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IN THE COURT OF APPEALS OF INDIANA

TOWN,	)	
	)	
Appellant-Defendant,	)	
	)	
vs.	)	No. 93A02-1002-EX-146
	)	
REVIEW BOARD OF THE INDIANA DEPARTMENT OF WORKFORCE DEVELOPMENT and B.K.,	)	
	)	
Appellee-Plaintiff.	)	

APPEAL FROM THE REVIEW BOARD OF THE DEPARTMENT OF WORKFORCE DEVELOPMENT
Steven F. Bier, Chairperson
Cause No. 09-R-5578

November 30, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

FRIEDLANDER, Judge

The Town ("Town") appeals the decision of the Review Board of the Indiana Department of Workforce Development ("Review Board") granting B.K.'s application for unemployment benefits. The Town presents the following restated issue for review: Is the Review Board's finding that B.K. was not dismissed for good cause contrary to the law and the evidence?

We affirm.

The facts found by the Review Board[1] are that the Town hired B.K. as a full-time zoning administrator and building coordinator on February 21, 2007. Under the Town's Employee Policy Manual, each employee is to be evaluated at least once per year. This involves the employee's immediate supervisor providing the employee with a performance evaluation form. Utilizing this form, the supervisor assesses the employee's performance upon multiple criteria grouped in four general areas, with each area divided into between four and thirteen categories. The employee receives a numerical score of between one ("does not meet expectations", *Transcript* at 38) and five ("exceeds expectations", *id*.), inclusive, in each of those categories.

[1] We direct the Town's counsel to Indiana Appellate Rule 49(A) which states that the appellant "shall file its Appendix with its appellant's brief." Yet, the Town failed to file an appendix in this case. We encourage counsel to correct this oversight in future appellate endeavors.

On September 24, 2008,[2] B.K. was presented with an evaluation form for her performance thus far, based upon reviews submitted by Town attorney William Enslen, Town councilman Rob Bult, and B.K.'s office manager, Heidi Kendall. She received a total composite score of 79, which included 17 categories in which she received scores of 2 points, 15 categories with scores of 3 points, and no categories where she received scores of 1, 4, or 5 points. B.K.'s composite score equaled a score of 49%. According to the Town's employee policy manual: "Minimum standard of performance is met if the total percent score is over 30%. [An] employee … must receive an overall composite score of 48. If the overall score is less than 48, the employee has not met the minimum standards of performance." *Id*. at 41. B.K. was informed that her performance was deficient in certain areas and that improvement was required. Following the meeting and on the same date, B.K. sent a memo concerning the review to Enslen, Bult, and Kendall in which she acknowledged that she had been informed "that failure to follow the proposed established guidelines would result in my termination and that this was my 'last chance' at improving my performance." *Appellee's Appendix* at 30.

As a result of the September 24 review, Bult and Kendall prepared a Performance Improvement Plan (the Plan) and presented it to B.K. on November 3, 2008. The Plan addressed five (5) key areas of the Claimant's employment which were deficient. They were

[2] There is evidence in the record that prior to the September 24, 2008 evaluation, B.K. had received two written warnings (on May 29, 2007 and August 10, 2007) and two verbal warnings (on October 12, 2007 and February 8, 2008) concerning her job performance. Although the Town includes these alleged occurrences in its recitation of facts and it does not appear that B.K. disputed then or now the veracity of these allegations, neither the ALJ nor the Review Board mention them in their findings of fact. Therefore, we do not consider them in rendering our decision.

described as follows in a memo to B.K.:

> (a) Understanding and applying Town ordinances;
> (b) Understanding the functions and responsibilities of all aspects of her job duties;
> (c) Written communication skills;
> (d) Completion of repetitive tasks with minimum assistance from peers or supervisors; and
> (e) Meeting report requirements and preparation of accurate reports.

Id. at 33. The memo also contained the following:

> [B.K.] was informed that her performance needs to improve in these key areas in order to continue her employment status with the Town of []. An action plan for improvement (attached) has been prepared and presented to [B.K.].
>
> A follow up review will be conducted by Rob Bult, Bill Enslen, and Heidi Kendall to determine if [B.K.] has made any improvements in her job performance as it relates to the action plan. It is of the understanding [sic] that if [B.K.] does not make the necessary improvements in her job performance in the areas outlined in the action plan by January 31, 2009, her employment with the Town can and will be terminated.

Id.

The follow-up review alluded to in the memo was conducted on February 3, 2009. Kendall and B.K. reviewed each item on the Plan and determined that B.K. had exhibited improvement in some areas but not others. Consequently, Kendall determined that B.K. had failed to make all of the necessary improvements and deemed her performance unsatisfactory. At that point, the Town began searching for someone to replace B.K. From February 3 through May 22, 2009, B.K. did not receive any disciplinary warnings or counseling regarding her work performance. B.K. was discharged on May 22, 2009 for failing to meet the terms of the Plan. It is not clear from the record that the Town informed B.K. that she had failed to meet the terms of the Plan prior to her discharge.

B.K. subsequently filed for unemployment benefits. On May 28, 2009, a deputy determined that B.K. was discharged for just cause. On June 11, 2009, a Determination of Eligibility advised B.K. of the deputy's findings that she was discharged for just cause in that she was willfully negligent or careless in the performance of her work and that the unsatisfactory work performance was a breach of the duty owed to the employer. B.K. appealed and a review hearing was conducted by an ALJ on October 14, 2009. On October 27, 2009, the ALJ issued a written decision affirming the deputy's initial determination that B.K. was discharged for proven just cause. B.K. appealed to the Review Board. On January 13, 2010, the Review Board entered a written decision reversing the determinations made by both the deputy and the ALJ and finding that B.K.'s discharge was not for proven just cause and that she was eligible for unemployment benefits. The Town appeals the Review Board's ruling.

In *Davis v. Review Bd. of Indiana Dept. of Workforce Dev.*, 900 N.E.2d 488, 492 (Ind. Ct. App. 2009), we set forth the appropriate standard when reviewing decisions of the Review Board, as follows:

> "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*."

(quoting *Best Chairs v. Review Bd. of Ind. Dep't of Workforce Dev.*, 895 N.E.2d 727, 730 (Ind. Ct. App. 2008)). We will not reverse the Review Board's decision unless reasonable people would be bound to reach a different conclusion. *Davis v. Review Bd. of Indiana Dept. of Workforce Dev.*, 900 N.E.2d 488.

The Town contends the Review Board erred in concluding that B.K. was not discharged for proven just cause. The Review Board set out the applicable conclusions of law as follows:

> The employer failed to carry its burden of proof. The Employer was aware of the Claimant's failure to meet the requirements of the Performance Improvement Plan as of February 3, 2009. Although the Employer had informed the Claimant that failure to complete the plan's requirements by January 31, 2009 would result in termination, the Employer waited until it found a replacement to terminate her employment. The Employer did not find a replacement until May. Consequently, the Claimant's employment was terminated more than three (3) months after it was determined that her performance failed to the [sic] meet the Employer's standards. By delaying the Claimant's discharge, the Employer, in a sense, acquiesced to her poor work performance. Thus, the Claimant was discharged at the Employer's convenience and not as a direct result of her performance.
>
> Furthermore, it is unclear from the record that the Claimant was informed she had failed to meet the terms of the Performance Improvement Plan. The Claimant also did not receive any reprimands or warnings after the follow up meeting in February. The Claimant would not have had reason to believe that the Employer was unsatisfied with her performance or that her performance needed further improvement. By delaying the Claimant's discharge, the

> Employer implied that the Claimant's performance was acceptable and that she had meet the terms of the plan. Although the Claimant's performance did not meet the Employer's expectations, the Employer would not have retained her for three months after it decreed to replace her if her performance was "careless or negligent to have such a degree or recurrence as to manifest equal culpability, wrongful intent, or evil design, or to show an intentional or substantial disregard of the employer's interest, or of the employee's duties or obligation to his employer." *Id*. The Employer decided it could find a better employee than the Claimant, but it demonstrated no urgency in replacing her. The Employer discharged the Claimant but not for proven just cause.

Appellee's Appendix at 2-3.

A claimant is ineligible for unemployment benefits if she is discharged for just cause. Ind. Code Ann. § 22-4-15-1(a) (West, Westlaw through 2010 2nd Regular Sess.). The employer bears the initial burden of establishing that an employee has been terminated for just cause. *Owen County ex rel. Owen County Bd. of Comm'rs v. Indiana Dept. of Workforce Development*, 861 N.E.2d 1282 (Ind. Ct. App. 2007). To establish a prima facie case for just discharge under I.C. § 22-4-15-1(d)(9), the employer must show that the claimant breached a "duty in connection with work which is reasonably owed an employer by an employee."

It is well established that an employee owes certain reasonably understood duties to her employer. *See McHugh v. Review Bd. of Indiana Dep't of Workforce Dev.*, 842 N.E.2d 436 (Ind. Ct. App. 2006); *see also* I.C. § 22-4-15-1(d)(9). "The nature of an understood duty owed to the employer must be such that a reasonable employee of that employer would understand that the conduct in question was a violation of a duty owed to the employer and that she would be subject to discharge for engaging in such activity or behavior." *McHugh v. Review Bd. of Indiana Dep't of Workforce Dev.*, 842 N.E.2d at 441.

This court has acknowledged that "the 'breach of duty' ground for just discharge is an

amorphous one, without clearly ascertainable limits or definition, and with few rules governing its utilization." *Hehr v. Review Bd. of The Indiana Employment Sec. Div.*, 534 N.E.2d 1122, 1126 (Ind. Ct. App. 1989). In determining whether an employer may justifiably cite this provision as a basis for justifying discharge, the Review Board should consider whether the conduct that is claimed to breach a duty reasonably owed to the employer is such that a reasonable employee under the circumstances would understand that said conduct was a violation of a duty owed the employer and would subject the employee to discharge for engaging in it. *Hehr v. Review Bd. of The Indiana Employment Sec. Div.*, 534 N.E.2d 1122. In *Wakshlag v. Review Board* 413 N.E.2d 1078, 1082 (Ind. Ct. App. 1980), this court described the kind of conduct that constitutes just cause for a discharge under this provision:

> It is conduct evidencing such willful or wanton disregard of the employer's interest as is found in deliberate violations or disregard of standards of behavior which the employer has a right to expect of his employee, or a carelessness or negligence of such a degree or recurrence as to manifest equal culpability, wrongful intent, or evil design or to show an intentional or substantial disregard of the employer's interest, or of the employee's duties or obligation to his employer.

Did the Town carry its burden of proving that B.K.'s conduct rose to this level? We conclude that it did not.

The Town did present evidence tending to show that B.K.'s performance was deficient in some respects and that there had been several attempts at remediating the deficiencies. There was undisputed evidence, however, that on February 3, 2009, Kendall met with B.K. to review the latter's progress with respect to the Plan that had been provided to B.K. three months before. Kendall concluded that B.K. had exhibited improvement in some but not all

areas that had been designated as needing improvement. Significantly, although Kendall testified that she made the decision at that time to replace B.K., such was apparently not communicated to B.K.. Moreover, it is undisputed that B.K. continued to work for the Town for another three and one-half months.[3] Taken together, the facts that B.K. was not informed that her performance warranted discharge and that she continued to work in her position for more than three months constitutes circumstantial evidence that B.K.'s performance did not rise to the level of misconduct constituting just cause for discharge. That is, it did not reflect "willful or wanton disregard" of the Town's interest evincing "deliberate violations or disregard of standards of behavior" that the Town had a right to expect of her, or "a carelessness or negligence of such a degree or recurrence as to manifest equal culpability, wrongful intent, or evil design or to show an intentional or substantial disregard of the employer's interest", as is required to establish discharge for just cause within the meaning of I.C. § 22-4-15-1. *Wakshlag v. Review Board* 413 N.E.2d at 1082. Thus, we cannot say that reasonable people would be bound to reach a different conclusion than the Review Board

[3] We note here the Review Board's conclusion that, "[b]y delaying the Claimant's discharge, the Employer, in a sense, acquiesced to her poor work performance." *Appellant's Appendix* at 20. We do not wish to be understood as sanctioning a general rule that if an employer does not *immediately* discharge an under-performing employee, this constitutes acquiescence such that discharge at a later date for said poor performance can never be for "just cause" within the meaning of I.C. § 22-4-15-1. In this case, it appears that after her last review, B.K. was not informed that her attempts to comply with the Plan fell so far short of the mark that she would be dismissed on that basis. It also appears that she was not advised that the Town at that point began actively seeking someone to replace her. This failure to inform B.K., *coupled with* the delay of several months to replace her, constitutes circumstantial evidence that B.K.' performance was not sufficiently substandard, as set out above.

reached here. *See Davis v. Review Bd. of Indiana Dept. of Workforce Dev.*, 900 N.E.2d 488.

Judgment affirmed.

BARNES, J., and CRONE, J., concur.