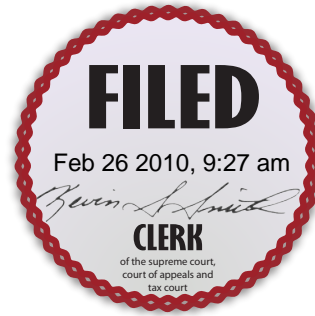


Pursuant to Ind.Appellate Rule 65(D), this Memorandum Decision shall not be regarded as precedent or cited before any court except for the purpose of establishing the defense of res judicata, collateral estoppel, or the law of the case.



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**IN THE
COURT OF APPEALS OF INDIANA**

LINSTAN SOUTH INC.,)
)
Appellant,)
)
vs.)
)
REVIEW BOARD OF THE INDIANA)
DEPARTMENT OF WORKFORCE)
DEVELOPMENT and S.H.,)
)
Appellees.)

No. 93A02-0907-EX-708

APPEAL FROM THE REVIEW BOARD OF THE DEPARTMENT OF WORKFORCE
DEVELOPMENT
Steven F. Bier, Chairperson
Cause No. 09-R-02488

February 26, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

Linstan South Inc. (Employer) appeals from a decision of the Department of Workforce Development Unemployment Insurance Review Board (Review Board) granting S.H.'s (Claimant) petition for unemployment insurance compensation benefits. Employer presents two issues for our review, which we consolidate and restate as: Is the decision of the Review Board that the Claimant was discharged without just cause supported by the evidence?

We affirm.

On March 17, 2000, Claimant was hired to work for County Wide Construction, a subsidiary of Employer, as a laborer for residential remodeling jobs. On October 16, 2008, Claimant was discharged from his job for violating company rules concerning use of personal cell phones during work hours and for using a company vehicle to transport a former/non-employee of L.S. from her jobsite to lunch. Claimant filed an application for unemployment compensation benefits.

On November 13, 2008, a claims deputy with the Department of Workforce Development submitted an initial determination that Claimant was “discharged for just cause” and therefore, not entitled to unemployment compensation benefits. *Appellant's Appendix* at 36. Claimant appealed, and a hearing before an administrative law judge (ALJ) was held on June 3, 2009. After receiving evidence and hearing arguments of the parties, the ALJ made the following findings of fact and conclusions of law:

FINDINGS OF FACT: The claimant began employment March 17, 2000 and was discharged effective October 16, 2008. He worked as an employee who was paid fourteen fifty (\$14.50) per hour.

The employer presented a copy of its written policies that the claimant admitted he received during his employment. The document was made part of the record. In relevant part it read, "Breaks are to be taken on the honor system. Employees are allowed fifteen minutes of break time during the morning. Employees are allowed fifteen minutes break time in the afternoon. . . . Talking during work hours shall be restricted to job related topics only." The policies are applicable to all employees. Neither party offered examples of inconsistent enforcement of the policies.

Ms. Therese Neidige was a former employee. The Administrative Law Judge finds that Ms. Neidige remained acquainted with the claimant. On October 16, 2008, Ms. Neidige called the claimant on his cell phone at about 10:00 a.m. She asked if the claimant would like to meet her for lunch. The conversation took no more than three to four (3-4) minutes. The claimant agreed he would see her for lunch. At about 11:45 a.m., Ms. Neidige called again and said that she had problems with her van. The claimant was driving the employer's truck. The claimant said he would pick her up and take her to lunch. The claimant drove and picked up Ms. Neidige and took her to lunch. They were seen by employees. The Administrative Law Judge finds that Mr. Scott Clifton, son of the president, was at the same restaurant. When he and the claimant left the restaurant, Mr. Clifton asked the claimant if he thought it was appropriate that he transported Ms. Neidige in the employer's truck to the restaurant. The claimant said that he did not think about this issue. The Administrative Law Judge finds that Mr. Scott Clifton told his father who made a determination that the claimant placed the employer's liability at risk by transporting a non-employee in one of its vehicles. The claimant was discharged from employment.

CONCLUSIONS OF LAW:

* * *

The claimant was subject to the employer's policies and aware of them. With reference to abuse of break time, the record demonstrated that an outside party called the claimant on his cell phone and spoke no more than a few minutes with time remaining on the break. Again the same individual called the claimant a second time in the same morning and spoke no more than a few minutes with the claimant. The written policy allows for two (2) fifteen minute breaks. There was no probative evidence offered that the claimant abused his morning fifteen (15) minute break on October 16, 2008. The Administrative Law Judge does not conclude the claimant knowingly violated the policies.

With reference to the rule regarding talking during work hours being restricted to job related topics only, the claimant's conversations with the former employee occurred during break. The rule is not applicable to this matter. There was no violation of the rule.

With reference to the claimant transporting a non-employee, the employer did raise an issue which would call for discipline but, in lieu of the aforementioned circumstances, discharge was clearly too harsh of a measure.

The employer failed to establish the claimant knowingly violated reasonable and uniformly enforced policies of an employer. The claimant was discharged but not for proven just cause and therefore qualified to receive benefits under the [Indiana Employment and Training Services Act].

Appellant's Appendix at 22-23 (emphasis in original). The ALJ thus reversed the deputy's initial determination to the contrary. Employer timely requested review of the ALJ's decision by the Review Board. On July 6, 2009, the Review Board adopted and incorporated the findings and conclusions of the ALJ and issued its decision affirming the ALJ's decision. Employer now appeals.

Employer argues that the Review Board's decision that Claimant was not terminated for just cause is not supported by the evidence and therefore, should be reversed. We have recently sent forth the standard of review applicable in this context:

"The Indiana Unemployment Compensation Act provides that any decision of the review board shall be conclusive and binding as to all questions of fact. Ind. Code § 22-4-17-12(a). Review Board decisions may, however, be challenged as contrary to law, in which case the reviewing court examines the sufficiency of the facts found to sustain the decision and the sufficiency of the evidence to sustain the findings of facts. Ind. Code § 22-4-17-12(f). Under this standard, we review determinations of specific or basic underlying facts, conclusions or inferences drawn from those facts, and legal conclusions. *McClain v. Review Bd. of the Ind. Dep't of Workforce Dev.*, 693 N.E.2d 1314, 1317 (Ind.1998).

When reviewing a decision by the Review Board, our task is to determine whether the decision is reasonable in light of its findings. *Abdirizak v. Review Bd. of Dept. of Workforce Development*, 826 N.E.2d 148, 150 (Ind. Ct. App. 2005). Our review of the Review Board’s findings is subject to a ‘substantial evidence’ standard of review. *Id.* In this analysis, we neither reweigh the evidence nor assess witness credibility, and we consider only the evidence most favorable to the Review Board’s findings. *Id.* Further, we will reverse the decision only if there is no substantial evidence to support the Review Board’s findings. *Id.*”

Best Chairs v. Review Bd. of Ind. Dep’t of Workforce Dev., 895 N.E.2d 727, 730 (Ind. Ct. App. 2008) (quoting *Quakenbush v. Review Bd. of Ind. Dep’t of Workforce Dev.*, 891 N.E.2d 1051, 1053 (Ind. Ct. App. 2008)).

Pursuant to Ind. Code Ann. § 22-4-15-1 (West, PREMISE through 2009 1st Regular Sess.), an unemployment claimant is ineligible for unemployment benefits if he is discharged from employment for “just cause.” *See also Russell v. Review Bd. of Ind. Dep’t of Employment and Training Servs.*, 586 N.E.2d 942 (Ind. Ct. App. 1992). Just cause includes discharge for a “knowing violation of a reasonable and uniformly enforced rule of an employer” I.C. § 22-4-15-1(d)(2).

The employer bears the initial burden of establishing that an employee was terminated for just cause. *Owen County ex rel. Owen County Bd. of Comm’rs v. Indiana Dep’t of Workforce Dev.*, 861 N.E.2d 1282 (Ind. Ct. App. 2007). To establish a prima facie case for just cause discharge for violation of an employer rule, it is necessary for the employer to show that the claimant: (1) knowingly violated; (2) a reasonable; and (3) uniformly enforced rule. *Coleman v. Review Bd. of Ind. Dep’t of Workforce Dev.*, 905 N.E.2d 1015 (Ind. Ct. App. 2009). It is not enough to prove that the employee violated a known rule; it must be

established that the employee knowingly violated the rule. *Id.* If an employer meets this burden, the claimant must present evidence to rebut the employer's prima facie showing. *Id.* The reason for requiring uniform enforcement of a known and reasonable rule is to give notice to employees about what punishment they can reasonably anticipate if they violate the rule and to protect employees against arbitrary enforcement. *See McClain v. Review Bd. of Ind. Dep't of Workforce Dev.*, 693 N.E.2d 1314 (Ind. 1998).

Employer asserts that there was substantial evidence, not rebutted by Claimant, that Claimant knowingly violated Employer's break time and phone policy as well as Employer's vehicle policy. Thus, Employer argues that the Review Board's determination to the contrary must be reversed. We disagree.

We first consider Employer's break time and conversation policies. Employer's written policy states that employees were on the "honor system" and were "allowed" fifteen minutes of break time during the morning and again during the afternoon. *Appellant's Appendix* at 42. Claimant admitted that he was aware of this policy and that it applied to him. Employer has another rule that states, "Talking during work hours shall be restricted to job related topics only." *Id.* According to Employer, employees were allowed to take personal phone calls while on their break. Employer also asserted that break times were set, i.e., the morning break was 10:00 a.m. to 10:15 a.m. and the afternoon break was 3:00 p.m. to 3:15 p.m. This break-time schedule, however, was not in writing. Contrary to Employer's evidence, Claimant testified that break times were not so rigid in that phone calls, drinks of

water, and trips to the restroom were not confined to break periods and were not usually subject to discipline.

Here, on October 16, 2008, Ms. Neidige called Claimant around 10:00 a.m. while he was on break. The phone call lasted no more than the few minutes necessary to arrange a lunch date that day. Just before noon, Ms. Neidige called Claimant to inform him that her vehicle would not start and asked Claimant if he could pick her up. Claimant agreed. The phone call lasted no more than a few minutes. Applying Employer's written rule, which utilized the honor system and authorized fifteen minutes of break time in the morning and in the afternoon, the Review Board found that Employer failed to present probative evidence that Claimant exceeded his allotted fifteen-minute morning break. The Review Board thus concluded that Claimant did not violate the Employer's break-time rule when he answered the call from Ms. Neidige. Implicit in this finding and the ultimate conclusion is that the Employer failed to establish that it uniformly enforced a strict break-time schedule.

Given the Review Board's conclusion that Claimant answered the call from Ms. Neidige during his allotted break-time, it follows that Claimant did not violate Employer's policy limiting conversations during work hours to work-related topics, as even Employer admitted that employees could take personal phone calls during their breaks.

We now consider Employer's primary reason for terminating Claimant—that Claimant violated Employer's vehicle policy transporting a non-employee in a company vehicle. Employer does not have a written rule or policy regarding personal use of company vehicles or transporting non-employees in company vehicles. Employer asserts that employees were

made aware of such policies during staff meetings when they were told that company vehicles were to be used only for picking up work-related materials and for traveling straight to and from lunch, without making stops for drinks or cigarettes. Claimant admitted that he was aware of the policy that when using a company vehicle, employees were not to make personal stops for drinks or cigarettes. Claimant testified that employees were never told anything specific about transporting non-employees or that such conduct would lead to termination. Claimant further testified that he had witnessed other employees transport their children in company vehicles or use company vehicles to run short errands.

On October 16, 2008, after receiving a call from Ms. Neidige, a non-employee, informing him that she was having car problems, Claimant agreed to pick her up and take her to the restaurant at which they had agreed to meet for lunch. Claimant drove approximately four blocks beyond the restaurant to pick up Ms. Neidige. It was not until he was confronted by the owner's son at the restaurant that he realized he may have done something wrong. On these facts, the Review Board concluded that discharge was "too harsh" for the first instance of transporting a non-employee in a company vehicle. *Appellant's Appendix* at 23. This is true especially in light of the fact that such policy was not in writing or clearly communicated and employees were never informed that such conduct would lead to termination. Conflicting evidence in the record also demonstrates that such unwritten policy was not uniformly enforced.

Employer's arguments that Claimant's conduct violated Employer's policies regarding break time and limits on personal conversations and Employer's vehicle policy are merely

requests that we reweigh the evidence. Our standard of review does not permit us to engage in such an analysis. There is substantial evidence in the record to support the findings made by the Review Board. Those findings in turn support the Review Board's conclusion that Claimant's discharge was not for just cause.

Affirmed.

NAJAM, J., and BRADFORD, J., concur.