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**IN THE
COURT OF APPEALS OF INDIANA**



J.M.,)
)
Appellant-Petitioner,)
)
vs.)
)
REVIEW BOARD OF THE INDIANA)
DEPARTMENT OF WORKFORCE)
DEVELOPMENT and T.C.,)
)
Appellees-Respondents.)

No. 93A02-1102-EX-146

APPEAL FROM THE REVIEW BOARD
OF THE DEPARTMENT OF WORKFORCE DEVELOPMENT
Case No. 10-R-06947

September 19, 2011

MEMORANDUM DECISION - NOT FOR PUBLICATION

CRONE, Judge

Case Summary

An employee, J.M., was fired because he worked forty-five minutes outside normal business hours. J.M. filed a claim for unemployment benefits, which was initially denied by a Department of Workforce Development unemployment claims deputy. J.M. appealed the denial of benefits to an administrative law judge (“ALJ”). The ALJ held a hearing, found that he was eligible for benefits because his employer was not justified in firing him, and reversed the claims deputy’s denial of benefits. J.M.’s former employer appealed the ALJ’s determination to the Review Board of the Department of Workforce Development (“the Review Board”). The Review Board reversed the ALJ’s grant of benefits because it concluded that the employer was justified in firing the employee. J.M. now appeals, claiming that the Review Board erred in determining that he was ineligible for unemployment benefits. Finding that the Review Board’s decision is contrary to law, we reverse.

Facts and Procedural History

J.M. worked in a county surveyor’s office (“T.C.”) as a survey field technician from July 6, 2009, until September 1, 2010. Normal work hours were from 8:00 a.m. to 4:30 p.m., with a floating one-hour unpaid lunch. In May 2010, J.M. informed the project manager,

who was his immediate supervisor, by email that he had signed up for a class on motors for the fall semester that met from 7:30 a.m. to 9:30 a.m. on Mondays and Wednesdays. Appellant's App. at 11 (Employer's Ex. 1). In his email, J.M. stated that he would be at work by 10:00 a.m. on Mondays and Wednesdays and could "make up the 4 hours a week by only taking 1/2 hour lunches and coming in 1/2 hour early on T, R, [and] F." *Id.* A few days later, the project manager responded by email as follows:

This issue has come up in the past and [the county surveyor] has always been in favor of someone continuing their [sic] education and bettering one's self. His policy has been that the employee may take the time necessary to attend class but it would be without pay or the employee would use his or hers [sic] vacation time to make up the hours.

For numerous reasons one being supervision and the second being tracking [the county surveyor] was not in favor of allowing employees to make up time.

I understand if this isn't the answer you were hoping or looking for but that has been [the county surveyor's] policy on this issue.

Id.

On August 23 and 25, 2010, J.M. attended the class. Of the four hours of work he missed, J.M. reported two-and-a-quarter hours of vacation time, took his lunch hour early on one of the days, and came in fifteen minutes early three days. On September 1, 2010, T.C. discharged J.M. when it became aware that J.M. had worked forty-five minutes outside normal business hours rather than using vacation time or unpaid leave in contravention of the surveyor's office unwritten policy that time cannot be made up by working outside normal business hours. Tr. at 9.

J.M. then filed a claim for unemployment benefits. On September 24, 2010, a Department of Workforce Development claims deputy found that T.C. was justified in firing J.M. and therefore J.M. was not eligible for unemployment benefits. On October 1, 2010, J.M. filed an appeal with the ALJ. Following a hearing, on November 16, 2010, the ALJ issued findings of fact and conclusions of law, reversing the claims deputy's determination of ineligibility.

On December 7, 2010, T.C. appealed the ALJ's determination to the Review Board. On January 21, 2011, the Review Board reversed the ALJ's determination of eligibility in an order that states in relevant part,¹

FINDINGS OF FACT:

.... [J.M.] was discharged for violating the *Employer's rule regarding obeying instructions*.

The Employer maintains an Employee handbook. The Employee handbook contains Section 6.11.2, Work Rule[s] Violations, which enumerates certain behaviors that are prohibited by the Employer. Each department within the county "has sole discretion to give a verbal reprimand, a written reprimand, a suspension of pay or termination upon violation" of any of the listed work rules. One such behavior that can warrant discipline is found in *Rule 33: "Disobeying a reasonable order of supervisor to perform assigned work or to comply with written or verbal instructions."* The Project Manager testified that the Employer uniformly enforces its rules. [J.M.] disagreed, but he was unable to provide any evidence of non-uniform enforcement. The Review Board finds that the surveyor's office uniformly enforces the Employer's Work Rules.

....

¹ The Review Board specifically incorporated and adopted the ALJ's findings of fact and conclusions of law except to the extent inconsistent with its decision.

The Project Manager responded by e-mail a few days later and informed [J.M.] that although he was approved to miss work to attend the class, the current surveyor's policy was to not allow employees to try to "make up" hours they missed.

.... The Employer discharged [J.M.] on September 1, 2010 when it became aware that he had "made up" time in violation of the Project Manager's instructions.

....

CONCLUSIONS OF LAW: The burden was on the Employer to prove that it had just cause to discharge [J.M.]. "Discharge for just cause" includes a "knowing violation of a reasonable and uniformly enforced rule of an employer." Ind. Code § 22-4-15-1(d)(2). To find that a discharge was for just cause, the Review 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.

The Employer's policy is a rule, because it is capable of uniform enforcement. *The Employer's rule is reasonable because it is in place to prevent unsupervised work and untrackable work hours.* The rule is uniformly enforced. [J.M.] was aware of the Employer's rule. *[J.M.'s] action violated the rule, because he came in early on three days to make up time he missed for his class.* The only issue is whether [J.M.] knowingly violated the rule.

[J.M.] knowingly violated the rule, *because he had been informed by the Project Manager that he could not make up time.* [J.M.] had been told that he would need to use vacation time, personal time, or unpaid time to cover the time he missed for class. [J.M.] obviously knew that he was required to report his time rather than make up the time, because he admittedly used vacation time or comp time for a portion of the time missed for the first week of classes. [J.M.] also did not try to make up all of the time, as he had originally suggested in his email. He further acknowledged that he did not use all of his personal/vacation time the first week, because he thought he would need to save it to use later in the semester. *[J.M.] knowingly violated a reasonable and uniformly enforced rule of the Employer.*

Id. at 3-4 (citations omitted) (emphases added).

J.M. appeals. Additional facts will be provided as necessary.

Discussion and Decision

J.M. contends that the Review Board's determination that he is ineligible for unemployment benefits is contrary to law. The Indiana Unemployment Compensation Act ("UCA") 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). When the Review Board's decision is challenged as being contrary to law, our review 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) (quoting Ind. Code § 22-4-17-12(f)). Applying this standard, we review "(1) determinations of specific or 'basic' underlying facts, (2) conclusions or inferences from those facts, sometimes called 'ultimate facts,' and (3) conclusions of law." *Id.* The Review Board's findings of basic fact are subject to a "substantial evidence" standard of review. *Id.* In conducting our analysis, we neither reweigh evidence nor judge witness credibility; rather, we consider only the evidence most favorable to the Review Board's findings. *Id.* The Review Board's conclusions regarding ultimate facts involve an inference or deduction based on the findings of basic fact, and we typically review them to ensure that the Review Board's inference is "reasonable" or "reasonable in light of its findings." *Id.* at 1318 (citation and quotation marks omitted). We review the Review Board's conclusions of law using a de novo standard. *Ind. State Univ. v. LaFief*, 888 N.E.2d 184, 186 (Ind. 2008).

The UCA provides unemployment benefits to individuals who are “unemployed through no fault of their own.” Ind. Code § 22-4-1-1. Under the UCA, an individual is disqualified for unemployment benefits if he is discharged for “just cause.” Ind. Code § 22-4-15-1(a). The employer bears the burden to prove that it discharged the employee for just cause. *Hehr v. Review Bd. of the Ind. Emp’t Sec. Div.*, 534 N.E.2d 1122, 1124 (Ind. Ct. App. 1989). “Discharge for just cause” includes but is not limited to:

- (1) separation initiated by an employer for falsification of an employment application to obtain employment through subterfuge;
- (2) knowing violation of a reasonable and uniformly enforced rule of an employer, including a rule regarding attendance;
- (3) if an employer does not have a rule regarding attendance, an individual’s unsatisfactory attendance, if the individual cannot show good cause for absences or tardiness;
- (4) damaging the employer’s property through willful negligence;
- (5) refusing to obey instructions;
- (6) reporting to work under the influence of alcohol or drugs or consuming alcohol or drugs on employer’s premises during working hours;
- (7) conduct endangering safety of self or coworkers;
- (8) incarceration in jail following conviction of a misdemeanor or felony by a court of competent jurisdiction; or
- (9) any breach of duty in connection with work which is reasonably owed an employer by an employee.

Ind. Code § 22-4-15-1(d). The Review Board found that T.C. discharged J.M. for just cause based on Indiana Code Section 22-4-15-1(d)(2) (“Section (d)(2)”). To establish a prima facie case of a rule violation pursuant to Section (d)(2), the employer must show that the employee (1) knowingly violated (2) a reasonable and (3) uniformly enforced rule. *Stanrail Corp. v. Review Bd. of the Dep’t of Workforce Dev.*, 735 N.E.2d 1197, 1203 (Ind. Ct. App. 2000), *trans. denied* (2001).

Here, the parties disagree about which “rule” J.M. violated. In its findings of fact, the Review Board discussed Rule 33 of the “Work Rules Violations” section of the “[T.C.] Employee Handbook”,² which provides, “Disobeying a reasonable order of supervisor to perform assigned work or to comply with written or verbal instructions.” Appellant’s App. at 3. The Review Board also stated that J.M. was discharged for violating the rule “regarding obeying instructions.” *Id.* However, the “rule” discussed in the findings of fact is not the same “rule” that is discussed in the conclusions of law. The Review Board concluded that “the rule is reasonable because it is in place to prevent unsupervised work and untrackable work hours,” and J.M.’s “action violated the rule, because he came in early on three days to make up time he missed for class.” *Id.* These statements clearly show that the “rule” discussed in the conclusions of law is not Rule 33, but rather the surveyor’s office unwritten policy banning employees from making up time outside normal work hours.

J.M. contends that he was fired for violating the surveyor’s office policy regarding making up work outside normal business hours, not for violating Rule 33, and emphasizes that the Review Board failed to mention Rule 33 in its conclusions of law. The Review Board contends that

J.M.’s argument appears to be based on the faulty premise that the Employer’s testimony that J.M. was fired for working outside normal business hours and the Review Board’s finding that he was terminated for violating the employer’s rule regarding obeying instructions are two separate reasons for termination. Working outside business hours was in direct violation of J.M.’s supervisor’s instructions that he was not allowed to do so, and thus, the two are not different bases for termination.

² To be clear, Rule 33 is found in the T.C. Employee Handbook and therefore applies to all county employees, not just to surveyor’s office employees. Employer’s Exs. 3 and 4.

Review Board's Br. at 7.

For purposes of determining whether J.M. was discharged for just cause under Indiana Code Section 22-4-15-1(d), we cannot accept the Review Board's assertion that a violation of the surveyor's office unwritten policy regarding making up work is the same as a violation of Rule 33 in the T.C. Employee Handbook. The Review Board's decision itself, by first discussing one rule in its findings and then discussing another in its conclusions, recognizes the existence of two separate rules. The two rules may not be treated interchangeably unless both rules satisfy the requirements of Section (d)(2). Section (d)(2) requires that the rule be reasonable and uniformly enforced. "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." *Coleman v. Review Bd. of Ind. Dept. of Workforce Dev.*, 905 N.E.2d 1015, 1020 (Ind. Ct. App. 2009). The goals of notice to employees and prevention of arbitrary enforcement will be frustrated if both rules are applied but only one rule meets the criteria of Section (d)(2).

A careful review of the Review Board's conclusions of law shows that in concluding that J.M. knowingly violated a reasonable and uniformly enforced "rule," the Review Board applied the elements required to establish a "just cause" discharge pursuant to Section (d)(2) to the surveyor's office unwritten policy that employees cannot make up time outside normal business hours. Yet, the Review Board made no specific findings of fact regarding the surveyor's office unwritten policy. Rather, its findings of fact apply only to the Work Rules

Violations, specifically Rule 33, in the T.C. Employee Handbook. As such, no findings directly support the Review Board's conclusion that the surveyor's office policy is uniformly enforced.

In addition, the Review Board's conclusion that the surveyor's office unwritten policy was uniformly enforced is not a reasonable inference in light of its findings regarding the Work Rules Violations in the T.C. Employee Handbook. The T.C. Work Rules Violations contain a list of sixty behaviors that may result in written or verbal reprimands, suspension of pay, or termination. Appellant's App. at 12-13 (Employer's Ex. 4). In addition to Rule 33 regarding disobeying a reasonable order of a supervisor, the Work Rules Violations also include the following behaviors: late reporting for work without justified explanation, unauthorized absenteeism, failure to notify authorized management before the regular show-up time when unable to report for duty, unauthorized overtime, and excessive absenteeism. However, making up time outside normal business hours is *not* on the list. *Id.* Therefore, we fail to see how findings regarding the uniform enforcement of the T.C. Work Rules Violations are relevant to determining whether the surveyor's office unwritten policy banning employees from making up work outside normal business hours is uniformly enforced.

Moreover, we observe that T.C. bore the burden to establish that it had a rule that was reasonable and uniformly enforced. It failed to meet its burden with regard to either the T.C. Work Rules Violations or the surveyor's office unwritten policy. A uniformly enforced rule is one that is carried out in such a way that all persons under the same conditions and in the same circumstances are treated alike. *Gen. Motors Corp. v. Review Bd. of Ind. Dep't of*

Workforce Dev., 671 N.E.2d 493, 498 (Ind. Ct. App. 1996). “In order to evaluate uniformity one must first define the class of persons against whom uniformity is measured.” *Stanrail*, 735 N.E.2d at 1203.

As to the T.C. Work Rules Violations, the Review Board found that they were uniformly enforced based solely on the project manager’s testimony that they were. In light of the specific terms of the T.C. Work Rules Violations, this cannot be so. The T.C. Work Rules Violations specifically provide that each department “*has sole discretion* to give a verbal reprimand, a written reprimand, a suspension of pay or termination upon violation of any of the work rules listed.” Appellant’s App. at 12 (emphasis added). The discretion granted to each department precludes a conclusion that the T.C. Work Rules Violations were uniformly enforced. *See Stanrail*, 735 N.E.2d at 1206 (concluding that because “human resource manager exercised ‘unbridled discretion’ in determining whether demerit points would be assessed for an employee’s violation of the limit of ‘three-day’ absences under the attendance policy,” the employer’s “attendance policy was not uniformly enforced”). Therefore, we conclude that the Review Board’s finding that the T.C. Work Rules Violations were uniformly enforced is not supported by substantial evidence.

As for the surveyor’s office policy regarding makeup work, “[a]n employer’s asserted work rule must be reduced to writing and introduced into evidence to enable this court to fairly and reasonably review the determination that an employee was discharged for ‘just cause’ for the knowing violation of a rule.” *Id.* at 1205 (citing *KBI, Inc. v. Review Bd. of the Ind. Dep’t of Workforce Dev.*, 656 N.E.2d 842, 844 (Ind. Ct. App. 1995)); *see also Watterson*

v. Review Bd. of Ind. Dep't of Emp't & Training Serv., 568 N.E.2d 1102, 1105 (Ind. Ct. App. 1991) (stating that reducing rule to writing and introducing it into evidence is “the minimum evidence necessary for the employer to satisfy its burden that it has a rule and that that rule is reasonable and uniformly enforced”). Although T.C. submitted a copy of the T.C. Work Rules Violations as well as a copy of the T.C. Employee Handbook “Employee Acknowledgment Form” signed by J.M., the evidence it submitted regarding the surveyor’s office policy was significantly different. Unlike with the T.C. Work Rules Violations, T.C. failed to submit evidence of a written makeup work policy published to its employees. Rather, the surveyor’s office policy was submitted as a printout of an email sent to J.M. Such evidence merely shows that the project manager told J.M. that the county surveyor had had a policy prohibiting employees from making up work outside normal business hours and that the project manager was going to apply that policy to J.M. Such evidence does not establish that the policy was an official part of a county-wide or department-wide policy. It does not enable us to define the class of persons against whom uniformity is measured, and therefore it cannot show that the policy was uniformly applicable to all employees similarly situated. Nor does the email establish that J.M. was aware that a violation of the surveyor’s office policy could subject him to discharge. Accordingly, the Review Board’s conclusion that the surveyor’s office unwritten policy was uniformly enforced is not supported by substantial evidence.

Based on the foregoing, we conclude that the Review Board's determination that J.M. was discharged for just cause and therefore is not entitled to unemployment benefits is contrary to law.³ Accordingly, we reverse.

Reversed.

BAILEY, J., and MATHIAS, J., concur.

³ T.C.'s argument implies that this Court may affirm the Review Board's decision based on any of the reasons enumerated in Indiana Code Section 22-4-15-1(d). See T.C.'s Br. at 6, 7, and 9. T.C. asserts that "there is no requirement that the ALJ or the Review Board explicitly rely on one of the specified subsections used to find that a discharge was for 'just cause.'" *Id.* at 6. Obviously, this Court is neither the ALJ nor the Review Board. T.C. then contends, "In addition to being a violation of a rule of the employer, [J.M.'s] action in attempting to make up work outside of normal hours after receiving instructions to the contrary constitutes insubordination, a refusal to obey instruction, and breach of a duty reasonably [owed] to his employer." *Id.* at 9. T.C. fails to provide any citation to authority that supports the notion that this Court may affirm the Review Board on a basis different from that relied on by the Review Board. Here, the Review Board specifically cited Section (d)(2), and only Section (d)(2), as its basis for concluding that J.M. was discharged for just cause. Our review is limited to the conclusion of law articulated by the Review Board. See *Ryan v. Review Bd. of Ind. Dep't of Emp't & Training Serv.*, 560 N.E.2d 112, 114 (Ind. Ct. App. 1990) ("While the Board's task is to use any applicable definition in the statute to determine whether an employee was discharged for just cause, our review is limited to determining whether the Board made sufficient findings to support the definition it selected to apply."); see also *McHugh v. Review Bd. of Ind. Dep't of Workforce Dev.*, 842 N.E.2d 436, 441 (Ind. Ct. App. 2006) (refusing to address employee's argument regarding just cause based on Section (d)(2) and instead addressing whether she was discharged for just cause under Section (d)(8) because that was section ALJ cited to support conclusions of law); cf. *Hehr*, 534 N.E.2d at 1125 (where Review Board cited alternative bases under Indiana Code Section 22-4-15-1(d) to support its conclusion that employee was discharged for just cause, this Court could affirm Review Board on either basis); but cf. *Butler v. Review Bd. of Ind. Dep't of Emp't & Training Services*, 633 N.E.2d 310, 312 (Ind. Ct. App. 1994) (Review Board cannot uphold employee's discharge on grounds other than those relied upon by employer).