rather, a significant question of law: specifically, what constitutes "good cause," and what standard applies for imputing an employee's criminal acts to his employer, the licensee.

This Board reviews questions of law de novo.

> "It is well settled that the interpretation and application of a statutory scheme to an undisputed set of facts is a question of law [citation] which is subject to a de novo review on appeal. [Citation.] Accordingly, we are not bound by the trial court's interpretation. [Citation.]" (*Rudd v. California Casualty Gen. Ins. Co.* (1990) 219 Cal.App.2d 948, 951-952 [268 Cal.Rptr. 624].) An appellate court is free to draw its own conclusions of law from the undisputed facts presented on appeal.

(*Pueblos Del Rio South v. City of San Diego* (1989) 209 Cal.App.3d 893, 899 [257 Cal.Rptr. 578].)

As an initial matter, we can dispense with the argument that the charges in count 2 were later dismissed by a criminal court, and therefore should not be the basis for discipline in this matter. The Appeals Board addressed the same argument in *Janal's Entertainment, Inc.* (2000) AB-7385. The Board in that case noted that, "because the standard of proof in a criminal matter – beyond a reasonable doubt – is higher than the preponderance-of-the-evidence standard that is applicable in a license disciplinary matter," a dismissal or acquittal in a related criminal case is not "relevant evidence" and is properly excluded from the record. The Board also relied on *Gikas v. Zolin* (1993) 6

Cal.4th 841 [25 Cal.Rptr.2d 500] and *Cornell v. Reilly* (1954) 127 Cal.App.2d 178 [273 P.2d 572], both of which held that an acquittal in a criminal case is not dispositive in an administrative disciplinary proceeding based on the same underlying conduct. We have no reason to decide this issue differently in the present matter.

We do, however, take exception to the Department's interpretation of "good cause" and its imputation of the employee's criminal acts to the licensee.

In his decision, the ALJ essentially imputed the clerk's conduct to the licensee via a strict liability standard: "A licensee may suffer license discipline for the single unlawful act(s) of an employee even though the employer did not authorize the act or have actual knowledge of the activity." (Determination of Issues ¶ 13.) In support of this standard, the ALJ cited a trio of cases dating back to 1967 and earlier. (See *Mack v. Department of Alcoholic Beverage Control* (1960) 178 Cal.App.2d 149 [2 Cal.Rptr. 629]; *Mantzaros v. State Board of Equalization* (1948) 87 Cal.App.2d 140 [196 P.2d 657]; *Reimel v. Alcoholic Beverage Control Appeals Board* (1967) 252 Cal.App.2d 520 [60 Cal.Rptr. 641].) The Department, in its reply brief, provides little analysis, but does cite two additional cases in support of its assertion that "It is well settled that the licensee . . . is vicariously responsible for the unlawful on-premises acts of its employees." (See *Morell v. Department of Alcoholic Beverage Control* (1962) 204 Cal.App.2d 504 [22 Cal.Rptr. 405]; *Harris v. Alcoholic Beverage Control Appeals Board* (1961) 197 Cal.App.2d 172 [17 Cal.Rptr. 315].)

The ALJ cites from *Santa Ana* in support of his conclusion that only a minimal nexus to alcoholic beverage sales is relevant. (Determination of Issues at ¶ 12.) However, what the *Santa Ana* decision holds is different from what the ALJ infers. The

relevant quote states: "For a suspension to be rational, the acts giving rise to it must have some minimal nexus to the licensee's sale of alcoholic beverages." (*Santa Ana Food Market, Inc. v. Alcoholic Beverage Control Appeals Board* (1999) 76 Cal.App.4th 570, 575 [90 Cal.Rptr.2d 523].) By this, the court indicated that where the facts had no nexus to alcoholic beverages sales – as in the case before it – a suspension could not be rational. (See *id.* at 576.) The ALJ, however, made an unfounded logical leap, and concluded the inverse: that where there is a minimal nexus between the criminal act and alcoholic beverages sales, suspension is necessarily rational. (Determination of Issues at ¶¶ 11-12.) This is comparable to interpreting the statement "all cars must have an engine" to mean that anything with an engine is necessarily a car. The Department, in its brief, makes a similar mistake, and conflates "good cause" with "nexus." (See Reply Br. at p. 4-5.)

This is an incorrect interpretation of the law. The mere existence of some apparent nexus between the criminal conduct and alcoholic beverage sales alone does *not* establish good cause for disciplinary action. Other factors must be considered.

Take, for example, this Board's decision in *King Stop, Inc.* (2000) AB-7520. In that case, the nexus between the employee's criminal conduct and alcoholic beverage sales was undeniable: an employee of the licensee accepted money from a minor in exchange for the provision of stolen alcohol. (*Id.* at p. 2.) This Board pointed out, however, that there are cases "where, because of unusual circumstances, the courts are reluctant to impute to an employer the consequences of an employee's conduct." (*Id.* at p. 4.) This Board found several factors relevant: first, only the employee, and not the employer, benefitted from the criminal act; second, as in *Santa Ana*, the employer

had no knowledge of the wrongful conduct; and finally, the employer was, in fact, the victim of the criminal conduct. (*Id.* at pp. 5-6.) Thus, the fact that there was an apparent nexus between the criminal act and alcoholic beverage sales did *not* definitively indicate that good cause existed, or that disciplinary action was appropriate.

There are parallels in the case before us. While the employee's actions took place immediately after his refusal to sell alcohol to the decoy, there is nothing to suggest that the appellant in any way benefitted from the clerk's criminal conduct. Moreover, not only was the licensee unaware of the criminal conduct, it would have no reason to foresee this particular criminal act, or take action to prevent it.

This leads us to a second misapplication of the law: the imputation of the acts of an employee to the employer is not necessarily governed by the strict liability standard adopted by the ALJ. (See Determination of Issues ¶ 13.)

The doctrine of *respondeat superior* provides that an employer or principal is vicariously liable for the wrongful conduct of his or her employees or agents committed within the scope of the employment or agency. (*Perez v. Van Groningen & Sons, Inc.* (1986) 41 Cal.3d 962, 967 [227 Cal.Rptr. 106].) It is well settled in Alcoholic Beverage Control Act case law that an employee's on-premises knowledge and misconduct is imputed to the licensee/employer. (See *Yu v. Alcoholic Bev. etc. Appeals Bd*. (1992) 3 Cal.App.4th 286, 295 [4 Cal.Rptr.2d 280]; *Laube v. Stroh* (1992) 2 Cal.App.4th 364, 377 [3 Cal.Rptr.2d 779]; *Kirby v. Alcoholic Bev. Etc. Appeals Bd*. (1973) 33 Cal.App.3d 732, 737 [109 Cal.Rptr. 291].) However, courts have recently criticized the "strict liability" standard of imputation in cases involving criminal conduct. (See, e.g., *Laube*, *supra*, 2 Cal.App.4th 364.)

In *Laube*, for example, the court said:

> We . . . hold that a licensee must have knowledge, either actual or constructive, before he or she can be found to have "permitted" unacceptable conduct on a licensed premises. It defies logic to charge someone with permitting conduct of which they are not aware. It also leads to impermissible strict liability of liquor licensees when they enjoy a constitutional standard of good cause before their license – and quite likely their livelihood – may be infringed by the state.
>
> [¶ . . . ¶]
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> The *Marcucci* case[2] perhaps states it best. A licensee has a general, affirmative duty to maintain a lawful establishment. Presumably this duty imposes upon the licensee the obligation to be diligent in anticipation of reasonably possible unlawful activity, and to instruct employees accordingly. Once a licensee knows of a particular violation of the law, that duty becomes specific and focuses on the elimination of the violation. Failure to prevent the problem from recurring, once the licensee knows of it, is to "permit" by a failure to take preventive action.

(*Laube*, *supra*, at p. 377.)

The *Santa Ana* court echoed this concern, observing that the result of applying the general "strict liability" standard led to a "kafkaesque" result. (*Santa Ana Food Market*, *supra*, at p. 575.) The court refused to apply the strict liability standard of imputation to the case before it. Nevertheless, the ALJ cited *Santa Ana* as support for the very same strict liability imputation rule that the *Santa Ana* court refused to apply. (See Determination of Issues at ¶ 13.)

In fact, the *Laube* court went so far as to criticize the entire line of cases that established an apparent strict liability standard for imputed licensee knowledge of criminal conduct on the premises. The court described one commonly used line in particular, taken from *McFaddin*, as "the unfortunate product of [a] line of cases whose language has become so routinely repeated and fossilized into unquestioned

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[2] *Marcucci v. Board of Equalization* (1956) 138 Cal.App.2d 605 [292 P.2d 264].

correctness that, like those terrified of the Great Oz, few bothered to look behind the curtain." (*Laube*, *supra*, at p. 373, describing *McFaddin San Diego 1130 v. Stroh* (1989) 208 Cal.App.3d 1384 [257 Cal.Rptr. 8].) Moreover, as the court pointed out, even *McFaddin* declined to impose liability without fault. (*Laube*, *supra*, at p. 378.) Among the many other cases the court scrutinized and determined did *not* support the strict liability standard of imputation were *Morell* and *Harris* – both of which were cited by the Department in its reply brief as support for this rule. (*Laube*, *supra*; Reply Br. at p. 4.)

It is true that *Laube* involved a somewhat different set of facts; the criminal conduct did not involve any act by an employee. Nevertheless, we largely agree with its criticisms of the strict liability standard. Without some minimal element of foreseeability, it is unfair to expect a licensee to take preventative action. (See *Laube* at pp. 377-378.)

The types of misconduct which have been historically imputed to the licensee are those that are foreseeable in the operation of a licensed premises. Such misconduct includes: prostitution (see AB-8331), keeping a disorderly house (see AB-9008), gambling (see AB-8699), B-girl activity (see AB-9250), and the sale of illegal drugs (see AB-9179). Similarly, when a clerk sells alcohol to a minor, even though the licensee is not present, he or she is liable for that sale as if he or she had made the sale themselves – the conduct is imputed to the licensee because it is foreseeable, and is therefore the type of conduct the licensee has an obligation to prevent.

It is not clear, however, that cutting up a decoy's license or resisting a peace officer is the type of conduct that a licensee has an obligation to anticipate, much less prevent. Moreover, no alcohol was sold to the minor decoy; the nexus to alcoholic beverage sales emerges from the fact that the conduct at issue followed immediately

after the employee's refusal to participate in an unlawful transaction.

We do not believe there is good cause for imposing discipline on this licensee. We believe the ALJ has misinterpreted the law surrounding "good cause" and the standards for imputation, and that these misinterpretations are sufficient to merit reversal.

ORDER

The decision of the Department is reversed.[3]

BAXTER RICE, CHAIRMAN
FRED HIESTAND, MEMBER
PETER J. RODDY, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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[3]This final order is filed in accordance with Business and Professions Code section 23088, and shall become effective 30 days following the date of the filing of this order as provided by section 23090.7 of said code.

Any party, before this final order becomes effective, may apply to the appropriate court of appeal, or the California Supreme Court, for a writ of review of this final order in accordance with Business and Professions Code section 23090 et seq.