



intoxicated, being contrary to the universal and generic public welfare and morals provisions of the California Constitution, article XX, §22, arising from a violation of Business and Professions Code §25602, subdivision (a).

Appearances on appeal include appellants Brenda R. Zubieta and John M. Zubieta, appearing through their counsel, Ralph Barat Saltsman and Steven Warren Solomon, and the Department of Alcoholic Beverage Control, appearing through its counsel, Matthew G. Ainley.

#### FACTS AND PROCEDURAL HISTORY

Appellants' on-sale general public eating place license was issued on March 7, 1997. Thereafter, the Department instituted an accusation against appellants charging the sale of an alcoholic beverage (brandy) to Colin at a time Colin was obviously intoxicated.

An administrative hearing was held on March 6, 1998, at which time oral and documentary evidence was received. At that hearing, testimony was presented by Michael McDermott, a Los Angeles police officer who had been observing Colin's activities and behavior prior to Colin having been served the brandy drink, and by the licensees Brenda and John Zubieta.

Officer McDermott testified that he observed Colin leaning on the bar counter, attracting a lot of attention with his loud, slurred voice, and, at one point, stumbling backward and falling against the wall [RT 9-11]. Colin was dressed in shorts, and wore a dirty, untucked shirt [RT 13]. His eyes were bloodshot and watery [RT 13]. After McDermott had been watching Colin for about 20 minutes, Colin ordered a brandy drink from Emmons. At the time Colin ordered the drink, his eyes were still bloodshot, his face flushed, his shirt untucked, and his voice loud and slurred [RT 16].

On cross-examination, McDermott testified that it became obvious to him within a few minutes or seconds that Colin was obviously intoxicated, adding that Colin had also spilled a cup of coffee from which he had been drinking [RT 19], and, that Colin, while leaving the bar, had difficulty getting his keys from his pocket [RT 23-27]. McDermott admitted, however, that he had not observed Colin exhibit any difficulty removing a \$5 bill from his pocket when he paid for the brandy drink [RT 30-31]. McDermott described Colin's behavior as "like a drunk at the bar that's making loud conversation and trying to attract attention to himself" [RT 38], and said it was his belief Colin's behavior was due to his intoxication [RT 39].

On redirect examination, McDermott testified that he first noted Colin's symptoms less than five minutes after he entered the bar [RT 43]. McDermott also acknowledged that when Colin drank the brandy, he had no trouble holding the glass or finding his mouth, and did not spill anything as he drank it [RT 44].

John Zubieta testified that he currently holds five licenses, of which Zubieta's Chicken Coop is one. All of the restaurants are family oriented, and in the 30 years during which he has held alcoholic beverage licenses, this is the first disciplinary action brought against him. Zubieta admitted he had departed the premises prior to the time the citation was issued.

Brenda Zubieta testified that it is her practice to tour the three dining rooms and the kitchen to see that everyone is properly doing his or her job [RT 52-53], but saw no unusual activity on the night in question. She did not know Colin's name, but had seen him in the premises on earlier occasions. She described him as gruff, "kind of a construction worker" [RT 55], and boisterous. She has never seen him out of control.

Mrs. Zubieta identified Exhibit A as part of the training materials provided to

employees, which includes material addressing the symptoms of obvious intoxication. In addition, Mrs. Zubieta has gone through the Department's LEAD training program, and has trained her employees in similar fashion. She stated that the rules are strictly enforced.

Subsequent to the hearing, the Administrative Law Judge (ALJ) issued his proposed decision, noting the presence of some symptoms of intoxication, but concluding that it had not been established by a preponderance of the evidence that Colin was obviously intoxicated. He said the fact that Colin drank two cups of coffee prior to the service of the alcoholic beverage, and did not spill the alcoholic beverage, were important factors in reaching his conclusion.

The Department rejected the proposed decision. In its own decision, the Department made specific reference to the symptoms which McDermott had described, concluding that "Colin exhibited many of the common symptoms and outward manifestations associated with that of an obviously intoxicated person during the time that Sergeant McDermott was observing him." The Department also concluded that the evidence established that Emmons had violated Business and Professions Code §25602, subdivision (a), by serving Colin the brandy.

Appellants thereafter filed a timely notice of appeal. In their appeal, appellants raise the following issues: (1) The testimony of Officer McDermott is insufficient to establish that Colin was obviously intoxicated; and (2) the Department failed to demonstrate compliance with the 100-day limit in Government Code §11517, subdivision (d),<sup>2</sup> for issuing its own decision under §11517, subdivision (c).

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<sup>2</sup> Business and Professions Code § 11517, subdivision (d), provides:

## DISCUSSION

In their brief, appellants challenged the sufficiency of Officer McDermott's testimony to demonstrate that Colin was obviously intoxicated, and that Emmons would have been put on notice of that fact. At oral argument, appellants enlarged upon this contention, arguing that there was no finding that Colin was intoxicated.

Appellants contend that Officer McDermott never gave an opinion that Colin was obviously intoxicated, claiming there is no such testimony in the record.

This contention is incorrect.

In addition to describing a number of symptoms consistent with intoxication (loud behavior, slurred voice, balance problems, stumbling, disheveled appearance, red face, sweating in a cool building, bloodshot and watery eyes), McDermott also testified as follows:

Q. (Counsel for appellants): You sat down sort of in the middle of the bar toward the south end; is that right?

a. Yes, sir.

Q. And you observed Mr. Colin -- a fellow that was later identified as Colin; is

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"The proposed decision shall be deemed adopted by the agency 100 days after delivery to the agency by the Office of Administrative Hearings, unless within that time the agency commences proceedings to decide the case upon the record, including the transcript, or without the transcript where the parties have so stipulated, or the agency refers the case to the administrative law judge to take additional evidence. In a case where the agency itself hears the case, the agency shall issue its decision within 100 days of submission of the case. In a case where the agency has ordered a transcript of the proceedings, the 100-day period shall begin upon delivery of the transcript. If the agency finds that a further delay is required by special circumstances, it shall issue an order delaying the decision for no more than 30 days, and specifying the reasons therefor. The order shall be subject to judicial review pursuant to Section 11523."

that correct?

a. Yes, sir.

Q. You did not at that point determine that Mr. Colin was obviously intoxicated, did you?

a. Within a few minutes or a few seconds of observation it was obvious.

Q. It was obvious to you?

a. Yes, sir.

Later, McDermott reaffirmed his belief that Colin was intoxicated: "I know he was intoxicated that night" [RT 25].

There is little doubt that the symptoms as described by McDermott are sufficient to demonstrate obvious intoxication as seen in decided cases.

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], overruled on other grounds, Paez v. Alcoholic Beverage Control Appeals Board (1990) 222 Cal.App.3d 1025, 1026 [272 Cal.Rptr. 272].) 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].)

Similarly, the evidence is sufficient to support the Department's determination that Emmons knew or should have known of Colin's intoxication. 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].)

Here, Colin was seated at the bar, only a few feet from Emmons. If Emmons was unaware of Colin's behavior, it could only have been because of his failure to note what was occurring near him.

Finally, on this point, we are unpersuaded by appellants' contention that the decision lacks the critical finding that Colin was intoxicated. We think Finding of Fact IV is an essential equivalent of a more explicit finding of intoxication. While the Department might have been more specific in its assessment of the facts, we do not think the manner in which it expressed itself is ground for reversal.

## II

Appellants' contention that the Department failed to demonstrate compliance with the 100-day time limit in Government Code §11517, subdivision (d) was abandoned in the course of oral argument. Consequently, we do not address this issue.

ORDER

The decision of the Department is affirmed.<sup>3</sup>

TED HUNT, CHAIRMAN  
JOHN B. TSU, MEMBER  
RAY T. BLAIR, JR., MEMBER  
ALCOHOLIC BEVERAGE CONTROL  
APPEALS BOARD

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<sup>3</sup> 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.