
APRIL 3, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

HOFFMAN, Senior Judge

Claimant-Appellant Adam W. Pluris (“Pluris”) appeals from the Review Board of the Indiana Department of Workforce Development’s (“Board”) denial of his claim for unemployment benefits after he was discharged by the Interstate Brands Corporation (“Interstate”). We affirm.

Pluris raises four issues for our review, which we renumber and restate as:

1. Whether Interstate waived its right to discharge Pluris.
2. Whether Pluris knowingly refused to submit to a drug test.
3. Whether Pluris established that he is entitled to unemployment benefits pursuant to a statute allowing benefits to a worker whose employment is terminated as a result of a “medically substantiated disability.”
4. Whether Pluris established that he is entitled to unemployment benefits because Interstate’s drug-testing policy was unreasonable.

Pluris was employed by Interstate from August 17, 1996 until he was discharged on January 13, 2006. On the day before he began working for Interstate, Pluris, by his signature acknowledged that he had “received” Interstate’s “Substance Testing Policy.” The policy stated that Interstate may require an employee to submit to a drug screen test where there is “‘probable suspicion’ that an employee uses illegal drugs.” (Employer’s

Exhibit 1). The policy further provides that an employee who does not submit to the test “will be suspended and discharged.” *Id.*

On the evening of December 27, 2005, Pluris was forty-five minutes late in returning from his lunch break. Interstate’s Assistant Production Manager, Chris Stults, noticed that Pluris was acting in an unusual manner and that his eyes “didn’t look quite right.” (Claimant’s Exhibit 7). Stults conferred with Line Supervisor Dave Marietta, and Marietta called Production Manager Wayne McGeorge for permission to compel Pluris to submit to a drug- and alcohol- screening test.

Stults and Marietta spoke with Pluris and told him that they believed he was under the influence of drugs and/or alcohol, and they requested that he sign the consent form and submit to the test. Pluris responded that he had received a different prescription from a doctor who was not his regular doctor. Pluris stated that he was reacting to the prescription and that he should not have to take a drug test. Stults and Marietta told him that if he was not going to submit to the test, he should go home and report to McGeorge the next morning. Pluris went home.

After arriving home, Pluris became even more disoriented, and he was eventually hospitalized for six days. It was subsequently discovered that he had mistakenly been given Xanax instead of the Oxycontin he was supposed to use for recurring stomach problems. The Xanax caused his disorientation.

On December 28, 2005, Interstate suspended Pluris while it investigated the matter. On January 13, 2006, Interstate discharged Pluris for refusing to submit to the drug screen.

Pluris' application for unemployment benefits was initially denied, and Pluris appealed. After a hearing, an administrative law judge reversed the denial of benefits. The administrative law judge reasoned that Pluris was not discharged for just cause because there was no evidence that Pluris "knowingly" refused to submit to the test. Interstate appealed, and the Board reversed the administrative law judge's determination. The Board concluded that the record did not support the administrative law judge's conclusion "that [Pluris] was so impaired that he could not knowingly refuse to take a drug test. [Pluris] argued with his supervisors that he should not have to take the test because he was under the influence of a prescription drug." (Appellant's App. at 1). The Board further concluded that it is "irrational" to say "that an employer does not have just cause to discharge an impaired employee because he is too impaired to consent to a test to determine if he is impaired. . . ." *Id.* Pluris now appeals from the Board's determination.

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). When the Board's decision is challenged as contrary to law, the reviewing court is limited to a two-part inquiry into the "sufficiency of the facts found to sustain the decision" and the "sufficiency of the evidence to sustain the findings of facts." Ind.Code § 22-4-17-12(f). Under this standard, we are called upon to review: (1) determinations of specific or basic underlying facts; (2) conclusions or inferences from those facts, or determinations of ultimate facts; and (3) conclusions of law. *Stanrail Corp. v. Review*

Board of Department of Workforce Development, 735 N.E.2d 1197, 1198 (Ind. Ct. App. 2000), *trans. denied*.

Review of the Board's findings of basic fact is subject to a "substantial evidence" standard of review. *Id.* In this analysis, we neither reweigh the evidence nor assess the credibility of witnesses and consider only the evidence most favorable to the Board's findings. *Id.* We will reverse the decision only if there is no substantial evidence to support the Board's findings. *Id.*

An unemployed claimant is ineligible for unemployment benefits if he is discharged for "just cause." *Id.* Under Indiana law, "discharge for just cause" includes those discharges precipitated by the "knowing violation of a reasonable and uniformly enforced rule of an employer" and "reporting to work under the influence of alcohol or drugs. . . ." Ind.Code § 22-4-15-1(d)(2) and (5). To establish a prima facie case for violation of an employer rule under Ind. Code § 22-4-15-1(d)(2), the employer must show that the claimant: (1) knowingly violated; (2) a reasonable; and (3) uniformly enforced rule. *Stanrail*, 735 N.E.2d at 1203.

When an employee is alleged to have been terminated for just cause, the employer bears the burden to establish a prima facie showing of that cause. *Hehr v. Review Bd. of the Indiana Employment Security Division*, 534 N.E.2d 1122, 1124 (Ind. Ct. App. 1989). Once the employer meets that burden, the burden shifts to the employee to introduce competent evidence to rebut the employer's case. *Id.*

I.

Pluris contends that Interstate waived its right to enforce its mandatory drug testing rule when Stults and Marietta told him that he could either submit to the test or go home and return the next day to speak with McGeorge. Whether an employer has waived the right to enforce a rule is fact sensitive. *See Mead Johnson and Co. v. Review Bd. of Ind. Employment Security Division*, 463 N.E.2d 537, 539 (Ind. Ct. App. 1984) (holding that the employer waived its right to fire an employee when the employee “complied with [the employer’s] disciplinary sanction and was reassured that the matter was settled); *Poort v. Review Bd. of the Ind. Employment Security Division*, 418 N.E.2d 1193 (Ind. Ct. App. 1981) (holding that the employer’s delay in discharging an employee did not constitute a waiver of the right to do so).

In the present case, Stults testified at the hearing that he asked Pluris to submit to the test, and upon Pluris’s refusal, he told Pluris to go home and return the next day to talk with McGeorge. On cross-examination, Stults explained that Pluris was not given the option of going home in lieu of compliance with Interstate’s rule. After Stults testified, Marietta’s written statement was entered into evidence. Marietta stated that he explained to Pluris that the “option” to go home was “a measure to insure the safety of his co-workers as well as himself as he was not in the proper mindset to be operating machinery.” (Employer’s Exhibit #2).

The evidence presented by Interstate is sufficient to support the conclusion that Stults’ and Marietta’s statements to Pluris were not a waiver of Interstate’s right to discipline Pluris. Instead, the “option” given to Pluris was a common sense solution that protected Pluris and his co-workers from possible injury. Furthermore, the “option” to

return to talk to McGeorge was not a waiver of a right of discipline; it was a promise of discipline to come. More importantly, the so-called “option” was communicated to Pluris after he refused to sign a consent to the drug test or submit to the test.

II.

Pluris contends that he was not discharged for just cause because he did not “knowingly” refuse to submit to the drug test. Pluris argues that the undisputed evidence “can lead only to the conclusion that, at the time he refused the test, he was not aware that he was doing so.” Appellant’s Brief at 8.

As we noted above, the Board determined that Pluris’ response to Stults and Marietta indicates that he knew what he was doing when he refused to submit to the drug test. When refusing to sign the consent form or to submit to the test, Pluris stated that his behavior resulted from ingestion of the wrong medicine, not from illegal drug use. The Board determined that this comment was responsive to Stults’ and Marietta’s statements; thus, the comment was indicative of Pluris’ awareness of the nature and import of their requests. Although another inference could be made from the evidence, the Board’s conclusion is not unreasonable. We will not reweigh the evidence.

III.

Pluris contends that he is entitled to unemployment benefits because his termination resulted from a medically substantiated disability. In support of his contention, Pluris cites Ind. Code § 22-4-15-1(c)(2), which provides that “[a]n individual whose unemployment is the result of medically substantiated physical disability and who is involuntarily unemployed after having made reasonable efforts to maintain the

employment relationship shall not be subject to disqualification under this section for such separation.”

Here, Pluris did present a note from his treating physician stating that he suffered from “a significant mood disorder related to medication and he should no longer be impaired” and that he was hospitalized due to side effects from medications. (Claimant’s Exhibit #3). This note, however, does not unequivocally show how his physical disability was directly connected to his refusal to submit to drug testing as required by Interstate’s policy. As we discuss above, the Board was within its discretion in determining that Pluris’ dissenting statements to Stults and Marietta were evidence that he “knowingly” refused to submit to the test. It was this refusal, and not his physical condition, that precipitated his discharge for just cause.

IV.

Finally, Pluris contends that Interstate’s rule was not reasonable under all circumstances and was not reasonable as applied to him. Pluris argues that the rule was not reasonable because it “provided no protection to Pluris and allowed [Interstate] no chance to consider Pluris’ circumstances.” Appellant’s Reply Brief at 5. Pluris cites to *Beene v. Review Bd. of the Ind. Department of Employment and Training Services*, 528 N.E.2d 842 (Ind. Ct. App. 1988) and *General Motors Corp. v. Review Bd. of the Ind. Department of Workforce Development*, 671 N.E.2d 493 (Ind. Ct. App. 1996) for the proposition that a reasonable rule must have more than an appropriate purpose.

Unemployment compensation may be denied to employees who are discharged for just cause. Ind. Code § 22-4-15-1(d). 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). A work rule is reasonable if it protects the interests of the employees as well as those of the employer. *General Motors*, 671 N.E.2d at 497.

In *Beene*, we addressed whether the employer's rule regarding absences was reasonable. We held that "[w]e cannot say a [rule] is unreasonable per se simply because it allows some absences caused by illness to be accumulated toward the thirteen-day benchmark at which an employee has been excessively absent and will be discharged." *Beene*, 528 N.E.2d at 845 (quoting *Jeffboat, Inc. v. Review Bd. of Ind. Employment Security Div.*, 464 N.E.2d 377 (Ind. Ct. App. 1984)). After noting that the no-fault attendance policy protected the employer's interest in the "efficient running of its business by preventing against the practice of certain employees of being frequently 'ill,'" we stated that the policy also protected employee interests by giving some leeway for long-term illnesses and emergencies. *Id.* at 846.

In a subsequent case, we analyzed an employer's drug policy. See *Butler v. Review Bd. of Indiana Department of Employment and Training Services*, 633 N.E.2d 310 (Ind. Ct. App. 1994). We succinctly stated the reasonableness test in two sentences: "Clearly, a private employer has a right to insure that its workers are drug and alcohol free while on the job. Thus, [the employer] met its burden to demonstrate that its rule was reasonable." *Id.* at 313.

In *General Motors*, we explored whether the employer's drug rule was uniformly enforced. Before doing so, however, we reiterated that (1) a work rule is reasonable if it protects the interests of the employees as well as those of the employer; and (2) a private

employer has a clear right to insure that its workers are drug and alcohol free while on the job. 671 N.E.2d at 497. We do not consider *General Motors* to be a repudiation of the succinct approach used in *Butler*.

In the present case, Interstate’s drug policy states the importance of a drug-free workplace to the safety of its workers. Thus, the drug policy protects the interests of both the employees and the employer. Furthermore, while providing that an employee’s refusal to submit to a drug test will be considered a positive drug test and that a positive drug test will result in discharge from employment, the policy also provides for interpretation and application of the policy “to each particular situation.” Employer’s Exhibit #1. Pluris’ refusal to submit to the drug test prevented Interstate from obtaining valuable information that would have applied to consideration of his “particular situation.”¹

Affirmed.

FRIEDLANDER, J., concurs.

SULLIVAN, J., dissents with separate opinion.

¹ Pluris argues that Interstate violated its drug policy when it failed to have a union steward available during the discussion between Pluris and his supervisors. In light of Pluris’ failure to make an argument regarding the effect of this failure and his failure to argue the issue before the Board, we hold that the issue is waived. See *Frost v. Review Bd. of Indiana Employment Security Division*, 432 N.E.2d 459, 462 (Ind. Ct. App. 1982).

**IN THE
COURT OF APPEALS OF INDIANA**

ADAM PLURIS,)	
)	
Appellant-Defendant,)	
)	
vs.)	No. 93A02-0606-EX-475
)	
REVIEW BOARD OF THE INDIANA)	
DEPARTMENT OF WORKFORCE)	
DEVELOPMENT and INTERSTATE)	
BRANDS CORPORATION,)	
)	
Appellees-Plaintiffs.)	

SULLIVAN, Judge, dissenting

The policy of the employer to require the employee to submit to a drug test was triggered only where there is “‘probable suspicion’ that an employee uses illegal drugs.” Slip op. at 2 (emphasis supplied). Given Pluris’s accurate and true statement that his disorientation was occasioned by reaction to a prescription drug which had been erroneously prescribed by a doctor, it seems clear that there was no hint of use of illegal drugs by Pluris. Albeit by hindsight, Pluris reasonably and correctly explained the situation to his supervisors as a basis for not wishing to consent to a drug test.

In any event, Pluris became unemployed as a “result of a medically substantiated physical disability.” This disability was temporary but resulted in hospitalization for six days. The condition was remedied by his return to the correct prescription. Pluris was sent home from his employment on December 27, 2005. Pluris was suspended the following day while still hospitalized for the adverse reaction to the wrong medication. Such scenario should not have resulted in his discharge.

For this reason I would reverse and remand with instructions to enter an award of benefits.