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**IN THE  
COURT OF APPEALS OF INDIANA**

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R.B., )  
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Appellant, )  
 )  
vs. ) No. 93A02-1004-EX-497  
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REVIEW BOARD OF THE INDIANA )  
DEPARTMENT OF WORKFORCE )  
DEVELOPMENT and WORLD MEDIA )  
GROUP, )  
 )  
Appellees. )

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APPEAL FROM THE REVIEW BOARD OF THE DEPARTMENT OF  
WORKFORCE DEVELOPMENT  
The Honorable Steven F. Bier, Chairperson  
Cause No. 10-R-1283

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April 28, 2011

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BROWN, Judge**

R.B., *pro se*, appeals a decision by the Review Board of the Indiana Department of Workforce Development (the “Board”) denying his unemployment benefits. R.B. raises one issue, which we revise and restate as whether the record supports the Board’s decision to deny R.B. full unemployment benefits. We affirm.

The facts most favorable to the Board’s determination follow. In July 2009, R.B. became employed full-time with World Media Group (“Employer”) and was eventually a packaging supervisor. Employer manufactured and distributed CDs and DVDs. At some point during his shift on October 15, 2009, R.B. yelled “hey asshole!” to another employee, who reported to R.B., across the plant floor and in front of twenty to thirty employees.<sup>1</sup>

One of R.B.’s coworkers, who at the time was the warehouse manager, heard R.B.’s comments and sent an email to the vice president of operations and Employer’s director of human resources which stated:

Something just happened that really bothered me; I’m currently sitting at my desk (stating that so you know I’m in a closed space). When out on the floor I hear [R.B.] yell “hey asshole” across the plant to [another employee] as he was walking toward shipping. Everyone on the floor stops to stare at [the other employee], whose face at this point is bright red. That’s not cool, I know we all joke and say stuff but to yell that across the plant is totally out of line.

Exhibits at 19. As a result of R.B.’s statement, Employer terminated R.B.’s employment on October 16, 2009.

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<sup>1</sup> The human resources director for Employer indicated that R.B. stated “where have you been f--- asshole.” Transcript at 11. R.B. testified that he did not say “f-in asshole” but that he “probably said asshole.” *Id.* at 15.

R.B. filed a claim for unemployment benefits, and on November 3, 2009 a deputy for the Indiana Department of Workforce Development issued a Determination of Eligibility which found that R.B. was discharged due to a violation of Employer's policy, that the policy was known, reasonable, and uniformly enforced, and that R.B. was discharged for just cause and thus was ineligible for benefits in accordance with Ind. Code § 22-4-15-1(d). On November 9, 2009, R.B. filed an appeal from the deputy's determination and stated that he "completely DISAGREE[D] that the policy was uniformly enforced" and that "just the opposite" was true. Appellee's Appendix at 5. R.B. also stated: "I truly think there was absolutely ZERO intention on the part of [Employer] to employ[] me long term or for that matter beyond 90 days. I was a way to instill fear of [losing] their jobs with other employees or managers."<sup>2</sup> Id.

On February 16, 2010, a telephonic hearing was held on R.B.'s appeal before an administrative law judge (the "ALJ"), at which evidence was admitted including portions of Employer's employee handbook, an acknowledgement of R.B. that he received an employee handbook, and the testimony of B.R. and Dawn Bianchi, Director of Human Resources for Employer. Bianchi was asked whether "all employees [are] terminated if they make a comment as [R.B.] made such as hey where have you been f----- asshole?"

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<sup>2</sup> In his appeal, R.B. described the culture and management style at Employer's workplace. R.B. stated that he was initially hired as an efficiency expert, that management "made it real clear that a little fear was a good thing," that he "observed shouting matches that were [filled] with excessive profanity screamed both [on] the floor and in the office area," and that he witnessed first-hand the vice president of operations throw a "temper tantrum" and "kicking boxes and product," and that he "saw and heard outbursts several times a week." Appellee's Appendix at 2-3. R.B. also stated: "I have never worked anywhere quite like what I observed at [Employer]. People were a liability in their eyes and had to be watched consistently because most would do the opposite of the right thing given half a chance." Id. at 3.

Are all employees terminated if they make that, those comments?” Transcript at 9. She replied: “if we had somebody who made a comment like that from across the warehouse and in front of a warehouse full of employees, a supervisor to an employee, absolutely. They would be terminated. . . . [T]hat’s unacceptable.” Id. Bianchi was also asked if there are exceptions where an employee would only get a warning rather than be terminated, and Bianchi testified that “it depends on the infraction and what it was,” that Employer “had somebody who threatened to pull out a gun and shoot us” who “was also immediately terminated under this policy,” that “[i]f somebody says a cuss word, are they going to be terminated, no probably not, but it depends of course what the cuss word is, who they are saying it to, where they’re saying it,” and that “I think every incident is different, but how this incident played out, where it was, how it was done, by a supervisor to an employee, yes it was a similar situation, yes that supervisor would absolutely be terminated.” Id. at 10. Bianchi further testified that the other employee was coming back from lunch when R.B. made the comment “hey asshole” to the employee from “across the plant,” that R.B. was a supervisor talking to an employee, that the employee was “also in somewhat of a supervisory [role] being a lead,” that R.B. talked to that employee in a “derogatory way in front of . . . twenty to thirty other people in the plant,” and that R.B. was “loud enough that [the warehouse manager] sitting in that warehouse office . . . could hear him . . .” Id. at 10-11. R.B. testified that he “shouldn’t have got upset.” Id. at 13. R.B. also testified that, contrary to the written reprimand he received, he “didn’t yell from across the plant.” Id. at 15.

On February 24, 2010, the ALJ issued a decision which reversed the deputy's determination and found that Employer "failed to provide sufficient evidence to show that their rules are enforced the same for all employees" and that Employer "failed to meet its burden of proof to show that the claimant knowingly violated a reasonable and uniformly enforced rule and that the claimant was discharged, but not for just cause as defined by Ind. Code § 22-4-15-1." Appellant's Appendix at 9. Employer appealed the decision of the ALJ.

On April 22, 2010, the Board reversed the decision of the ALJ.<sup>3</sup> In its decision, the Board made the following conclusions of law:

The burden was on the Employer to prove that it had just cause to discharge [R.B.]. Barnett v. Review Bd., 419 N.E.2d 249 (Ind. Ct. App. 1981). "Discharge for just cause" includes a "knowing violation of a reasonable and uniformly enforced rule of an employer. . . ." Ind. Code § 22-4-151(d)(2). To find that a discharge was for just cause, the [Board] must first find that: (1) there was a rule; (2) the rule was reasonable; (3) the rule was uniformly enforced; (4) the claimant knew of the rule; and (5) the claimant knowingly violated the rule. Barnett, 419 N.E.2d at 251.

The Employer's policy regarding insubordination, as it applies to [R.B.], is a guideline and not a rule. The Employer's policy regarding the use of threatening, abusive, or vulgar language is a rule. The Employer's rule is reasonable because it ensures that employees are not subjected to threatening, abusive, or vulgar language and that they are treated with dignity and respect. [R.B.] was aware of the Employer's policy on the use of threatening, abusive, or vulgar language. [R.B.] violated the Employer's

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<sup>3</sup> The Board stated that its "review in this matter included listening to the recording of the testimony and examining all documents in the record." Appellant's Appendix at 10. The Board also noted that "[b]ecause the hearing was conducted by telephone, any explicit or implicit credibility determinations made by the [ALJ] were *not* based on her observations of the witness's demeanor," that "[b]ecause the [ ] Board listened to the hearing recording, the [ ] Board is in the same position as the [ALJ] to make determinations of credibility regarding the witness's testimony," and that "[t]hus, the [ ] Board is free to reject the [ALJ's] findings of credibility and to make its own determinations as to the credibility of the witness at the hearing." Id. at 10 n.1.

policy by loudly yelling profane language across the plant floor while addressing a subordinate in front of several other employees, thereby, causing a disruption in the work environment. The only issue to be determined is whether the Employer's rule is uniformly enforced.

In Yoldash v. Review Board, an employee was discharged for insubordination when he became enraged and called his manager and another employee names in response to being punished for a rule violation. 438 N.E.2d 310, 314 (Ind. Ct. App. 1982). The employee argued his outburst was excusable because it was an isolated incident, and he felt he was being treated unjustly. The court held that the employer discharged the employee for just cause. While it was determined the words he used were not necessarily obscene or profane, they were found to be, "offensive and abusive and to be in violation of 'standards of behavior which the employer had a right to expect of his employee[.]'" Id. (citing Wakshlag v. Review Board, 413 N.E.2d 1078 (Ind. Ct. App. 1980)).

Under Yoldash, there are many factors to consider regarding the use of offensive language: "the quantity of vulgar or profane language, i.e., whether [there were] multiple incidents, [a] lengthy barrage, or a single, brief incident; the degree of severity of the words used; use of the language in the presence of other employees; [and] whether [the] language was directed to a supervisor or to other persons." Id. None of these considerations, however, are conclusive or determinative. Each case should be analyzed on a case-by-case basis depending on the specific nature of the facts presented. Id.

Although the employee in Yoldash was discharged for breach of duty rather than a rule violation, his conduct was similar in that the final incident leading to discharge involved the use of offensive language. The court held in that case that discharge for the use of offensive language could be appropriate depending on the severity of the situation. Here, the Employer uses a similar standard in determining whether an employee's violation of the policy regarding the use of threatening, abusive, or vulgar language warrants discharge. While application of this standard means that not all employees will be disciplined in the same manner, it does not change the ultimate result that all employees will be subjected to some level of disciplinary action. Thus, the Employer's policy is uniformly enforced.

In [R.B.'s] case, he loudly yelled profane language across the plant floor to address a subordinate employee in front of several other employees. [R.B.'s] use of profane language caused a disruption in the work

environment in that several employees stopped working to stare at the subordinate he addressed. [R.B.] yelled loudly enough that he was heard not only by the other employees on the plant floor but by another employee who was sitting in an office with the door closed. Due to the severity of [R.B.'s] conduct, the circumstances in which it occurred, and that his conduct failed to comply with insubordination guidelines as applied to supervisors, the Employer determined the appropriate level of disciplinary action under its policy was discharge. The Employer discharged the Claimant for just cause.

. . . . The decision of [the ALJ] is reversed. [R.B.] is not entitled to unemployment benefits.

Id. at 10-11; Appellee's Appendix at 34-35.

The issue is whether the record supports the Board's decision to deny R.B. full unemployment benefits. The Indiana Unemployment Compensation Act provides that "[a]ny decision of the review board shall be conclusive and binding as to all questions of fact." Ind. Code § 22-4-17-12(a). However, Ind. Code § 22-4-17-12(f) provides that when the Board's decision is challenged as contrary to law, the reviewing court is limited to a two part inquiry into: (1) "the sufficiency of the facts found to sustain the decision;" and (2) "the sufficiency of the evidence to sustain the findings of facts." McClain v. Review Bd. of Ind. Dep't of Workforce Dev., 693 N.E.2d 1314, 1317 (Ind. 1998), reh'g denied. The Indiana Supreme Court clarified our standard of review of the Board's decisions in McClain:

Review of the Board's findings of basic fact [is] subject to a "substantial evidence" standard of review. In this analysis the appellate court neither reweighs the evidence nor assesses the credibility of witnesses and considers only the evidence most favorable to the Board's findings.

The Board's conclusions as to ultimate facts involve an inference or deduction based on the findings of basic fact. These questions of ultimate

fact are sometimes described as “questions of law.” They are, however, more appropriately characterized as mixed questions of law and fact. As such, they are typically reviewed to ensure that the Board’s inference is “reasonable” or “reasonable in light of [the Board’s] findings.” The term “reasonableness” is conveniently imprecise. Some questions of ultimate fact are within the special competence of the Board. If so, it is appropriate for a court to exercise greater deference to the “reasonableness” of the Board’s conclusion. . . . However, not all ultimate facts are within the Board’s area of expertise. As to these, the reviewing court is more likely to exercise its own judgment. In either case the court examines the logic of the inference drawn and imposes any rules of law that may drive the result. That inference still requires reversal if the underlying facts are not supported by substantial evidence or the logic of the inference is faulty, even where the agency acts within its expertise, or if the agency proceeds under an incorrect view of the law.

Id. at 1317-1318 (citations and footnotes omitted).

In Indiana, an employee is ineligible for unemployment benefits if he or she is discharged for just cause. Nersessian v. Review Bd. of Ind. Dep’t of Workforce Dev., 798 N.E.2d 480, 482 (Ind. Ct. App. 2003); Ind. Code § 22-4-15-1.<sup>4</sup> Ind. Code § 22-4-15-1(d) provides that “[d]ischarge for just cause” is defined to include a “knowing violation of a reasonable and uniformly enforced rule of an employer . . . .” The burden was upon Employer to establish a *prima facie* case showing just cause, after which, the burden shifted to R.B. to produce rebuttal evidence. Nersessian, 798 N.E.2d at 482. On appeal

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<sup>4</sup> Ind. Code § 22-4-15-1(a) provides in part:

[A]n individual who has voluntarily left the individual’s most recent employment without good cause in connection with the work *or who was discharged from the individual’s most recent employment for just cause* is ineligible for waiting period or benefit rights for the week in which the disqualifying separation occurred and until the individual has earned remuneration in employment equal to or exceeding the weekly benefit amount of the individual’s claim in each of eight (8) weeks.

(Emphasis added).

from a denial of benefits, the claimant bears the burden of showing error. McCurdy v. Department of Employment and Training Services, 538 N.E.2d 277, 279 (Ind. Ct. App. 1989).

R.B. argues that “[i]n the case of [Employer] the rule was not uniform [sic] enforced in fact it was uniformly ignored” and that “[t]he company representative could not provide one incident where an employee used profanity and received any form of disciplinary action let alone an action as severe as termination.” Appellant’s Brief at 6. Without citation to the record, R.B. further argues that the Board “took the description of the incident from the Employee Reprimand Notice document provided by [Employer] and not from the sworn testimony provided to [the ALJ]” and that “[t]here were less than [sic] half the number of employees stated in the employers [sic] description of the alleged incident and only 3 or 4 could have potentially heard the exchange.” Id. R.B. also argues, without citation to the record, that there “was no disruption to the entire production area,” there “was no violent outburst,” and there “was a clear admission by [Employer’s] representative . . . that there had never been any personnel action taken against any employee for the use of profanity.” Id.

The Board argues that R.B. knew Employer’s “rule regarding the use of threatening, abusive, or vulgar language” and that R.B. “does not argue that he lacked knowledge of [Employer’s] prohibition against the use of vulgar and obscene language.” Appellee’s Brief at 6-7. The Board further argues that R.B. knowingly violated Employer’s rules prohibiting abusive or vulgar language. The Board also argues that

Employer's policy was reasonable and uniformly enforced. Specifically, the Board argues that "[t]he record does not reflect that R.B. was the first employee terminated for violation of [Employer's] policy regarding abusive and vulgar language" and, citing to McClain, 693 N.E.2d at 1319, argues that "[e]ven were that the case, [Employer] was not required to show the rule had previously been enforced." Appellee's Brief at 9. The Board argues that R.B. "was terminated not just because he used vulgar and abusive language, but because he was a supervisor who directed his verbal abuse toward a subordinate, and did so in an open warehouse where many other employees saw and heard the incident." Id.

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. Wasyk v. Review Bd. of Ind. Emp't 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 Ind. Dep't of Workforce Dev., 905 N.E. 2d 1015, 1019-1020 (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. 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't 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, R.B. knew Employer's rule related to the use of threatening, abusive, or vulgar language. During the February 22, 2010 hearing before the ALJ, Employer submitted an exhibit containing portions of its employee handbook explaining Employer's policy regarding use of such language. A section titled "Threatening, Abusive, or Vulgar Language" in the handbook states:

We expect our employees to treat everyone they meet through their jobs with courtesy and respect. Threatening, abusive, and vulgar language has no place in our workplace. It destroys morale and relationships, and it impedes the effective and efficient operation of our business.

As a result, we will not tolerate threatening, abusive, or vulgar language from employees while they are on the worksite, conducting [Employer] business, or attending [Employer]-related business or social functions.

If you have any questions about this policy, contact the Human Resources Department.

Employees who violate this policy will face disciplinary action, up to and including termination.

Exhibits at 22. Employer also submitted an exhibit containing R.B.'s signed acknowledgement which indicated he had received a copy of the employee handbook.

Bianchi testified at the hearing that an employee had been previously terminated under the policy for threatening to pull a gun. Even if R.B. was the first employee to be terminated under the policy or the first employee terminated for using abusive language, we note that the Indiana Supreme Court has previously 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.

McClain, 693 N.E.2d at 1319. The purposes underlying uniform enforcement were met if, as the Board found, R.B. knew of the violation, knew or can be fairly charged with knowledge that it could result in termination, and there was no arbitrary enforcement. These factual determinations are supported by substantial evidence presented at the hearing. See McClain, 693 N.E.2d at 1319-1320 (noting that the purposes were met as McClain knew of the violation, knew or could be fairly charged with knowledge that it could result in termination, and there was no arbitrary enforcement, and holding that those factual determinations were supported by substantial evidence). We conclude that the Board properly found that R.B. was not eligible to receive full unemployment benefits.

For the foregoing reasons, we affirm the determination of the Board.

Affirmed.

FRIEDLANDER, J., and BAILEY, J., concur.