IN THE COURT OF APPEALS OF IOWA

No. 8-469 / 07-1763
Filed October 29, 2008

DARRIN F. BOGER d/b/a LAKE LANES,
Petitioner-Appellant,

vs.

IOWA DEPARTMENT OF COMMERCE,
ALCOHOLIC BEVERAGES DIVISION,
Respondent-Appellee.

Appeal from the Iowa District Court for Sac County, Joel E. Swanson, Judge.

The owner of a bowling alley appeals from the ruling on judicial review affirming the decision of the Iowa Department of Commerce to suspend the bowling alley's liquor license for thirty days. **REVERSED.**

Robert Tiefenthaler of Tiefenthaler Law Office, P.C., Sioux City, for appellant.

Thomas J. Miller, Attorney General, and Mark Hunaceck, Assistant Attorney General, for appellee.

Heard by Huitink, P.J., and Vaitheswaran and Potterfield, JJ.

POTTERFIELD, J.

Darrin Boger, the owner of the Lake Lanes Bowling Alley in Wall Lake, appeals from the ruling on judicial review affirming the decision of the Iowa Department of Commerce to suspend the bowling alley's liquor license for thirty days. We conclude the agency's finding that Boger "allowed or permitted" nudity in his establishment is not supported by substantial evidence, and therefore reverse.

Background Facts and Proceedings.

In 2004, Iowa State Patrol Sergeant Dan Schaffer was a member of the Iowa State Patrol's enforcement team that accompanies the Register's Annual Great Bike Ride Across Iowa (RAGBRAI). Sergeant Schaffer paid a pre-event visit to the liquor establishments located along the route, including Lake Lanes Bowling Alley in Wall Lake. He received information from "several people" that there might be naked beer slides at Lake Lanes during the event. During his visit to Lake Lanes, Sergeant Schaffer asked Boger whether this information was accurate. Boger admitted that he was planning a beer slide, but denied that he was promoting nor that he had advertised a *naked* beer slide. Sergeant Schaffer warned that beer slides during RAGBRAI could easily turn into naked beer slides, and advised that he would be visiting the establishment when RAGBRAI came to town on July 25, 2004.

Boger proceeded with plans for the beer slide, covering several bowling lanes with plastic and placing hay bales at the end of each lane. Beer was poured on the plastic covering the lanes. No rules were posted for the activity, and Boger planned to monitor the slides from his vantage point behind the bar.

When Sgt. Schaffer arrived at the bar at about 4:00 p.m., he observed a crowd by the lanes, and heard people chanting loudly. Almost immediately, he saw an individual at the end of the lane drop his shorts "in the blink of an eye" and slide completely naked down the lane. As this was happening, Sgt. Schaffer overheard Boger loudly shouting "no, no, don't, don't" in an attempt to have the man stop. Boger then hurdled the bar and confronted the man, who by then, had already slid naked down the alley. After the individual completed the slide, he walked back along the lane, still naked. Sgt. Schaffer confronted the man, made him get dressed, and arrested him for indecent exposure.

Sgt. Schaffer later charged Boger with permitting criminal activity on his premises, in violation of Iowa Code section 123.49(2)(j) (2003). Boger was ultimately acquitted of this charge. However, on July 7, 2005, the Iowa Department of Public Safety filed a hearing complaint against Boger and Lake Lanes, alleging that Boger knowingly permitted nudity by a person who acts as an entertainer on his premises in violation of section 728.5. The department sought a suspension of Lake Lanes' liquor license. Following a contested case hearing, the administrative law judge concluded Boger allowed and permitted public indecent exposure in his establishment, and determined Boger's liquor license should be suspended for twenty-one days. On administrative appeal, the agency increased the suspension to thirty days. This decision was affirmed on judicial review. Boger appeals from this ruling.

Scope of Review.

In reviewing the decision of the district court, we must apply the standards set forth in Iowa Code section 17A.19(10) and determine whether our

application of those standards produces the same results as reached by the district court. *Auen v. Alcoholic Beverages Div.*, 679 N.W.2d 586, 589 (Iowa 2004). Section 17A.19(10) allows the district court to grant relief to a party seeking judicial review if the court determines that substantial rights of the person seeking judicial relief have been prejudiced by the agency action because the agency action meets any one of the several enumerated provisions in paragraphs *a* through *n.* Iowa Code § 17A.19(10).

Substantial evidence is defined as evidence of the quality and quantity "that would be deemed sufficient by a neutral, detached, and reasonable person, to establish the fact at issue when the consequences resulting from the establishment of that fact are understood to be serious and of great importance." Iowa Code § 17A.19(f)(1). Thus, evidence is substantial when a reasonable person could accept it as adequate to reach the same finding. *Asmus v. Waterloo Cmty. Sch. Dist.*, 722 N.W.2d 653, 657 (Iowa 2006). We liberally and broadly construe the agency's findings to uphold its decision. *Finch v. Schneider Specialized Carriers, Inc.*, 700 N.W.2d 328, 331 (Iowa 2005). It is not the task of the reviewing court "to weigh the evidence or the credibility of the witnesses." *Tim O'Neill Chevrolet, Inc. v. Forristall*, 551 N.W.2d 611, 614 (Iowa 1996).

Statutory Overview.

Iowa Code section 123.39 permits the Administrator of the Alcoholic Beverages Division to suspend a liquor license of any licensee who violates any of the provisions of chapter 123. As noted, section 123.49(2)(j) provides that a licensee shall not knowingly permit or engage in any criminal activity on licensed

premises. Finally, as will be noted in the next section, Iowa Code section 728.5(3) prohibits public indecent exposure in certain establishments. It was this provision that the agency concluded Boger violated. With this statutory background in mind, we proceed to address the issues raised by Boger on appeal.

Substantial Evidence.

Because we find this issue dispositive of all the claims on appeal, we first address Boger's claim that substantial evidence does not support a finding that he "knowingly permitted or allowed the nudity of an entertainer on the licensed premises . . . ." Iowa Code section 728.5(3) prohibits public indecent exposure in certain establishments. In particular, it provides that

> An owner . . . who exercises direct control over a place of business required to obtain a sales tax permit shall be guilty of a serious misdemeanor under any of the following circumstances
> . . .
> [i]f such person allows or permits the exposure of the genitals or female breast nipple of any person who acts as an entertainer, whether or not the owner of the place of business in which the activity is performed employs or pays any compensation to such person to perform such activity.

In particular, Boger argues there is a lack of evidence to support that he *knowingly* permitted nudity on his premises. He points to the fact that Sgt. Schaffer overheard him loudly shouting "no, no" in an attempt to have the man stop, and that he then hurdled the bar to confront the by-then nude man. He also finds it significant that Sgt. Schaffer testified that the individual "dropped his drawers in the blink of an eye . . . ." He believes this shows the nudity was of a spontaneous nature and that no individual could have reacted quickly enough to prevent the nudity from happening, and that his immediate reaction to stop the

behavior negates any inference that he knowingly permitted the nudity in his establishment.

The department offers the following testimony, which it claims constitutes substantial evidence that Boger permitted or allowed the naked entertainment:

> 1. that people were talking about an upcoming naked beer slide event days before it happened.
> 2. that Sgt. Schaffer warned Boger regarding the likelihood of the slide devolving into a naked event.
> 3. that Boger, despite the warning, failed to post rules for using the slide.
> 4. that Boger was thirty feet away from the activity and not in a position to stop it.
> 5. that Boger only said "no, no" to the naked individual *after* seeing Sgt. Schaffer.

Accepting this evidence on its face, without analyzing weight or credibility, we agree that it may support an inference that nudity at the beer slide was *predictable*, that Boger could have taken additional measures to stop it more quickly, and even that Boger might have permitted it to occur if Sgt. Schaffer had not arrived just before the patron stepped out of his shorts. However, we conclude it does not constitute substantial evidence that Boger knowingly permitted or allowed his patron to be naked.

The Administrator's final order states that:

> The warnings of Sgt. Shaffer and the Licensee's failure to take precautions in spite of the warnings constitute a sufficient factual basis to conclude that the Licensee knowingly allowed or permitted "naked" beer sliding on the licensed premises.

Warning that something *might* happen and a failure to take preventive measures fall far short of knowledge that something will happen or permitting it to occur. Just because an event—in this case a bar patron shedding his clothes prior to sliding down the alley—may have been predictable, or perhaps in some sense

preventable, does not mean that action has been permitted or allowed, as is required by the statute. While these facts might permit an inference of anticipation, substantial evidence is lacking that Boger permitted or allowed it.

We find guidance from the field of criminal law. Iowa Criminal Jury Instruction 200.3 provides that an actor has knowledge when there is a "conscious awareness" that a prohibited act is occurring. We cannot say, on this record, that Boger allowed the nudity to occur once he held a conscious awareness the patron was taking off his clothes. First, there is no evidence in the record of any pre-event advertising for a naked beer slide or for solicitation for an individual to take off his or her clothes. Likewise there is no evidence whatsoever in the record that Boger encouraged, persuaded, or prompted any persons to take off their clothes on the day in question. Nor is there evidence that once, in a "blink of an eye," the patron was naked, Boger allowed him to continue his "entertainment." At most, there was simply a setting in which some nudity might have occurred. Once it did, Boger stopped it as quickly as possible. The mere fact that one individual did, in fact, become nude is insufficient to support the inferential leap that he was permitted or allowed to do it by the owner of the bowling alley.

While certainly direct and circumstantial evidence are equally probative, *State v. Knox*, 536 N.W.2d 735, 742 (Iowa 1995), the evidence offered and cited by the director can only be viewed as total speculation as to Boger's state of mind. For instance, Sgt. Schaffer hypothesized that the only reason Boger reacted by shouting "no, no" when the man took off his pants was that he saw a law enforcement officer entering the building. The agency relied heavily on this

supposition regarding Boger's intentions in finding he allowed the nudity. We believe this cannot be characterized as anything other than speculation and conjecture. *See Thacker v. Eldred*, 388 N.W.2d 665, 670 (Iowa Ct. App. 1986) (stating substantial evidence must be either direct or circumstantial, not merely a surmise or conjecture). We conclude an inference of knowledgeable permission is not supported by this scant evidence.

Conclusion.

Cognizant of the fact that our task is not to re-weigh the evidence or to determine which evidence is stronger, s*ee Arndt v. City of Le Claire*, 728 N.W.2d 389, 394 (Iowa 2007), we nonetheless conclude the agency decision is not supported by *any* substantial evidence that Boger knowingly permitted or allowed or permitted nudity in his bowling alley. Lacking such evidence we must reverse the district court order denying Boger's petition for judicial review.

REVERSED.