

IN THE COURT OF APPEALS OF IOWA

No. 1-679 / 11-0328
Filed September 21, 2011

MOTIF, LTD., d/b/a BO-JAMES,
Plaintiff-Appellant,

vs.

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

Appeal from the Iowa District Court for Johnson County, Mitchell E.
Turner, Judge.

Plaintiff appeals the district court decision, which affirmed the finding of
the administrator of the Iowa Alcoholic Beverages Division imposing a civil
penalty for serving alcohol to an underage person. **AFFIRMED.**

Dennis J. Mitchell of Meardon, Sueppel & Downer, P.L.C., Iowa City, for
appellant.

Thomas J. Miller, Attorney General, and John R. Lundquist, Assistant
Attorney General, for appellee.

Considered by Vaitheswaran, P.J., Tabor, J., and Huitink, S.J.*

*Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2011).

HUITINK, S.J.,

I. Background Facts & Proceedings.

On October 24, 2008, Iowa City police officers conducted a compliance check of area establishments in an effort to determine whether liquor was being sold to anyone under the legal age for purchasing liquor. See Iowa Code § 123.3(19) (2007) (“Legal age’ means twenty-one years of age or more.”). L.D., who was twenty years old, was assigned to assist Officer Zachary Diersen. Officer Diersen took a photograph of L.D., verified his age, and made a copy of his Iowa driver’s license. Officer Diersen searched L.D. to make sure he had no other identification with him.

At about 1:00 a.m., L.D. entered Bo-James, a restaurant/bar in Iowa City. Gustaf Hawbaker was working at the door that evening. He examined L.D.’s driver’s license and stamped his hand with a smiley face. L.D. went up to the bar and ordered a beer. The bartender did not do anything to check his age, and she served L.D. a beer. L.D. paid for the beer, gave it to Officer Diersen, and left the bar. Officer Diersen approached the bartender, who stated she did not check the age of people she served but left that to the person working at the door. Hawbaker told officer Diersen “that he just hadn’t paid very close attention to it.”

The Iowa Department of Public Safety filed a complaint against Motif, Ltd., doing business as Bo-James, for violating Iowa Code section 123.49(2)(h) by serving liquor to an underage person. A hearing before an administrative law judge (ALJ) was held on July 27, 2009. Officer Diersen testified that when a person is under the age of twenty-one when a driver’s license is issued the

license is vertical in orientation rather than horizontal, and L.D. had a vertical driver's license. L.D.'s date of birth, xx/xx/1988, was on the driver's license in large red print. Also, next to L.D.'s picture is a red band with yellow printing which states, "Under 21 until xx/xx/2009."

Hawbaker testified that he had worked at Bo-James for about three to three and one-half months, and had received ten to fifteen hours of training before working at the door on his own. He stated that after 7:00 p.m. Bo-James was open exclusively for people over the age of twenty-one and very few people who were underage tried to come into the bar. Hawbaker testified that he mistakenly read L.D.'s date of birth to be 1986, which would have made him over the age of twenty-one. He stated that a hologram on the driver's license made it more difficult to read the date. Hawbaker also stated L.D. was quite forthright in giving his identification and most times if people were under age they were apprehensive.

Leah Cohen testified she had owned Bo-James for twenty-five years and had no prior violations. She testified there was a very extensive training program before somebody worked at the door. The majority of the employees at Bo-James had attended Training in Intervention Procedures (TIPS) from an Iowa City police officer. Bo-James also participated in Responsible Retailing Forum, which sent mystery shoppers into establishments to verify whether employees were checking identification when selling alcohol.

The ALJ found that one of Bo-James's "employees failed to exercise reasonable care when examining a driver's license and as a result, an underage

person was allowed to purchase a beer.” The ALJ determined that as a first offense Bo-James would be required to pay a civil penalty of \$500. Bo-James appealed. The administrator of the Iowa Alcoholic Beverages Division affirmed the findings and conclusions of the ALJ. The administrator found “the preponderance of the evidence demonstrates neither the door person, nor the bartender, exercised ‘reasonable care to ascertain’ LD’s age on October 24, 2008.”

Bo-James filed a petition for judicial review. The court concluded “there is substantial evidence in the record to support the agency’s finding that Mr. Hawbaker failed to exercise reasonable care in ascertaining the age of L.D. when he presented his identification for entrance to Bo-James.” The court stated, “taking time to review all of the numerals in the driver’s license is imperative when an individual such as Mr. Hawbaker is the ‘gatekeeper’ to alcohol access at the bar.” The court concluded the agency’s decision should be affirmed. Bo-James now appeals the decision of the district court.

II. Standard of Review.

We review for the correction of errors at law. *Jim O., Inc. v. City of Cedar Rapids*, 587 N.W.2d 476, 478 (Iowa 1998). In judicial review of agency action we apply the standards found in the Iowa Administrative Procedure Act. Iowa Code ch. 17A. We apply the standards found in section 17A.19(10) to determine whether our application of those standards produces the same result as that reached by the district court. *Auen v. Alcoholic Beverages Div.*, 679 N.W.2d 586, 589 (Iowa 2004).

III. Sufficiency of the Evidence.

Bo-James contends there is not substantial evidence in the record to support the agency's finding that its employees did not exercise reasonable care.

Section 123.49(2)(h) provides a person or club holding a liquor license shall not:

Sell, give, or otherwise supply any alcoholic beverage, wine, or beer to any person, knowing or failing to exercise reasonable care to ascertain whether the person is under legal age, or permit any person, knowing or failing to exercise reasonable care to ascertain whether the person is under legal age, to consume any alcoholic beverage, wine, or beer.

The company states Hawbaker was a very conscientious employee who simply misread the birth date on L.D.'s driver's license. Bo-James asserts the statute requires only reasonable care, not perfection.

Agency action may be reversed when it "is not supported by substantial evidence in the record before the court when that record is viewed as a whole."

Iowa Code § 17A.19(10)(f). The term substantial evidence means:

the quantity and quality of evidence 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.

Id. § 17A.19(10)(f)(1). We do not consider whether the evidence might support a different finding, but whether there is substantial evidence to support the findings actually made. *Meyer v. IBP, Inc.*, 710 N.W.2d 213, 218 (Iowa 2006).

"Section 123.49(2) simply requires the licensee and the licensee's employees to exercise 'reasonable care.'" *Walnut Brewery, Inc. v. Iowa Dep't of Commerce*, 775 N.W.2d 724, 730 (Iowa Ct. App. 2009). Under section 123.49(2)(h), the problem of "ascertainment" may be "overcome by simply

requiring patrons to furnish proof of age before the licensee serves them.” *Jim O.*, 587 N.W.2d at 478. A bartender who made no effort whatsoever to ascertain a person’s age did not meet the threshold of “reasonable care” required by the statute. *Id.*

We determine there is substantial evidence in the record to support the agency’s findings that Bo-James’s employees did not exercise reasonable care to ascertain whether L.D. was under the legal age. Officer Diersen testified Hawbaker told him “that he just hadn’t paid very close attention to it.” L.D.’s driver’s license was vertical in orientation which should have alerted Hawbaker that L.D. was under the age of twenty-one at least when the driver’s license was issued. Furthermore, the license clearly stated L.D.’s date of birth in 1988. The license also stated that L.D. was under the age of twenty-one until a specific date in 2009. As noted above, the compliance check took place in October 2008.

While there was evidence in the record to support a finding that Bo-James took care to train its employees, and that generally Hawbaker was a conscientious employee, in the specific instance when L.D. entered the bar there is sufficient evidence to support the agency’s finding that Hawbaker did not exercise reasonable care to ascertain whether L.D. was under the legal age. We affirm the district court’s conclusion that the agency’s decision was supported by substantial evidence.

IV. Burden of Proof.

Bo-James claims the agency improperly placed the burden of proof on the company. The administrator stated, “In a contested case hearing, the burden of

going forward with the evidence to establish a violation is on the State, but the burden of proving compliance with the statute shifts to the licensee.” The agency relied upon the case of *McCrea v. Iowa Department of Transportation*, 336 N.W.2d 427, 428-29 (Iowa 1983), which notes that section 17A.18(3) provides that a licensee whose license is subject to revocation be “given an opportunity to show, in an evidentiary hearing . . . compliance with all lawful requirements for the retention of the license.”

The administrator of the Iowa Alcoholic Beverages Division in the final agency action in this case specifically found “the IDPS has proven beyond a preponderance of the evidence that the Licensee’s employee violated Iowa Code §123.49(2)(h) on October 24, 2008.” Thus, it is clear the agency did not improperly shift the burden of proof onto Bo-James. We determine the agency did not improperly assign the burden of proof to Bo-James. The Iowa Department of Public Safety was required to prove its case, and it did so.

We affirm the decision of the district court.

AFFIRMED.