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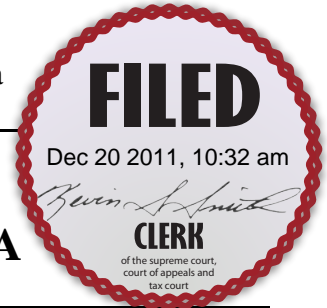
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IN THE
COURT OF APPEALS OF INDIANA

C.C.,)
)
Appellant,)
)
vs.)
)
REVIEW BOARD OF THE INDIANA)
DEPARTMENT OF WORKFORCE)
DEVELOPMENT and EMPLOYER,)
)
Appellees.)

No. 93A02-1008-EX-1000

APPEAL FROM THE REVIEW BOARD OF THE DEPARTMENT OF
WORKFORCE DEVELOPMENT
Cause No. 10-R-03548

December 20, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

BARTEAU, Senior Judge

STATEMENT OF THE CASE

C.C.¹ appeals the decision of the Unemployment Insurance Review Board of the Indiana Department of Workforce Development (“Review Board”) denying him unemployment benefits. Concluding that the Review Board properly determined that C.C. was discharged for just cause, we affirm.

ISSUE

C.C. raises several issues for our review, which we consolidate and restate as: whether the record supports the Review Board’s determination that C.C.’s employer (“Employer”), a municipal department, discharged him for just cause.

FACTS AND PROCEDURAL HISTORY²

When C.C. was hired by Employer in April 2001, he received a copy of the employee handbook. The handbook defines minor work rule violations, which include “[p]roven discourtesy, transmitting misinformation, or rudeness to a citizen” and “[c]ausing a minor accident in which the total damages do not exceed \$1,000.00 where

¹ For the reasons stated in *Moore v. Review Board of the Indiana Department of Workforce Development*, 951 N.E.2d 301 (Ind. Ct. App. 2011), I would include the parties’ full names. However, my colleagues find that Indiana Code section 22-4-19-6(b) (2010) and Indiana Administrative Rule 9(G)(1)(b)(xviii) mandate confidentiality and thus require the use of initials. They are not persuaded that Administrative Rule 9(G)(4)(d) permits the use of names.

² C.C. has filed a Motion to Strike Portions of Brief of Appellee Review Board and a Motion to Correct Erroneous Filing Dates and Allow Filing of Appellant Motion to Strike. We deny these motions by separate order issued contemporaneously with this opinion.

the employee is at fault through recklessness or negligence.” Employer’s Ex. 3, p. 3. In addition, the handbook provides a system of progressive discipline for minor work rule violations. A first violation leads to a written warning, a second violation leads to suspension, a third violation leads to demotion, suspension, or dismissal, and a fourth violation leads to dismissal. The successive violations need not be violations of the same minor work rule but include violations of any minor work rule. The handbook allows for dismissal of an employee following a third minor work rule violation within 365 days. *See* Employer’s Ex. 3, p. 6. A separate provision in the handbook provides for termination in the event of repeated personnel problems: “If in the best interests of [Employer] it is better that an employee not continue employment with [Employer] due to job performance, violation of personnel policies, or repeated personnel problems, [Employer] may sever the employment relationship by terminating the employee.” Employer’s Ex. 11.

Employer gave C.C. a written warning of a minor work rule violation on July 8, 2008. D.W., the Assistant Superintendent of the branch of Employer in which C.C. worked, later testified that C.C. caused yard damage three weeks in a row because he did not take the time to maneuver around a tight corner. The written warning states:

You are hereby notified that you have violated Minor Infraction No. 10.01 paragraph 5, of the . . . Employee Handbook for “Willful destruction of or sabotage of [Employer] property, vehicles, tools, materials, or the personal or real property of [Employer’s] employees, [Employer’s] officials or citizens within the scope of his/her employment.”^{3]}

³ The handbook shows that this is a major work rule violation that leads to immediate suspension or separation from employment. *See* Employer’s Ex. 3, pp. 1, 2. However, we need not dwell on this discrepancy as C.C. signed the written warning acknowledging the “Minor Infraction.” Further, although C.C. notes in passing that the violation was initially classified as a major and not minor work rule

Damage done to the property located at 1506 Oak Street. [C.C.] has also done damage to a fence twice in the 400 Blk. [o]f Decatur which we have repaired.

You are hereby given a written warning.

This notice will be made a permanent record in your personnel file.

Employer's Ex. 10. C.C. signed the written warning acknowledging the violation.

Employer gave C.C. a final warning on March 16, 2009 for causing damage to a fence. The final warning notified C.C. that another violation could lead to termination:

You are hereby notified that you have violated Minor Infraction No. 10.02 paragraph 1, of the . . . Employee Handbook for “Causing a minor accident in which the total damages do not exceed \$1,000.00 where the employee is at fault through recklessness or negligence.”

On March 12, 2009, driver, [C.C.], while driving down the alley behind 1520 Oak Street hit a City owned toter and pushed it into a white picke[t] fence in the back yard of 1520 Oak Street. There had to be a question of whether Truck #06 could make it between a telephone pole and the toter. [C.C.] should have had his helpers move the toter instead of trying to get by without hitting the telephone pole or the toter because of this judgment we have another insurance claim due to negligence.

On July 8, 2008, [C.C.] did damage to a fence at 1506 Oak Street which we had to repair.

You are hereby given a “final warning” in regards to damaging property another violation will result in time off with out pay or termination from a Drivers position as per the insurance company's request.

This notice will be made a permanent record in your personnel file.

violation, *see* Appellant's Br. p. 19 n.14, he does not argue on appeal that it cannot be classified as a minor work rule violation.

Employer's Ex. 5. D.W. made a note on this final warning that C.C. threw the warning on D.W.'s desk and refused to sign it. C.C. later testified that he had caused the damage to the fence:

Q. So the day in question, you[r] truck must have struck that toter and then it fell into the fence, is that right?

A. That's correct.

Q. And, and you acknowledge that happened.

A. Yes.

Tr. p. 141.

On March 31, 2009, D.W. received a phone call from a cashier at a Marathon gas station. The cashier told D.W. that one of Employer's employees, later identified as C.C., had been in the store to make a purchase. When C.C. was short on change, he told the cashier that he would go to his truck to get the change and return to pay her. Instead, he drove away. The cashier was upset about the incident and told D.W. that she did not want any of Employer's employees stopping at that gas station any more.

C.C. later explained to D.W. that he was only short six cents. D.W. responded that it did not make a difference if the amount was six cents or sixty dollars, "if you said you w[ere] going to your truck to pay the lady and you drove off, it's the same thing." *Id.* at 55. C.C. told D.W. that he would "go back and take care of it." *Id.* The next morning, D.W. received another call from the cashier. She told him that C.C. had just stopped by the gas station and threatened her and that she was going to call the police. C.C. later testified regarding his visit:

Q. What was the purpose of going back into the convenience store the next morning?

A. I asked her why did she call my job and say I didn't pay you for the chips that she alleged.

JUDGE: I recall your talking about this before.

Q. Was there any other reason other than to talk to her about that?

A. Nope, that was it.

Q. While you were in there, did you threaten her?

A. I told her, it wasn't a threat, I said, you are lucky, and I was upset about it, I said, but you're lucky that I'm a little more mature, I said, because I was anybody else, it would've been years ago, I said I would be in here having a tirade with you about this.

Id. at 145-46.

On April 2, 2009, A.W., Employer's General Manager, gave C.C. a letter of termination. The letter said that Employer had investigated the events at the gas station on March 31, 2009 and determined

that you provided misinformation to the cashier in that you led the cashier to believe you were going to go to your truck for money and return to pay your bill and instead you returned to your truck and left the premises without paying the full amount owed for the goods you took. Additionally, leaving the premises of an establishment without fully paying your bill is discourteous and rude.

Employer's Ex. 4, p. 1. The letter stated that C.C. had violated the minor rule work prohibition on proven discourtesy, transmitting misinformation, or rudeness to a citizen and that he had already accumulated two other minor work rule violations on July 8, 2008 and March 12, 2009. Because of these violations, Employer concluded that termination was appropriate: "With a third Minor Work Rule Infraction on 03/31/09, the progressive discipline raises to the level of dismissal." *Id.* In addition, the letter noted that C.C. had accumulated four major and fourteen minor work rule violations over the past six years and found that this record constituted repeated personnel problems justifying termination.

When A.W. presented the letter to C.C. for his signature, C.C. “said f*ck y’all and then he left the room.” Tr. p. 13.

C.C. filed a claim for unemployment benefits. On April 14, 2009, a determination of eligibility was mailed to C.C. in which a claims deputy determined that, due to C.C.’s knowing violation of a reasonable and uniformly enforced rule, C.C. was terminated for just cause and thus ineligible for unemployment benefits.

C.C. appealed the determination. A hearing was held before an administrative law judge (“ALJ”). A.W., D.W., and other employees of Employer testified. C.C. testified that he picked up a bag of chips marked ninety-nine cents, went to the cashier, gave her a dollar, and turned to leave. According to C.C.’s testimony, when the cashier told him that the bill was \$1.06, he told the cashier that he would have to go to his truck: “What I told the clerk was there’s no sales tax on chips, I’d have to go to the truck and I left.” *Id.* at 141. When asked to clarify why he would say that he had to go to his truck, C.C. explained:

I didn’t have six cents on me, but I had a dollar because the chips are ninety nine cents, so I give a dollar, keep the penny, and I turned to walk away, and she was like well you owe a dollar six. When I told her I said there’s no sales tax on chips, I’ll have to go to the truck and get it, and I turned and left.

Id. at 142.

In her decision, the ALJ cited Indiana Code section 22-4-15-1(d)(2) (2004), which provides in relevant part that a “knowing violation of a reasonable and uniformly enforced rule of an employer” constitutes just cause for discharge. The ALJ found that Employer had a system of progressive discipline in which a third minor work rule

violation could result in discharge. She further found that C.C. accumulated his third minor work rule violation when he told the cashier he would go to his truck for money and return to pay her but instead drove away without paying his bill. Noting that the minor work rule concerning proven discourtesy, transmitting misinformation, or rudeness to a citizen was a reasonable and uniformly enforced rule of Employer, the ALJ concluded that C.C. was terminated for just cause and affirmed the claims deputy's determination.

C.C. then appealed to the Review Board, which adopted and incorporated the ALJ's findings and conclusions. The Review Board also attached an addendum noting that C.C.'s appeal to the Board argued that no sales tax was owed on the chips. After briefly addressing the issue, the Board stated, "The Claimant violated the Employer's rule when he left the store without paying the full price, including tax, of the item." Appellant's App. p. 1. The Board affirmed the ALJ's decision as modified by the addendum. C.C. now appeals.

DISCUSSION AND DECISION

C.C. contends that he was not discharged for just cause. The Indiana Unemployment Compensation Act provides that any decision of the Review Board is conclusive and binding as to all questions of fact. Ind. Code § 22-4-17-12(a) (1995). Review Board decisions may be challenged as contrary to law, in which case we examine the sufficiency of the facts found to sustain the decision and the sufficiency of the evidence to sustain the findings of facts. *Coleman v. Review Bd. of Ind. Dep't of Workforce Dev.*, 905 N.E.2d 1015, 1019 (Ind. Ct. App. 2009). When reviewing a Review

Board decision, we analyze whether the decision is reasonable in light of its findings. *Id.* We evaluate Review Board findings to determine whether they are supported by substantial evidence. *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 reverse only if there is no substantial evidence to support the Review Board's findings. *Id.*

A claimant is ineligible for unemployment benefits if he or she is discharged for just cause. *Id.* Discharge for just cause is defined to include discharge for a "knowing violation of a reasonable and uniformly enforced rule of an employer." Ind. Code § 22-4-15-1(d)(2). The employer bears the initial burden of establishing that an employee was terminated for just cause. *Coleman*, 905 N.E.2d at 1019. 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. *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.* 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. *Id.*

Employer provided two separate reasons for terminating C.C.: (1) C.C. had incurred three minor work rule violations within one year, and (2) it was in Employer's

best interests to terminate C.C. due to repeated personnel problems. Because the ALJ based her conclusion that C.C. was terminated for just cause on the fact that he had incurred three minor work violations within one year, and the Review Board subsequently adopted and incorporated this conclusion, we need not address the second justification.

As an initial matter, the only arguments C.C. presents regarding the first two minor work rule violations supporting his dismissal challenge the sufficiency of the evidence. The evidence most favorable to the Review Board's findings shows that C.C. violated those rules. The arguments C.C. makes regarding these violations are merely requests to reweigh the evidence, which we may not do.

The employee handbook, which C.C. acknowledged receiving, provides that “[p]roven discourtesy, transmitting misinformation, or rudeness to a citizen” is a minor work rule violation. Employer's Ex. 3, p. 3. The evidence most favorable to the Review Board's findings shows that C.C. went into the gas station to make a purchase but was short on change. Although C.C. told the cashier that he would go to his truck to get the change and return to pay her, he instead drove away without paying the full bill.⁴ This evidence is sufficient to show that C.C. knowingly violated the rule. Moreover, C.C.'s own testimony shows that he knowingly violated the rule. C.C. testified that he gave the cashier a dollar for a bag of chips marked ninety-nine cents. When he turned to leave, the

⁴ This evidence was admitted through the testimony of Employer's other employees, who related what the cashier had told them. To the extent C.C. argues that this testimony was inadmissible hearsay, we find the argument waived for failure to object at the hearing. Moreover, much of this allegedly inadmissible evidence was introduced by C.C.'s own attorney, who questioned Employer's other employees about what the cashier had told them. *See, e.g.*, Tr. pp. 17, 42, 105.

cashier told him that the cost of the item was \$1.06. C.C. told the cashier that there was no sales tax on chips but nevertheless said that he would go to his truck to get the change. C.C.'s own testimony showed that he lied to the cashier and was discourteous and rude when he left with the bag of chips without fully paying the bill.

We pause here to observe that C.C. spends a substantial portion of his appellate brief and reply brief explaining why his bag of chips was not subject to sales tax. The Review Board stated that C.C. raised the issue in his appeal to the Board and therefore briefly addressed the issue in an addendum to its decision. As noted above, regardless of whether his purchase was subject to sales tax, the evidence demonstrates without question that C.C. knowingly violated the work rule by indicating to the cashier that he would return to finish the transaction but leaving instead. Any tax issue is irrelevant, and the Board's brief discussion of it does not negate the fact that the Board nevertheless adopted and incorporated the ALJ's findings and conclusions. We therefore decline C.C.'s invitation to reverse the Board's decision on the basis of its addendum.

We must next determine whether the work rule is reasonable. A work rule is reasonable if it protects the interests of the employees as well as those of the employer. *Gen. Motors Corp. v. Review Bd. of Ind. Dep't of Workforce Dev.*, 671 N.E.2d 493, 497 (Ind. Ct. App. 1996). At the hearing, D.W. testified that it was significant to Employer that C.C. drove off without fully paying: "Well sir, . . . it was [important] to us. A City employee doing a shenanigan like that, even though it was, it's not the amount, it's the act, you know." Tr. p. 43. He later stated, "[T]his is such a[n] unbecoming thing of a worker for the City to do, that, that was the main thing right there. . . . [I]t's just

unbecoming of a worker for the . . . City . . . to do such a thing.” *Id.* at 58. Employer has a valid interest in its employees behaving courteously to the public.

C.C. nevertheless contends that the rule is unreasonable because it “includes no hint or suggestion that ‘rudeness’ prohibits the exercise of one’s right to protest a suspected overcharge.” Appellant’s Br. p. 25. However, C.C. was not discharged for telling the cashier that there was no sales tax on the chips. He was discharged because he told the cashier that he would go to his truck for the money and return to pay her but instead drove off with the bag of chips without fully paying the bill. Any interest C.C. had in protesting the suspected overcharge was not stifled by the work rule.

C.C. also argues, “Appellant’s immediate compliance with his employer’s request that he make it right is the only remedy expected which would allow the rule to be considered a reasonable one.” *Id.* at 21. First, even if C.C. eventually paid the six cents, this does not change the fact that he transmitted misinformation and was discourteous and rude during his initial encounter with the cashier. Second, the evidence shows that when C.C. returned to the gas station the next morning, he made the cashier feel threatened. The evidence most favorable to the Review Board’s findings shows that the work rule is reasonable.

Finally, we must determine whether the rule is uniformly enforced. C.C. argues that there is no evidence that Employer enforced the work rule in this manner before this incident. Our review of the record reveals that no evidence was introduced showing that this rule has ever been applied. Nonetheless, our Supreme Court has stated:

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 of 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. This is important to ensure that employees who are denied compensation under this subsection are only those who lost their jobs for reasons within their control.

McClain v. Review Bd. of Ind. Dep’t of Workforce Dev., 693 N.E.2d 1314, 1319 (Ind. 1998) (citation omitted). The handbook provided to C.C. included “[p]roven discourtesy, transmitting misinformation, or rudeness to a citizen” as a minor work rule violation, Employer’s Ex. 3, p. 3, and indicated that a third minor work rule violation within a year could result in demotion, suspension, or dismissal. C.C. was given adequate notice that he could be terminated for proven discourtesy, transmitting misinformation, or rudeness to a citizen if it constituted his third minor work rule violation within one year. Furthermore, C.C.’s actions at the gas station were within his control. When a dispute arose regarding the bill, C.C. could have decided to simply pay the extra six cents under protest or leave the chips at the store. He instead decided to leave with the chips without paying the extra six cents despite telling the cashier that he would do so.

C.C. also highlights his termination letter’s list of four major and fourteen minor work rule violations that he had incurred in six years and argues that this evidence itself shows that Employer did not follow its own system of progressive discipline.⁵ Indeed,

⁵ C.C. suggests that we may not consider any evidence of minor work rule violations incurred over a year before his March 31, 2009 violation because the ALJ sustained his objection to that evidence. However, because he relies on evidence of these very same minor work rule violations on appeal to support his contention that Employer did not follow its own system of progressive discipline, we find his argument waived.

the evidence shows that C.C. has been given written warnings, written documentations in his personnel file, and only one suspension for his past violations and that he has incurred three minor work rule violations within a year without being demoted, suspended, or dismissed. Nonetheless, in the situation here, we find that C.C. was given adequate notice about what punishment he could reasonably anticipate for violation of the work rules. Employer gave him a written warning on July 8, 2008 that he had committed a minor work rule violation by cutting a corner and damaging property. Employer gave him a final warning on March 16, 2009 after he committed a minor work rule violation by pushing a toter into a fence. The final warning noted his July 8, 2008 violation and indicated that another violation could result in time off without pay or termination from his driver's position. These warnings, in combination with the handbook provision indicating that a third violation of a minor work rule could lead to dismissal, gave C.C. more than adequate notice that he could be terminated if he violated another work rule.

We conclude that there is substantial evidence to support the Review Board's findings. These findings in turn provide a reasonable basis for the Review Board's conclusion that C.C. knowingly violated a reasonable and uniformly enforced rule of Employer and was terminated for just cause.

CONCLUSION

For the reasons stated above, we affirm the Review Board's decision.

Affirmed.

VAIDIK, J., and BARNES, J., concur.