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APPELLANT PRO SE:

ATTORNEYS FOR APPELLEE:

BRADY G. MCCORD, SR.
Fort Wayne, Indiana

GREGORY F. ZOELLER
Attorney General of Indiana

ELIZABETH ROGERS
Deputy Attorney General
Indianapolis, Indiana

**IN THE
COURT OF APPEALS OF INDIANA**

BRADY MCCORD,)
)
Appellant-Petitioner,)
)
vs.)
)
REVIEW BOARD OF THE)
INDIANA DEPARTMENT OF)
WORKFORCE DEVELOPMENT)
and MARIANE, INC.,)
)
Appellee-Respondent.)

No. 93A02-0901-EX-65

APPEAL FROM THE REVIEW BOARD OF THE DEPARTMENT OF WORKFORCE
DEVELOPMENT
Steven F. Bier, Chairperson
Cause No. 08-R-3922

October 20, 2009

MEMORANDUM DECISION - NOT FOR PUBLICATION

BROWN, Judge

Brady McCord appeals a decision by the Review Board of the Indiana Department of Workforce Development (“Board”) denying him unemployment benefits. McCord raises two issues, which we revise and restate as whether the Board’s determination that McCord was terminated for just cause was reasonable. We affirm.

The facts most favorable to the Board’s determination follow. McCord worked as a restaurant manager for Mariane, Inc., managing two fast food restaurants. McCord was discharged on September 4, 2008 “for ‘blatant unprofessional conduct’ . . . and for ‘unsatisfactory performance of assigned job responsibilities and duties’” based upon his performance as a restaurant manager. Appellee’s Appendix B at 16. On September 19, 2008, a deputy with the Indiana Department of Workforce Development determined that McCord had been discharged for just cause and therefore found McCord ineligible to receive unemployment benefits. On November 12, 2008, a hearing was conducted by an Administrative Law Judge (“ALJ”), and both McCord and his former superior, the District Manager, appeared by telephone. The ALJ reversed the deputy’s determination, finding that McCord “was discharged but not for just cause and therefore qualified to receive benefits under the Act.” Exhibits at 40. Mariane appealed, and the matter was reviewed by the Board on December 1, 2008. On December 15, 2008, the Board reversed the ALJ’s determination. In deciding that McCord was discharged for just cause and therefore ineligible for unemployment benefits, the Board entered findings of fact and conclusions thereon as follows:

DECISION: Reversed. [McCord] is not entitled to unemployment benefits.

FINDINGS OF FACT: [McCord] worked for the Employer, a fast food chain, as a Restaurant Store Manager from November 2004 until he was discharged on September 4, 2008. [McCord] was discharged for failing to perform assigned job duties and for unprofessional conduct.

[McCord] was Restaurant Store Manager for two locations: the location at the IPFW and the location at Glenbrook Mall. [McCord's] immediate supervisor was the District Manager who participated in the hearing. It was the Employer's policy for District Managers to evaluate each Restaurant Store every three to four weeks; this evaluation is called a "DM Shop." The District Manager evaluated [McCord's] Glenbrook Mall location July 25, 2008, and the store received a rating of 96%. Employer's Ex. J. After the evaluation, the District Manager and [McCord] discussed ways to improve in certain areas. On August 28, 2008, the District Manager evaluated the Glenbrook Mall location again and left the DM Shop evaluation tacked to the bulletin board. Employer's Ex. H. The overall scores in several categories went down from the previous evaluation, and the store's overall rating dropped to 75%. Employer's Ex. H.

On August 29, 2008, [McCord] returned to the Glenbrook Mall location after assisting the start-up of a new restaurant in another town. While he was away from his stores, other restaurant store managers alluded to problems between [McCord] and the District Manager. [McCord] e-mailed the District Manager on August 29, 2008. [McCord's] subject line was "WTF," which is an abbreviation for "What the fuck?" [McCord] indicated at the hearing that he used the abbreviation, because using "fuck" would not have been professional. The body of the e-mail read as follows:

So what did I do to make you mad??????
Something??????
If you have a problem let me know !!!!!
Don't talk me down behind my back
I thought you were better than that

Employer's Ex. C.

The District Manager telephoned [McCord] to discuss the e-mail, and, during the conversation, [McCord] hung up on the District Manager.

[McCord] sent another e-mail, with the subject line “Fuck Me,” to the District Manager with the following message:

I can't believe you
I try to talk to you and you tell me
“Fuck you then quit on me too”
I understand you can't be friends with me
Anymore but you need to think a little bit more
Before you speak

If you do want me to quit then I will
I've already fought Tammy to keep this job
I'm not doing a part 2

Employer's Ex. D.

The District Manager responded that he had not told [McCord] “fuck you” and that he had instructed him to do the standards at the restaurants. He acknowledged that he had told [McCord] that he did not care if [McCord] quit. Employer's Ex. E. [McCord] responded to the District Manager's e-mail that the District Manager had lied, that he did “say what you said” and that [McCord] had done the standards. Employer's Ex. E. After the e-mail exchange, the District Manager attempted to call [McCord] again, but [McCord] hung up on him again.

The District Manager subsequently learned that [McCord] had sent both e-mails to the Home Office Staff and the Above Restaurant Management. In fact, the Owner contacted the District Manager directly to ask what was going on with [McCord]. On September 2, 2008, the District Manager issued an Employee Consultation Memorandum to the Claimant for violating Work Rule #10, “blatant unprofessional conduct,” by sending the e-mails to the other recipients. Employer's Ex. B. [McCord] was instructed to send an apology e-mail to everyone who received the previous e-mails. Employer's Ex. B. He was further informed that “[a]ny further actions of this type will result in immediate termination of employment.” Employer's Ex. B.

In response to the directive in the Memorandum, on September 2, 2008, [McCord] sent the following e-mail with the subject line, “my unprofessional misconduct: I do believe everybody's on here”:

I do apologize for sending out such an E-mail;
I was upset that such a thing could happen and nothing would be
Done about it

But I was wrong
I would get wrote up for it and be forced to send an apology out
.....
So again, I apologize

Employer's Ex. F. Approximately an hour after sending his apology e-mail, [McCord] sent the following e-mail to the District Manager with "My job ?????? ?????? ??????" as the subject line:

So where does this leave my feeling of job security
Yeah that's kinda what I figured

Employer's Ex. G.

On September 4, 2008, the District Manager conducted a DM Shop at [McCord's] other restaurant at IPFW. The evaluation scores were even worse than the Glenbrook Mall store's recent evaluation, and the District Manager noted that several trainings were not being done. Employer's Ex. I. The IPFW's overall evaluation was 64%. Employer's Ex. I. The District Manager terminated [McCord] on September 4, 2008 for "blatant unprofessional conduct" as evidenced by the tone and content of the apology e-mail and for "unsatisfactory performance of assigned job responsibilities and duties" for his failure to properly oversee the daily running of the stores under his management. Employer's Ex. A.

* * * * *

CONCLUSIONS OF LAW: When an employee is discharged from employment in Indiana, the employee will not be disqualified from unemployment benefits unless the discharge was for just cause within the meaning of Indiana Code § 22-4-15-1(d). Indiana Code § 22-4-15-1(d)(8) defines just cause for discharge to include: "(8) . . . any breach of duty in connection with work which is reasonably owed an employer by an employee." In *Hehr v. Review Board*, 534 [N.E.2d] 1122, 1126 (Ind. Ct. App. 1989), the Court recognized that discharge based on "breach of duty" could be abused, so the Court created guidelines for the proper use of

“breach of duty” for just cause discharges. The Court indicated that the Review Board

should consider whether the conduct which is said to have been a breach of a duty reasonably owed to the employer is of such a nature that a reasonable employee of the employer would understand that the conduct in question was a violation of a duty owed the employer and that he would be subject to discharge for engaging in the activity or behavior.

Id. Additionally, in *Wakshlag v. Review Board*, 413 N.E.2d 1078 (Ind. Ct. App. 1980), the Court reviewed the principle that an unemployed person without fault is entitled to unemployment benefits. In that case, the Court stated:

Whether unemployed persons are without fault must be determined upon the facts and circumstances of the individual case. Determination of cause is a question of fact. 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 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.

Id. at 1082. (Internal citations omitted.)

[McCord] owed a duty to the Employer to conduct himself in a professional manner when communicating with his superiors and to perform his work duties to the Employer’s standards. [McCord] willfully and wantonly disregarded his duty to the Employer when he used profanity to the District Manager and when he subjected all of the Home Office Staff and Above Restaurant Management to the same. [McCord] additionally failed to operate his restaurants in a manner to meet the Employer’s standards. After he was warned that any similar unprofessional conduct would result in discharge, he sent a non-apologetic apology to the earlier recipients of the e-mails. He then taunted the District Manager about the status of his job. [McCord’s] conduct was unprofessional. The Employer discharged [McCord] for just cause.

ORDER: The decision of the Administrative Law Judge is reversed. [McCord] is not entitled to unemployment benefits.

Appellee's Appendix B at 15-18 (footnotes omitted).

The issue is whether the Board's determination that McCord was terminated for just cause was reasonable. 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) (2004). 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 (internal citations and footnotes omitted).

In Indiana, an employee is ineligible for unemployment benefits if he is discharged for just cause. Ind. Code § 22-4-15-1(a) (2004). Among the statutory definitions of discharge for just cause is “any breach of duty in connection with work which is reasonably owed an employer by an employee.” Ind. Code § 22-4-15-1(d)(8). The burden was upon Mariane to establish a prima facie case showing that it had just cause to terminate McCord's employment, after which the burden shifted to McCord to produce rebuttal evidence. See Stanrail Corp. v. Review Bd. of Dep't of Workforce Dev., 735 N.E.2d 1197, 1203 (Ind. Ct. App. 2000), trans. denied.

We first examine whether McCord's termination for “blatant unprofessional conduct,” stemming from the emails between McCord and the District Manager which McCord forwarded to the “Home Office Staff and the Above Restaurant Management” (“Superiors”), was for just cause. Appellee's Appendix B at 17. McCord appears to argue that a reasonable employee would not have understood that the “conduct in question was a violation of a duty owed to the employer and that he would be subject to discharge for engaging in the activity or behavior.” Appellant's Brief at 6. McCord also argues that he “could not have known that discharge was imminent fro [sic] his conduct

because the apology email was not blatantly unprofessional as was the original email to him.” Id. (internal citations omitted).

Essentially, McCord requests that we reweigh the evidence and judge the credibility of the witnesses, which we cannot do. McClain, 693 N.E.2d at 1317. The Board found that McCord “used profanity to the District Manager and . . . subjected all of the [Superiors] to the same. . . . [H]e sent a non-apologetic apology to the earlier recipients of the e-mails. He then taunted the District Manager about the status of his job.” Appellee’s Appendix at 18. Given these findings of fact, we cannot say that the Board’s determination that McCord was terminated for just cause was unreasonable. See, e.g., Yoldash v. Review Bd. Of Ind. Employment Sec. Div., 438 N.E.2d 310, 314-315 (Ind. Ct. App. 1982) (holding that claimant “was discharged for just cause within the meaning of the statute because of his outburst and offensive language directed towards his superiors”).

Additionally, we find that McCord’s termination was also for just cause due to his “‘unsatisfactory performance of assigned job responsibilities and duties’ for his failure to properly oversee the daily running of the stores under his management,” stemming from his performance as a restaurant manager. Appellee’s Appendix B at 16. A review of the evidence reveals that in the months leading up to McCord’s termination, the “DM Shop” scores evaluating the restaurants McCord managed fell from their previously satisfactory levels. Also, despite the District Manager’s requests, McCord failed “to do the standards at the restaurants.” Appellant’s Appendix B at 17. Again, given this substantial

evidence, we cannot say that the Board's determination that McCord was terminated for just cause was unreasonable. See Wakshlag, 413 N.E.2d at 1081-1082 (holding that claimant's termination after repeated conferences with employer who "remonstrated with her about her 'solvenly' [sic] work and her failure to perform tasks pursuant to [employer's] instructions" constituted just cause, and that claimant's argument was a mere invitation to reweigh the evidence which under the standard the court declined to do).

For the foregoing reasons, we affirm the Indiana Department of Workforce Development Review Board's determination that McCord was terminated for just cause.

Affirmed.

MAY, J., and CRONE, J., concur.