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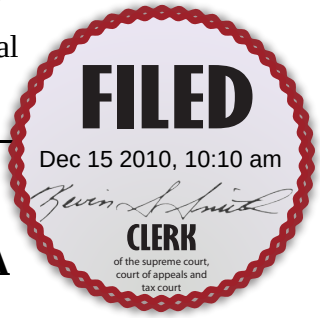

IN THE COURT OF APPEALS OF INDIANA

M.H.,	)	
	)	
Appellant-Claimant,	)	
	)	
vs.	)	No. 93A02-1005-EX-496
	)	
REVIEW BOARD OF THE INDIANA DEPARTMENT OF WORKFORCE DEVELOPMENT,	)	
	)	
Appellee-Employer.	)	

APPEAL FROM REVIEW BOARD OF THE INDIANA
DEPARTMENT OF WORKFORCE DEVELOPMENT
Cause No. 10-R-496

December 15, 2010

MEMORANDUM DECISION – NOT FOR PUBLICATION

RILEY, Judge

STATEMENT OF THE CASE

Appellant-Claimant, M.H., appeals the decision by the Review Board of the Indiana Department of Workforce Development's (Review Board) that M.H. is not eligible for unemployment benefits.

We affirm.

ISSUE

M.H. raises two issues on appeal which we consolidate and restate as: Whether the Review Board's decision that M.H. was discharged for just cause by his Employer is supported by the evidence.

FACTS AND PROCEDURAL HISTORY

In September of 2003, M.H. became an employee of Laura Kopetsky Tri-Ax, Inc. (Employer). The Employer's "Employee Handbook" specifies in its attendance policy that "[a]ny employee arriving late for work three (3) times in a 90-day period, without prior arrangement or acceptable reasoning is subject to: . . . possible immediate termination. Tardiness is defined as 15 minutes past your scheduled start time." (Appellee's App. pp. 45-46). M.H. is typically due at work at 7 a.m. However, on October 5, 2009, M.H. arrived at 7:30 a.m.; on October 26, 2009, he arrived at 7:30 a.m.; and on November 30, 2009, M.H. arrived at 7:35 a.m. That same day—November 30, 2009—M.H. was terminated by his Employer.

In December of 2009, M.H. applied for unemployment benefits with the Department of Workforce Development (DWD). On December 16, 2009, the DWD determined that

M.H. had been discharged for just cause and was not entitled to unemployment benefits. On December 22, 2009, M.H. appealed this decision to the Administrative Law Judge (ALJ). On January 28, 2010, after a hearing, the ALJ affirmed DWD's decision, determining that M.H. had been discharged for just cause. On February 20, 2010, M.H. filed an appeal with the Review Board, which, on April 14, 2010, affirmed the ALJ's decision and adopted and incorporated by reference the ALJ's findings of fact and conclusions of law.

M.H. now appeals. Additional facts will be provided as necessary.

DISCUSSION AND DECISION

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 fact. I.C. § 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. *Brown v. Indiana Dept. of Workforce Dev.*, 919 N.E.2d 1147, 1150 (Ind. Ct. App. 2009).

When reviewing a decision by the Review Board, our task is to determine whether the decision is reasonable in light of its findings. *Id*. Our review of the Review Board's findings is subject to a substantial deference standard of review. *Id.* We neither reweigh the evidence nor assess witness credibility and we consider only the evidence most favorable to the

Review Board's findings. *Id*. We will reverse the decision if there is no substantial evidence to support the Review Board's findings. *Id*.

M.H. contends that there is no evidence to support the Review Board's conclusion that he was discharged from his employment for just cause. The purpose of the Unemployment Compensation Act is to provide benefits to those who are involuntarily out of work, through no fault of their own, for reasons beyond their control. *Wasylk v. Review Bd. of Indiana Employment Sec. Div*., 454 N.E.2d 1243, 1245 (Ind. Ct. App. 1983). The employer bears the initial burden of establishing that an employee was terminated for just cause. *Coleman v. Review Bd. of Indiana Dept. of Workforce Dev*. 905 N.E.2d 1015, 1019-20 (Ind. Ct. App. 2009). To establish a *prima facie* case for just cause discharge for violation of an employer rule, the employer has to show that the claimant: (1) knowingly violated; (2) a reasonable; and (3) uniformly enforced rule. *Id*. at 1020. 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*. To have knowingly violated an employer's rules, the employee (1) must know the rule; and (2) know his conduct violated the rule. *Barnett v. Review Bd. of the Ind. Emp. Sec. Div*., 419 N.E.2d 249 (Ind. Ct. App. 1981). If an employer meets this burden, the claimant must present evidence to rebut the employer's *prima facie* showing. *Id*.

Here, M.H. knew Employer's rule with respect to tardiness and termination, but nevertheless knowingly violated it. During the hearing before the ALJ, the Employer submitted an "Employee acknowledgement," signed by M.H. on September 16, 2003, which indicated that M.H. had received a copy of the Employee Handbook, explaining Employer's

attendance policy. (Appellee's App. p. 47). Also, the ALJ admitted as evidence a "Violation Notice/Performance Correction" issued to M.H. by his Employer on June 29, 2009, which advised M.H. of a "Performance Transgression" and "Unsatisfactory work performed" and put him on notice that he "will be terminated" in case of other incidents or complaints. (Appellee's App. p. 48). When questioned by the ALJ about Employer's attendance policy, M.H. admitted that he knew that in case of three instances of tardiness within a ninety day period, he could be terminated. M.H.'s Employer presented evidence that M.H. was more than fifteen minutes late for work on October 5, October 26, and on November 3, 2009.

Although it was established at the hearing that M.H. was the first employee to be terminated under this attendance policy, our supreme court has previously stated that

> A policy that has not been the basis for termination of an employee in the past may nonetheless be uniformly enforced even if only one person is the subject for an enforcement action, so long as the purposes underlying uniform enforcement are met. Uniform enforcement gives notice to employees about what punishment they can reasonably anticipate if they violate the rule and it protects employees against arbitrary enforcement.

McClain v. Review Bd. of Indiana Dept. of Workforce Dev., 693 N.E.2d 1314, 1320 (Ind. 1998), *reh'g denied*. In the instant case, the purpose underlying the uniform enforcement is met as M.H. acknowledged during the hearing that he could be terminated if he was late three times within a ninety day period.

Nevertheless, in his brief, M.H. now asserts that he was subjected to "racial slurs, comments and confrontations by white employees" and alleges a pattern of discrimination against him by his Employer. (Appellant's Br. p. 2). To that end, M.H. included in his

appendix documents establishing that he has twice filed a charge of discrimination with the Indiana Civil Rights Commission claiming discrimination based upon race and retaliation by his Employer. However, none of these documents were offered by M.H. during the hearing, nor were any admitted into evidence by the ALJ. As such, these documents cannot be part of the record on appeal and therefore, M.H. has waived his claim with respect to his discrimination claim.

In sum, we conclude that M.H. knowingly violated his Employer's reasonable and uniformly enforced tardiness policy. *See Coleman*, 905 N.E.2d at 1019-20. Therefore, we will not disturb the Review Board's decision.

CONCLUSION

Based on the foregoing, we conclude that the Review Board properly affirmed the ALJ's decision that M.H. had been terminated for just cause and therefore was not eligible to receive unemployment benefits.

Affirmed.

KIRSCH, J., and BAILEY, J., concur.