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IN THE
COURT OF APPEALS OF INDIANA

L.S.,	)	
	)	
Appellant,	)	
	)	
vs.	)	No. 93A02-0911-EX-1057
	)	
REVIEW BOARD OF THE INDIANA DEPARTMENT OF WORKFORCE DEVELOPMENT,	)	
	)	
Appellee.	)	

APPEAL FROM THE REVIEW BOARD OF THE
INDIANA DEPARTMENT OF WORKFORCE DEVELOPMENT
Case No. 09-R-04023

November 30, 2010

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAILEY, Judge

Case Summary

L.S. appeals from the decision of the Review Board ("the Board") of the Indiana Department of Workforce Development ("the Department") that he was disqualified from eligibility for unemployment benefits because he was dismissed for just cause. He raises one issue for our review, whether the Board's decision is supported by sufficient evidence.

We affirm.

Facts and Procedural History

L.S. began temporary employment with Mullinix Packages, Inc. ("Mullinix"), in Fort Wayne, in June 2006, and became a permanent employee on October 12, 2006. Mullinix used a progressive discipline policy under which three formal written warnings for violations of workplace policies in any twelve-month period would result in discharge of the employee ("the three-strikes policy"). One lock out/tag out violation related to the operation of certain machinery was automatically treated as resulting in a second written warning under the policy such that any subsequent offense, "regardless of the relation of the offenses," could result in discharge from employment. (Tr. Ex. E-2.) L.S. signed a form that acknowledged his receipt of the employee handbook containing the three-strikes policy, including the lock out/tag out policy. The form also reflected L.S.'s understanding that he was responsible for reading and complying with all the policies in the handbook.

On July 6, 2008, L.S. was working as a packer in the production area. He was disciplined for a lock out/tag out violation for entering the chain room of a tool without first

locking the tool or assuring that the tool had been locked down.[1] L.S. was thus considered to have received two formal written warnings under the three-strikes policy. L.S. signed the written warning form, acknowledging that he had received the warning.

On May 27, 2009, L.S. was found taking an extended break outside the designated break areas while using a cell phone. This conduct violated Mullinix's employee break policy and constituted L.S.'s third violation. Consistent with the three-strikes policy, Mullinix issued L.S. his third formal written warning and terminated L.S.'s employment on June 2, 2009. L.S. again signed the written warning form.

On June 22, 2009, the Department determined that L.S. was not entitled to collect unemployment benefits because he was discharged for just cause. L.S. appealed this decision through a letter sent on June 26, 2009.

An administrative law judge ("ALJ") held a telephonic hearing with L.S. and a representative for Mullinix on August 28, 2009. The ALJ affirmed the Department's initial decision the same day. L.S. appealed the ALJ's decision in writing on August 29, 2009. On October 1, 2009, the Board adopted the ALJ's findings and conclusions and affirmed the ALJ's order.

This appeal followed.

Discussion and Decision

L.S. appeals the Board's determination, arguing that he was discharged not for just

[1] The record from the hearing does not provide detail on the type of tool L.S. was working on. The tool, as this court understands it, is a machine large enough to have a separate compartment the size of a room, and the compartment houses a chain that powers or operates the tool in some fashion.

cause but because certain supervisors disliked him. In support of his argument, L.S. cites Indiana Code section 22-4-15-1(d)(8)[2] and this court's decision in Giovanoni v. Review Bd. of Ind. Dep't of Workforce Dev., 900 N.E.2d 437 (Ind. Ct. App. 2009), vacated, 927 N.E.2d 906 (Ind. 2010). To the extent these relate to his argument, we understand L.S. to assert that the ALJ's decision was not supported by sufficient evidence of just cause and that he was discharged through no fault of his own.

When reviewing a decision of the Board on the argument made by L.S., we apply a "substantial evidence" standard. Quakenbush v. Review Bd. of Ind. Dep't of Workforce Dev., 891 N.E.2d 1051, 1053 (Ind. Ct. App. 2008). We do not reweigh evidence or assess the credibility of witnesses and consider only the evidence most favorable to the Board's findings, reversing only if there is no substantial evidence to support the Board's findings. Id.

Our statutes set forth the circumstances under which a terminated employee may be disqualified from eligibility for unemployment benefits: "an individual … who was discharged from … employment for just cause is ineligible" unless certain other conditions that are not applicable in this case are met. Ind. Code § 22-4-15-1(a) & (c). The statute goes on to provide a non-exclusive list of situations in which just cause may exist, including "knowing violation of a reasonable and uniformly enforced rule of an employer, including a rule regarding attendance." I.C. § 22-4-15-1(d)(2).

[2] This specific subsection deals with discharge for just cause because of "incarceration in jail following conviction of a misdemeanor or felony by a court of competent jurisdiction." We do not understand L.S. to argue that this specific provision is at issue, but rather that he cites this subsection of the statute as part of a broader argument related to whether he was discharged for any just cause listed under 22-4-15-1(d).

In order for an employee to be disqualified from receiving benefits under subsection 22-4-15-1(d)(2), the terminating employer must establish a prima facie case for termination for just cause. This requires showing "that the employee: (1) knowingly violated, (2) a reasonable, and (3) uniformly enforced rule." Giovanoni v. Review Bd. of Ind. Dep't of Workforce Dev., 927 N.E.2d 906, 911 (Ind. 2010) (vacating Giovanoni v. Review Bd. of Ind. Dep't of Workforce Dev., 900 N.E.2d 437 (Ind. Ct. App. 2009)). Once the employer has established a prima facie showing of just cause, the employee must rebut that showing to be eligible for benefits. Stanrail Corp. v. Review Bd. of Ind. Dep't of Workforce Dev., 735 N.E.2d 1197, 1203 (Ind. Ct. App. 2000), trans. denied.

Whether L.S. Knew of the Three-Strikes Policy

L.S.'s challenge to the Board's determination centers on whether he knowingly violated Mullinix's workplace rules with regard to the lock out/tag out and break policy violations.[3] Where an employee challenges a determination of the Board on the ground that he did not know the rule the employer claims was violated, we look to evidence of whether the employee (1) knew of the rule, and (2) knew his conduct violated that rule. Stanrail, 735 N.E.2d at 1203. We have held that publication to all employees of an employment policy is sufficient to establish evidence of the terminated employee's knowledge of the rule if (1) written evidence of the policy is introduced to the ALJ, and (2) there is no evidence that the policy is inconsistently enforced or subject to exceptions unknown to the terminated

[3] L.S.'s brief and appendix make references to relationships with supervisors and his past conduct. To the extent these might articulate other arguments, they introduce evidence outside the record. We are precluded from considering any additional evidence, and thus we cannot review these arguments. See Quakenbush, 891 N.E.2d at 1053.

employee. Id. at 1204-05.

As to whether L.S. knew of Mullinix's disciplinary policies, Mullinix produced copies of the three-strikes policy in the employee manual and L.S.'s signed acknowledgment that he received the manual and that he understood his responsibilities to read and comply with all of the policies therein. L.S. acknowledged in his testimony before the ALJ that he had received Mullinix's employee handbook, and did not at any point in the hearing claim that he had not read or did not know the policies. Through its representative at the hearing, Mullinix testified that each of the policies was uniformly enforced and did not provide evidence of any exceptions. L.S. did not produce evidence counter to that testimony, except to say that he had not been written up for violating the workplace breaks policy in the past.

In light of the evidence presented at the hearing, we conclude that there was substantial evidence of L.S.'s knowledge of Mullinix's consistently enforced three-strikes policy.

Whether L.S. Violated the Lock-Out/Tag-Out Policy

L.S. also contends that he did not violate the lock-out/tag-out policy. The evidence favorable to the ALJ's decision includes Mullinix's "Employee Disciplinary Report," which notes that the team leader "observed [L.S.] inside the tool cutting out the plastic with the machine still on and no lock on the former cabinet nor any safety devices in use." (Tr. Ex. C-1.) Mullinix's expectation as stated on the form is that L.S. would ensure "any piece of machinery" be "properly locked out and all safety devices [be] in place." (Tr. Ex. C-1.) L.S.'s written response at the time of the disciplinary action was that he "was getting plastic

out of [the] chain rail." (Tr. Ex. C-1.)

Though acknowledging the safety rationale for the rule and the disciplinary action, he interprets his written comment on the report to be evidence that he was not inside the tool or responsible for being sure that the tool itself was in a safe condition and, therefore, that he should not have been disciplined. The ALJ nevertheless determined that L.S. had violated the lock out/tag out policy, noting that L.S. was "inside the tool cutting out the plastic." (Appellant's App. 8.) In parsing his statement from the disciplinary report, L.S. requests that we reweigh evidence, which we cannot do. Quakenbush, 891 N.E.2d at 1053.

Given the evidence presented to the ALJ, we conclude that there was substantial evidence of L.S.'s violation of the lock out/tag out policy.

Whether L.S. Violated the Employee Break Policy

L.S. also contends that he did not violate Mullinix's policies on break room, break time, and cell phone use. The Employee Disciplinary Report for May 27, 2009, indicates that on May 24, 2009, L.S. "was sitting outside in an unauthorized area without permission … on the steps by Door D for at least 30 minutes," and that on May 27, 2009, L.S. was "in the same area talking on [sic] cell phone." (Tr. Ex. B-2.) L.S. admitted that he was sitting outside a designated break area and explained that he doesn't like to be around smoking or lewd language, which he contended occur in the designated break rooms. He also claimed not to have exceeded his designated break time, though he did not know the length of the break times as designated by Mullinix.

Given the evidence presented to the ALJ, we hold that the ALJ's finding that "a

determination was made that the claimant violated the three warnings in one year policy" and that L.S. "took an extended break in an unauthorized area," giving Mullinix "grounds to issue a third and final written warning" was based in substantial evidence. (Appellant's App. 8 (reverse side).) We therefore hold that the Board's decision that L.S. was "discharged pursuant to his violation of the policy and therefore discharged for just cause" is grounded in substantial evidence, and that the Board's determination that L.S. is ineligible for benefits is also supported by substantial evidence. (Appellant's App. 8 (reverse side).)

Affirmed.

NAJAM, J., and DARDEN, J., concur.