MEMORANDUM DECISION

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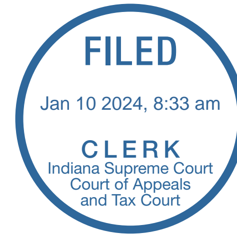

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IN THE COURT OF APPEALS OF INDIANA

Company,
Appellant,

v.

Review Board of the Indiana Department of Workforce Development and A.J.P.,
Appellee.

January 10, 2024

Court of Appeals Case No. 23A-EX-782

Appeal from the Review Board of the Indiana Department of Workforce Development

Gabriel Paul, Chairman
Larry A. Dailey, Member
Heather D. Cummings, Member

Case No. 23-R-0516

Memorandum Decision by Judge Felix

Judges Crone and Brown concur.

Felix, Judge.

Statement of the Case

[1] Company[1] ("Employer") appeals a decision of the Review Board of the Indiana Department of Workforce Development ("Review Board"), which affirmed the decision of the administrative law judge (the "ALJ") that Employer did not have just cause to terminate the employment of A.J.P. ("Claimant") and, therefore, Claimant was entitled to unemployment compensation benefits. Employer presents a single issue for review, namely, whether the evidence supports the Review Board's decision.

[2] We affirm.

Facts and Procedural History

[3] In 2019, Employer hired Claimant to be a leasing agent and, in August 2020, promoted her to property manager at The Fields of New Durham Apartment Complex. In the final 16 months of working for Employer, she received a written warning on May 17, 2021; a "final written warning" on June 18, 2021;

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[1] We are keeping Employer's and Claimant's names confidential even though neither party followed the procedure for claiming such confidentiality. Under Indiana Code section 22-4-19-6(b), the parties in unemployment benefit cases are confidential at the agency level. However, the confidentiality provided for pursuant to Access to Court Records Rule 5(B) only applies if its terms are complied with. Here, the parties have not complied by filing the Form ACR as required by Indiana Access to Court Records Rule 5(B) for the parties' names to remain confidential. We remind them to employ this policy to assure confidentiality in the future.

and then another written warning on March 23, 2022, each alleging "failure to comply with company policy and/or procedure" and two of which also alleged "failure to do a job." Appellant's App. Vol. II at 24, 70, 91. Shortly after receiving the third warning, Claimant received a pay increase. As of the third warning, Claimant testified that she "never had [the] thought or feeling, or was told" that her job could be in jeopardy. Appellant's Tr. Vol. II at 80.

[4] On October 6, 2022, Employer terminated Claimant's employment based on its determination that she had violated company policies and concurrently provided her a "final warning" that defined the "problem area" as violation of Employer's sexual harassment policy, violation of its general harassment policy by creating a hostile work environment, and "violations of the policy and procedure [sic] which could result in criminal charges." Appellant's App. Vol. II at 124.

[5] Claimant subsequently applied for unemployment benefits. A claims investigator at the Indiana Department of Workforce Development ("Department") determined Claimant was eligible for unemployment benefits because the Employer terminated Claimant's employment without just cause. Employer appealed.

[6] At a hearing before the ALJ, Employer's human resources coordinator, owner, and corporate coordinator testified for Employer, and Claimant and a former employee testified for Claimant. Following the hearing, the ALJ affirmed the Department's decision.

[7] Employer appealed the ALJ's decision to the Review Board, which reviewed the ALJ record and affirmed the ALJ. In support of its order, the Review Board adopted and incorporated by reference the ALJ's findings of fact and conclusions of law, which provides in relevant part as follows:

> FINDINGS OF FACT:
>
> * * *
>
> Employer has a written progressive discipline policy that provides for a counseling session, verbal warning, written warning, final written warning, and suspension prior to termination. However, employees are made aware that there is no requirement to issue each step of the plan and Employer has discretion on which to step to start at or issue based on the severity of each issue.
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> On May 17, 2021, Employer issued Claimant a written warning when it learned she had lease[-] and financial[-]related discussions with a resident's mother causing the resident to threaten legal action resulting in Employer incurring costs to avoid litigation. Employer also felt Claimant acted inappropriately when she named an anonymous user who posted a negative review of the community. Claimant received and signed for receipt of this warning.
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> On June 18, 2021, Employer issued Claimant a final written warning when it learned that a potential resident was approved for the lease under his father's name, as he did not qualify under his own, which was against fair housing procedures. Employer also felt claimant acted inappropriately and hostile toward the potential resident and his fianc[ée] asking questions about their character and financial situation which caused them to be upset.

While Claimant denied knowledge of the false name provided by the potential resident to obtain the lease and felt she was not rude she understood that her staff member created the lease with improper information, so she signed for receipt of the final warning.

On March 23, 2022, Employer issued Claimant a written warning as a corporate audit of leases was performed resulting in the discovery of about twenty-four improper leases or lease records contrary to the fair housing regulations Employer needs to follow.

While some of the leases reviewed were created and entered into before Claimant was the property manager claimant understood she was ultimately in charge of all leases at that time, so she signed for receipt of the warning and agreed to perform monthly audits of the leases moving forward to get them into good standing. However, since this was not a final warning, and no comments were made to her about her job being in jeopardy claimant was not aware that any more issues would result in immediate discharge.

Furthermore, when Claimant received a compensation schedule with an income bonus on March 25, 2022, she felt she must have been doing a good job or she would not have been deserving of an increase.

On September 27, 2022, Employer received an email from an employee, who was not a party to the hearing, indicating that he felt uncomfortable at work because Claimant was dating his father and relaying personal information about that relationship to other employees who then shared it with him.

Employer was concerned about this, so it directed the HR coordinator to meet offsite with him to get his statement. During

this conversation the employee told Employer he told Claimant it was fine if she dated his dad, but he did not want her to talk to others or himself about it. Claimant agreed but employees were still telling him information about their dating life, so he felt uncomfortable at work.

To further investigate the HR coordinator met with two other employees, who were also not a party to the hearing, about the matter. In these conversations the HR coordinator noted that they said Claimant had talked to them about her dating life, which also made them uncomfortable and that she generally made the work environment uncomfortable by telling them she was always watching them on the camera or performing outside of established protocols to increase tenancy.

Due to these issues, on September 28, 2022, Employer notified Claimant she was suspended pending further investigation into some issues, though the issues were not explained to Claimant at that time.

On September 30, 2022, Employer learned Claimant had made Facebook marketplace postings attempting to sell items that were bought and owned by Employer. Therefore, on October 6, 2022, Employer met with Claimant and issued her a separation notice indicating it was discharging her for performance and conduct. Employer also provided a counseling record indicating that Claimant was discharged due to complaints of sexual harassment, general harassment towards staff and criminal conduct in selling Employer's property without permission or providing Employer with the revenue.

Claimant was surprised by the discharge as her prior counseling was only a written and not a final warning and she had received a raise thereafter. Claimant also knew the allegations were false as she never talked to anyone about details of her personal

relationship and never talked at all about the relationship to her boyfriend's son. Claimant also knew she was friends with most of her staff and, like her witness, they thought she was a great supervisor and property manager as one of them even nominated her as property manager of the year.

Furthermore, while she did make [a] posting trying to sell Employer's property, they were only for items Employer said it did not want and were just taking up space in a room they could use for other things, and she never even had any interest let alone a sale so there was no wrongdoing or theft.

CONCLUSIONS OF LAW:

* * *

In the present matter Claimant did not commit embezzlement as she did not convert Employer's property to her own possession as it never left Employer's property and control. Claimant also did not commit theft as she did not exert any unauthorized control over Employer's property as it always remained on Employer's premises and Employer was never deprived of it's [sic] use or value. Claimant did not commit gross misconduct in connection with the work as established under IC 22-4-15-6.1.

* * *

Employer discharged Claimant for breaching a duty to Employer by upsetting other staff members with allegations of sexual harassment and creating a hostile work environment. As a manager with staff under her, Claimant reasonably owed Employer a duty to act respectfully and professionally at all times while interacting with staff.

> Employer presented hearsay testimony and written statements alleging Claimant made staff uncomfortable by talking about her dating and sexual relationship and putting staff in fear of getting in trouble. However, Claimant denied talking about the intimate details of her relationship with staff and Claimant and her witness provided firsthand testimony that Claimant was professional and appropriate with staff so there is insufficient evidence to establish Claimant willfully breached a duty owed to Employer.
>
> Furthermore, it cannot be established that Claimant was aware her job was in jeopardy or that these allegations against her would result in discharge as Employer routinely skipped around on the progressive discipline plan leaving an employee unsure what step might be next and the final step in Claimant's situation was just a writing warning, not a final or suspension, without any notation of her job being in immediate jeopardy, follow[ed] by a pay increase. Therefore, Claimant was deprived of the chance to amend her behavior, if needed, to avoid discharge and it must be established Employer discharged Claimant without just cause as defined by Indiana Code Section 22-4-15-1(d).

Appellant's App. Vol. II at 6–10.

[8] As a result of the findings and conclusions, the Review Board adopted the ALJ's conclusions, which provide:

1. "Claimant did not commit gross misconduct in connection with the work as established under IC 22-4-15-6.1," Appellant's App. Vol. II at 9;

2. There is "insufficient evidence to establish that Claimant willfully breached a duty owed to Employer," *id.* at 10; and

3. Employer had not demonstrated that Claimant was aware her job was in jeopardy, ***(id.* at 10)**.

[9] *Id.* at 8–10. Employer now appeals.

Discussion and Decision

[10] Employer contends that it made a prima facie case of just cause for terminating Claimant's employment and that the Review Board disregarded substantial and uncontradicted evidence in reaching its determination. In particular, Employer challenges the Review Board's reliance on the ALJ's findings of fact and argues that other evidence supports the conclusion that Employer demonstrated just cause for discharging Claimant. We cannot agree.

Standard of Review

[11] A former employee does not qualify for unemployment benefits if discharged for just cause. *J.M. v. Rev. Bd. of Ind. Dep't of Workforce Dev.*, 975 N.E.2d 1283, 1286 (Ind. 2012) (citing I.C. § 22–4–15–1(a)). Just cause includes "any breach of duty in connection with work which is reasonably owed an employer by an employee."[2] *J.M.*, 975 N.E.2d at 1287 (citing I.C. § 22–4–15–1(d)(9)).

> In order to qualify as a breach of duty for unemployment purposes, the duty must be:

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[2] Gross misconduct is another ground for discharging an employee that results in ineligibility for unemployment benefits. I.C. § 22-4-15-6.1. Employer does not appear to take issue with the Review Board's findings or determination regarding gross misconduct.

> (1) reasonably connected to the work;
>
> (2) reasonably owed to the employer by the employee; and
>
> (3) of such a nature that a reasonable employee would recognize a violation of the duty, and would understand that such a violation of the duty would subject the individual to discharge.

646 Ind. Administrative Code 5-8-6(a). "The employer bears the burden of establishing a prima facie showing of just cause for termination, and once that burden is met, the burden shifts to the employee to introduce competent evidence to rebut the employer's case." *Spieker v. Rev. Bd. of Ind. Dep't of Workforce Dev.*, 925 N.E.2d 376, 378 (Ind. Ct. App. 2010).

[12] Although Indiana Code section 22-4-17-12(f) sets out a two-part test for evaluating a Review Board's decision on appeal, our Indiana Supreme Court has clarified the test by breaking it down into three areas of review or types of errors:

> [A]n appellate court reviews "(1) determinations of specific or 'basic' underlying facts; (2) conclusions or inferences from those facts, sometimes called "ultimate facts,' and (3) conclusions of law."

J.M., 975 N.E.2d at 1286 (Ind. 2012) (quoting *McClain v. Rev. Bd. of Ind. Dep't of Workforce Dev.*, 693 N.E.2d 1314, 1317 (Ind. 1998)).

> The Review Board's "findings of basic facts are subject to a 'substantial evidence' standard of review." We neither reweigh evidence nor judge the credibility of witnesses; rather, we

> consider only the evidence most favorable to the Review Board's findings. We will reverse the decision only if there is no substantial evidence to support the Review Board's findings.

J.M., 975 N.E.2d at 1286 (citing *McClain*, 693 N.E.2d at 1317).

> The substantial-evidence test is met when the findings of the Review Board are conclusive and binding unless they meet certain exceptions, including but not limited to:
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> (1) The evidence on which the Review Board based its findings was devoid of probative value;
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> (2) The quantum of legitimate evidence was so proportionately meager as to lead to the conviction that the finding does not rest upon a rational basis;
>
> (3) The result of the hearing before the Review Board was substantially influenced by improper considerations;
>
> (4) There was not substantial evidence supporting the findings of the Review Board;
>
> (5) The order of the Review Board, its judgment or finding, is fraudulent, unreasonable or arbitrary.

J.M., 975 N.E.2d at 1288 (citing *McClain*, 693 N.E.2d at 1317 n.2).

[13] "The Board's conclusions as to ultimate facts involve an inference or deduction based on the findings of basic fact." *McClain*, 693 N.E.2d at 1317. "These questions of ultimate fact are sometimes described as questions of law" but they are "more appropriately characterized as mixed questions of law and fact." *Id.*

at 1317–18. We review mixed questions of law and fact "to ensure the Board's inference is 'reasonable' or 'reasonable in light of the [Board's] findings.'" *Id.* at 1318. A challenge to the determination that an employer did not have just cause to discharge an employee falls in this category. *See Recker v. Rv. Bd. of Ind. Dep't of Workforce Dev.*, 958 N.E.2d 1136, 1139 (defining issue on appeal, whether employee breached a duty reasonably owed to her employer and was discharged for just cause, as a question of ultimate fact); *but see also J.M.*, 975 N.E.2d at 1288 (reviewing ultimate order on entitlement to benefits without reference to specific facts as question of ultimate fact).

Direct Evidence Substantially Supports the Findings of Basic Facts

[14] Employer argues that substantial evidence does not support the findings of fact found by the ALJ and affirmed by the Review Board. In support, Employer reiterates evidence about Claimant's conduct, performance, and behavior that it contends support a finding of termination for just cause. However, in the Argument section of its appellate brief, Employer neither identifies nor provides citations to the Record on Appeal for the findings it challenges. These omissions constitute a violation of Indiana Appellate Rule 46(A)(8)(a), which can result in waiver of the issue on appeal. *See Miller v. Patel*, 212 N.E.3d 639, 657 (Ind. 2023); *Pierce v. State*, 29 N.E.3d 1258, 1268 (Ind. 2015).

[15] In evaluating the Review Board decision on the merits despite these deficiencies, the Employer does not dispute any of the following basic findings of fact that Employer:

> (1) had a "progressive discipline policy that provides for a counseling session, verbal warning, written warning, final written warning, and suspension prior to termination," Appellant's App. Vol. II at 7;
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> (2) issued a written warning on May 17, 2021; a final written warning on June 18, 2021; and then another written warning on March 23, 2022; and then, only two days later on March 25, increased Claimant's pay, **(*id.* at 7)**;
>
> (3) suspended Claimant on September 22, 2022, "pending further investigation into some issues" but without informing her of the issues to be investigated, *id.* at 8; and
>
> (4) discharged Claimant on October 6, 2022, and simultaneously issued a counseling record that named the reasons for discharge: "complaints of sexual harassment, general harassment towards staff and criminal conduct in selling Employer's property without permission or providing Employer with the revenue," *id.*

[16] Employer also does not point to any evidence in the record to challenge the finding that Claimant only posted for sale items belonging to Employer that it said it did not want. Further, Employer's human resources coordinator testified at the hearing before the ALJ that the property Claimant had posted for sale was still on the Employer's premises.

[17] Employer does not dispute that uncontroverted evidence supports these basic findings. Instead, Employer directs our attention to hearsay testimony it offered at the ALJ hearing to demonstrate Claimant's breach of duty by allegedly engaging in sexual harassment, harassment that created a hostile work

environment, and "violations of the policy and procedure [sic] which could result in criminal charges." Appellant's App. Vol. II at 124. Although never explicitly explained, it appears the potential for criminal charges is based on the allegation that Claimant posted Employer-owned property for sale on her personal Facebook page.

[18] The Review Board affirmed the ALJ's finding that the evidence Employer refers to was from employees who were "not a party" to the hearing before the ALJ; that is, they were not present and did not testify. Appellant's App. Vol. II at 7. "In general, hearsay evidence shall not be considered; however, an administrative law judge shall consider all hearsay evidence as would be admissible under common law or the Indiana Rules of Evidence." 646 I.A.C. 5-10-5(a). Hearsay evidence admitted under a recognized hearsay exception may be admitted at the hearing but "shall not be entitled to the same evidentiary weight as direct testimony." 646 I.A.C. 5-10-5(b).

[19] Employer's reliance on hearsay testimony is a request that we reweigh the evidence, which we cannot do. *See J.M.*, 975 N.E.2d at 1286 (citing *McClain*, 693 N.E.2d at 1317). The firsthand evidence offered at the hearing substantially supports the findings of basic fact.

[20] Employer also challenges the finding that "Claimant was surprised by the discharge as her prior counseling was only a written and not a final warning and she had received a raise thereafter." Appellant's App. Vol. II at 8. Employer contends that it "defies credibility to conclude that [Claimant] did

not understand that another violation in September of 2022 could result in her termination." Appellant's Brief at 15. Again, the final warning Employer gave Claimant with the discharge notice documented Employer's determination that Claimant had engaged in sexual harassment, creation of a hostile work environment, and criminal conduct based on the sale of company property without permission. Claimant denied these allegations, and Employer points to no direct evidence to support those allegations as a basis for just cause to discharge Claimant.

[21] Claimant denied having any indication or belief that her job was at risk. Employer's sequential use of the steps in its progressive discipline plan could have given Claimant an opportunity to amend her behavior or, at a minimum, it could have given her reason to understand that her employment was at risk of termination. On the record before us, we hold that substantial evidence also supports the Review Board's finding that "it cannot be established that Claimant was aware her job was in jeopardy." Appellant's App. Vol. II at 10.

The Review Board's Inferences from the Basic Facts Are Reasonable

[22] Having determined that the evidence substantially supports the findings of basic fact at issue on appeal, we next consider whether the Review Board's inferences based on those facts were reasonable. *See McClain*, 693 N.E.2d at 1317. Employer contends that the evidence demonstrates that Claimant breached a duty to Employer. Again, we cannot agree.

[23] The Review Board affirmed the ALJ's findings of ultimate fact that Employer did not demonstrate just cause for Claimant's discharge. On appeal, we must evaluate whether the basic facts found by the ALJ and as adopted and incorporated by reference by the Review Board support a reasonable inference that Employer did not demonstrate just cause for terminating Claimant's employment. To do so, we must consider whether her conduct constituted a breach of duty under Indiana Code section 22-4-15-1(d) and 646 Indiana Administrative Code 5-8-6(a). Again, to demonstrate a breach of duty, Employer had to show that the duty Claimant allegedly breached was (1) reasonably connected to Claimant's work for Employer; (2) reasonably owed to Employer; and (3) "of such a nature that a reasonable employee would recognize a violation of the duty, and would understand that such a violation of the duty would subject the individual to discharge." 646 I.A.C. 5-8-6(a).

[24] The basic findings of fact demonstrate that Employer terminated Claimant's employment based on complaints of sexual harassment, general harassment towards staff, and criminal conduct of selling Employer's property without permission. The only non-hearsay testimony regarding the facts underlying those allegations came from Claimant, who refuted those allegations.

[25] Regarding the alleged sale of Employer property, Claimant testified that her superior said he did not care what happened to the items she subsequently posted for sale, which were items Employer did not use. Tr. Vol. II at 75. Claimant also testified that none of the items she posted sold and that all were still in a closet on Employer's property. Employer's human resources

coordinator also testified that the property Claimant had posted for sale was still on the Employer's premises. Tr. Vol. II at 22. Thus, the Review Board's conclusion that Employer failed to demonstrate willful breach of a duty is reasonable. *See McClain*, 693 N.E.2d at 1317.

[26] Lastly, we consider Employer's challenge to the Review Board's legal conclusion that Claimant was unaware her job was in jeopardy or that the allegations put her job at risk and to the related finding that Employer "routinely skipped around on the progressive discipline plan leaving an employee unsure what step might be next." Appellant's App. Vol. II at 10. We do not read the Review Board's decision and the findings on this point in particular as indicating Employer was bound to follow a specific sequence before achieving just cause to terminate Claimant. The point is that Employer's conduct here did not give Claimant any reason to believe that her job was at risk. As a result, we do not think that the process Employer followed here supports a different result.

[27] Employer issued Claimant a written warning on May 17, 2021; a final written warning on June 18, 2021; and then another written warning on March 23, 2022, all of which were in the 16 months before her discharge. Claimant also received a raise days after the third warning. Approximately six months later, Employer suspended Claimant without advising her of the allegations against her. Given the apparent backward movement along the disciplinary progression and the subsequent raise, which were followed by six months without any documented disciplinary action, it was reasonable for the Review

Board to infer that Claimant would not have been aware that her job was at risk.

[28] This conclusion is supported by Claimant's testimony at the ALJ hearing that she was confused when Employer informed her of the sexual harassment allegation that was part of the basis for her discharge. Moreover, the grounds stated in the final warning accompanying the discharge notice were different from the reasons for the three prior disciplinary warnings. As such, the Review Board's conclusion that Claimant was not aware that her job was in jeopardy is reasonable. Appellant's App. Vol. II at 10. In sum, we conclude that ample findings support the Review Board's conclusions.

Conclusion

[29] Employer failed to establish a prima facie case of just cause for discharging Claimant. Substantial evidence supports the basic facts found by the ALJ and affirmed by the Review Board, and those facts support the conclusions that Employer failed to demonstrate just cause. As a result, we affirm the Review Board's determination that Claimant is entitled to unemployment benefits.

[30] Affirmed.

Crone, J., and Brown, J., concur.