ISSUED APRIL 19, 2000

BEFORE THE ALCOHOLIC BEVERAGE CONTROL APPEALS BOARD

OF THE STATE OF CALIFORNIA

DAVID CHAVEZ dba Leonardo's Restaurant 8420 Lankershim Boulevard Sun Valley, CA 91352, Appellant/Licensee, v. DEPARTMENT OF ALCOHOLIC BEVERAGE CONTROL, Respondent.	)))))))))))	AB-7377 File: 47-332332 Reg: 98044895 Administrative Law Judge at the Dept. Hearing: Sonny Lo Date and Place of the Appeals Board Hearing: March 2, 2000 Los Angeles, CA

David Chavez, doing business as Leonardo's Restaurant (appellant), appeals from a decision of the Department of Alcoholic Beverage Control[1] which suspended his license for 30 days for one of his employees having served an alcoholic beverage (beer) to an obviously intoxicated patron, and having furnished alcoholic beverages to persons under the age of 21, being contrary to the unive`rsal and generic public welfare and morals provisions of the California Constitution, article

[1] The decision of the Department, dated March 11, 1999, is set forth in the appendix.

XX, §22, arising from violations of Business and Professions Code §25602, subdivision (a), and 25658, subdivision (a).

Appearances on appeal include appellant David Chavez, appearing through his counsel, Armando H. Chavira, and the Department of Alcoholic Beverage Control, appearing through its counsel, David W. Sakamoto.

FACTS AND PROCEDURAL HISTORY

Appellant's on-sale general eating place license was issued on September 30, 1997. Thereafter, the Department instituted a multiple-count accusation against appellant charging violations involving the sale of an alcoholic beverage to an obviously intoxicated patron (count 1), and the sale and/or furnishing of alcoholic beverages to, and permitting consumption by, minors (counts 2 through 19).

An administrative hearing was held on January 5, 1999, at which time oral and documentary evidence was received. At that hearing, testimony was presented by Alejandro Martinez ("Martinez"), a Los Angeles police officer, of his observations of events in appellant's premises that he made while acting in an undercover capacity; by Daniel Morales ("Morales") and Fernando Valencia ("Valencia"), minors involved in some of the counts of the accusation; and by Norma Ortiz ("Ortiz") and Norma Aguirre ("Aguirre"), employees and/or former employees of appellant.

Subsequent to the hearing, the Department issued its decision which sustained counts 1, 6, 7, and 15. No evidence was presented with respect to counts 2, 3, 4, 5, 8, 9, 10, 11, 12, 13, 16, 17, 18, and 19 of the accusation, and those counts were dismissed. Count 14 was found not supported by the evidence.

Appellant thereafter filed a timely notice of appeal. In his appeal, appellant raises the following issues: (1) there was not substantial evidence in support of the finding that an alcoholic beverage was served to an intoxicated patron (count 1); (2) there was not substantial evidence that an alcoholic beverage was sold to Morales (count 6); (3) there was not substantial evidence that Morales or Valencia were caused or permitted to consume an alcoholic beverage (counts 7 and 15). Issues (2) and (3) have some factual similarities, and will be discussed together.

DISCUSSION

I

Appellant contends that the finding that an alcoholic beverage was served to an obviously intoxicated person was not supported by substantial evidence. He contends that the finding by the Administrative Law Judge (ALJ) that the waitress named in the accusation as the server was not the server, but that some other waitress was, means that there is no evidence that the unknown waitress had an opportunity to observe the symptoms of intoxication described by officer Martinez.

The ALJ concluded that it was irrelevant that the waitress named in the accusation was not the person who served the intoxicated patron, because appellant "would be culpable regardless of which one of his waitresses served the beer" (Finding II-D).

"Substantial evidence" is relevant evidence which reasonable minds would accept as a reasonable support for a conclusion. (Universal Camera Corporation v. National Labor Relations Board (1950) 340 US 474, 477 [71 S.Ct. 456]; Toyota Motor Sales USA, Inc. v. Superior Court (1990) 220 Cal.App.3d 864, 871 [269

Cal.Rptr. 647].) When, as in this case, the findings are attacked on the ground that there is a lack of substantial evidence, the Appeals Board, after considering the entire record, must determine whether there is substantial evidence, even if contradicted, to reasonably support the findings in dispute. (Bowers v. Bernards (1984) 150 Cal.App.3d 870, 873-874 [197 Cal.Rptr. 925].)

Appellate review does not "resolve conflicts in the evidence, or between inferences reasonably deducible from the evidence." (Brookhouser v. State of California (1992) 10 Cal.App.4th 1665, 1678 [13 Cal.Rptr.2d 658].)

The law demands that a licensee use substantial efforts in maintaining a lawfully-conducted business. (Givens v. Department of Alcoholic Beverage Control (1959) 176 Cal.App.2d 529 [1 Cal.Rptr. 446, 450].)

The term "obviously" denotes circumstances "easily discovered, plain, and evident" which place upon the seller of an alcoholic beverage the duty to see what is easily visible under the circumstances. (People v. Johnson (1947) 81 Cal.App.2d Supp. 973 [185 P.2d 105].) Such signs of intoxication may include bloodshot or glassy eyes, flushed face, alcoholic breath, loud or boisterous conduct, slurred speech, unsteady walking, or an unkempt appearance. (Jones v. Toyota Motor Co. (1988) 198 Cal.App.3d 364, 370 [243 Cal.Rptr. 611].)

It is apparent that the ALJ believed the officer's testimony that a waitress served a beer to a man who had exhibited objective signs of intoxication - speaking loudly, his voice slurred; red, bloodshot eyes; some balance difficulty; throwing the money at the waitress - but thought a mistake had been made when the officers wrote their citations as to which waitress had served him.

By the same reasoning, the waitress the officer did see serve the beer would have had the ability, either when she and the other waitresses were standing by the wall observing the activity in the room, or when she served the patron, to see the outward signs exhibited by the patron. The patron's yelling that he wanted another beer should have alerted the waitress that he may have been intoxicated, and aroused caution on her part as to whether to serve him.

The time necessary to observe misconduct and act upon that observation requires some reasonable passage of time. However, the observer must not be passive or inactive in regards to his or her duty, but must exercise reasonable diligence in so controlling prohibited conduct. (Ballesteros v. Alcoholic Beverage Control Appeals Board (1965) 234 Cal.App.2d 694 [44 Cal.Rptr. 633].)

We believe that the evidence, albeit not strong, is sufficient to sustain this count.

II

Appellant contends there was not substantial evidence to support the findings relating to the sale of beer to Morales, and consumption of beer by Morales and, in an incident unrelated to Morales, Valencia.

As to Morales, appellant asserts that Morales was told by the waitress that he could not drink, and agreed not to. Although Morales paid for the beer, appellant argues, it had been ordered by his sister, who was of legal age, and he simply paid for the beer as an act of generosity. Further, appellant claims, the waitress was unaware of the fact that Morales took a sip of his sister's beer.

As to Valencia, appellant contends there was no evidence that his

consumption of alcohol was observed by anyone, including, in particular, the waitress found by the ALJ to have served him. Appellant claims Valencia was served the beer by another patron at his table.

Appellant contends that, without evidence that either Morales or Valencia was observed drinking by one of his employees, the Department's findings are "tantamount to strict liability," contrary to the holding in Laube v. Stroh (1992) 2 Cal.App.4th 364 [3 Cal.Rptr.2d 779].

Contrary to appellant's claim, this is not a case of strict liability. The evidence is somewhat muddled, but, on balance, there is enough to sustain the ALJ's findings.

First, the fact that Morales paid for the beer is not questioned. His motives in paying for it, as well as the fact that his sister placed the order, are irrelevant. The waitress should have rejected his offer to pay. Quite clearly, there was a sale to a minor. What is more, Morales' alleged assurance to the waitress that he would not drink does not entitle her to ignore him thereafter. Having accepted money from Morales, who lacked the bar's hand stamp which signified drinking age, she was responsible for what followed.

Officer Martinez testified [RT 24] that he observed Morales sip from a beer which was handed to him by one of the waitresses. Morales testified that he sipped from his sister's beer [RT 81, 83]. The ALJ chose to accept Morales' version of what happened (see Finding III-B).

As to Valencia, officer Martinez testified [RT 23-24] that Valencia himself ordered a beer, and when it was handed to him by a waitress, he began drinking it.

Valencia testified [RT 92-93] that his friend, Jose, who was of legal drinking age, placed the beer order and paid for the beer. The waitress brought six bottles of Corona beer in a bucket. Valencia's friend gave one of the bottles of Corona beer to him, and Valencia drank from it. Once again the ALJ disregarded the police officer's testimony and adopted Valencia's version of what happened.

We do not believe that it matters that none of appellant's employees saw Morales or Valencia drinking. Neither violation would have occurred if the waitresses had exercised ordinary caution. For Morales, the waitress set the stage when she allowed him to pay for the beer. For Valencia, supplying six bottles of beer to three individuals, one of whom was a minor, and then ignoring what was done with the beer, was simply an invitation to trouble. In each case, negligence on the part of appellant's employees was a significant causative factor in the violations which followed.

Laube v. Stroh, supra, gives appellant no help. That was a case where the court held a licensee not responsible for surreptitious drug transactions the licensee had no reason to suspect were occurring among patrons of the "upscale hotel, bar and restaurant." Critical of the concept of strict liability in "permitting" cases, the court said (2 Cal.App.4th at 379):

> "The Marcucci[2] case 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

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[2] Marcucci v. Board of Equalization (1956) 138 Cal.App.2d 605 [292 P.2d 264]. Interestingly, Marcucci had this to say about consumption by minors on the premises: "A licentiate conducting the sale of beverages under an on-sale license is charged with an active duty to prevent minors from consuming intoxicating liquor on the licensed premises...."

> 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."

Appellant's emphasis on his alleged lack of knowledge ignores that part of Laube v. Stroh which imposes a duty on a licensee to be "diligent in anticipation of reasonably possible unlawful activity." A policy of serving six bottles of beer at one time - regardless of the number or age of the persons in the group - and then paying no attention to what happens -cannot be considered diligent by any measure.

We are of the view that appellant's arguments with respect to the counts involving Morales and Valencia are without merit.

ORDER

The decision of the Department is affirmed.[3]

TED HUNT, CHAIRMAN
RAY T. BLAIR, JR., MEMBER
E. LYNN BROWN, MEMBER
ALCOHOLIC BEVERAGE CONTROL
APPEALS BOARD

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

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