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**IN THE  
COURT OF APPEALS OF INDIANA**

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DAVID BAUMBERGER, )

Appellant-Defendant, )

vs. )

No. 93A02-0906-EX-0587

REVIEW BOARD OF THE INDIANA )

DEPARTMENT OF WORKFORCE )

DEVELOPMENT and BEST BUY STORES LP., )

Appellees-Plaintiffs. )

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APPEAL FROM THE REVIEW BOARD OF THE DEPARTMENT OF WORKFORCE  
DEVELOPMENT

The Honorable Steven F. Bier, Chairperson  
The Honorable George H. Baker, Member  
The Honorable Lawrence A. Dailey, Member  
Cause No. 09-R-01667

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**DECEMBER 31, 2009**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BARTEAU, Senior Judge**

STATEMENT OF THE CASE

Claimant-Appellant David Baumberger appeals the Indiana Review Board of the Department of Workforce Development's determination that he was discharged for just cause from Employer-Appellee Best Buy Stores LP. We reverse and remand with instructions.

ISSUE

The following restated issue is dispositive: whether the Board erred in determining that Baumberger knowingly violated a reasonable and uniformly enforced rule of an employer.

FACTS AND PROCEDURAL HISTORY

Baumberger worked for Best Buy before being discharged for violating Best Buy's employee discount purchasing policy.

On December 4, 2008, a Workforce Development claims deputy determined that Baumberger "was not discharged for just cause" and that Baumberger was eligible for unemployment insurance benefits. Best Buy appealed, and an Administrative Law Judge reversed the claims deputy's decision. The Administrative Law Judge made findings of fact that were adopted by the Review Board. The facts as found by the ALJ, and adopted by the Review Board, are as follows:

The claimant worked with his employer from October 21, 2003, until November 10, 2008. The claimant was last employed as a double agent performing in-home computer repair services. The claimant was discharged due to violation of company rules.

The Administrative Law Judge finds that the employer had an employee discount policy. Such policy had been liberal in the past. However, effective September 25, 2006, the employer revised its policy to limit the use of employee discounts to an employee, the employee's spouse and any dependent children. The employer's policy specifically excluded parents, parents-in-law and domestic partners from the discount program. The claimant received a copy of the employer's revised policy. The policy stated in part "employees must be present and pay for the purchase in order for the eligible family members to use the employee discount." Violation of such policy subjected employees to disciplinary action up to and including termination. All employees found to be in violation of such policy in a similar manner as the claimant received similar disciplinary treatment. The employer instituted the restrictive policy to prevent excessive use of the company discount policy.

The Administrative Law Judge finds that on October 22, 2008, the claimant and his mother entered the employer's store and presented some items for purchase. The sales clerk told the claimant the amount of the purchase. The claimant then conveyed such information to his mother. The claimant's mother then removed cash from her purse and handed it to the claimant. The claimant then handed the cash to the sales clerk and used his employee discount for such purchase. The claimant subsequently provided a written statement to the employer indicating that his mother had paid for the purchase. The claimant alleged that the cash actually belonged to him, and his mother was simply holding it for him. The claimant did not bring such information to the employer's attention until the time of the hearing.

(Appellee's Confidential Supplemental Appendix at 16-17).

Based upon these facts, the ALJ made the following conclusions of law:

In matters involving discharge, the burden of proof is on the employer to show that the separation was for just cause. Wakshlag v. Review Board, 413 N.E.2d 1078 (Ind. Ct. App. 1980). In defining discharge for just cause, the statute includes the knowing violation of a reasonable and uniformly enforced rule of an employer. IC 22-4-15-1(d)(2). To find that a discharge

was for just cause under this section, it must be found that there was a rule, the rule was reasonable, the rule was uniformly enforced, the claimant knew of the rule, and the claimant knowingly violated the rule. Barnett v. Review Board, 419 N.E.2d 249 (Ind. Ct. App. 1981).

The Administrative Law Judge concludes that the employer had a policy that was reasonable in so far as it clearly designated who was eligible for an employee discount and how such a policy was utilized. The employer's policy was uniformly enforced in so far as all similarly situated employees received similar disciplinary treatment. The claimant was made aware of the employer's policy when it was revised. The Administrative Law Judge concludes that credibility does not lie with the claimant in this instance. The claimant had ample opportunity before the time of the hearing to advise the employer that the cash used for the purchase was actually his own and not his mother's. The evidence that the actual cash used to make the purchase came from the purse of the claimant's mother would indicate that the mother was actually making the purchase and not the claimant. The Administrative Law Judge concludes that the claimant did knowingly violate the employer's policy in this instance. The employer has carried its burden of proof in this matter. For the above stated reasons, the Administrative Law Judge concludes that the claimant was discharged for just cause within the meaning of Chapter 15, Section 1 of the Indiana Unemployment Compensation Act.

#### DISCUSSION AND DECISION

An appellate court reviews the Review Board's findings of basic fact under a "substantial evidence" standard of review. *McClain v. Review Bd. of the Indiana Department of Workforce Development*, 693 N.E.2d 1314, 1317 (Ind. 1998); Ind. Code § 22-4-17-12(a). Under this standard, we neither reweigh the evidence nor assess the credibility of witnesses; and we consider only the evidence most favorable to the Board's findings. *Id.* We will reverse if there is no substantial evidence to support the findings. *Id.*

The Board's determination of ultimate facts involves "an inference or deduction based upon the findings of fact." *Id.* Questions of ultimate fact are essentially mixed questions of law and fact. *Id.* at 1318. The ultimate facts are typically reviewed to ensure that the Board's inference is "reasonable." *Id.* The Board's deduction 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.* In sum, we evaluate the Board's findings regarding basic facts for "substantial evidence," its ultimate facts for "reasonableness," and its conclusions of law for "correctness." *Id.* The amount of deference the reviewing court gives to the Board turns on whether the issue is one within the Board's particular expertise. *Id.*

When an employee is alleged to have been discharged for just cause, the employer bears the burden of proof to establish a prima facie showing. *Hehr v. Review Bd. of the Indiana Employment Security Division*, 534 N.E.2d 1122, 1124 (Ind. Ct. App. 1989). The burden does not shift to the employee until the employer meets its burden. *Id.*

Here, Baumberger allegedly was discharged for just cause, which is defined in pertinent part as a "knowing violation of a reasonable and uniformly enforced rule of an employer." Ind. Code § 22-4-15-1(d)(2). Baumberger challenges the determination that he "knowingly" violated Best Buy's employee discount policy. To have "knowingly" violated an employer's rule, an employee must have known of the rule and have known that his conduct violated the rule. *Stanrail Corp. v. Review Bd. of the Department of*

*Workforce Development*, 735 N.E.2d 1197, 1203 (Ind. Ct. App. 2000), *trans. denied*.

Misconduct that will justify discharge of an employee so as to make the employee ineligible for unemployment compensation is the “wanton or willful disregard of the employer’s interests, a deliberate violation of the employer’s rule, or wrongful intent.”

*Id.*

At the hearing, Joshua Gass, the Best Buy store manager who had informed Baumberger that he was discharged, was asked whether Baumberger “gave a statement in this case?” (Tr. at 11). Gass replied, “To the best of my knowledge [Baumberger] admitted that what happened had happened. However, he at the time seemed to have a misunderstood [sic] of the policy and was claimed [sic] that he was unaware that he, he couldn’t make a purchase just like what we had. . . .” *Id.* Gass further stated “it [the purchase] is the, the misunderstanding or the not knowing of what the, what the actual policy is.” *Id.* The statement to which the questioner and Gass were referring also indicates Baumberger’s misunderstanding of the policy.

The Board, through the agency of the ALJ, made justifiable findings and conclusions regarding the existence and reasonableness of the rule, the uniform enforcement of the rule, and Baumberger’s knowledge of the rule’s existence. However, the Board erroneously concluded as a matter of law that Baumberger “knowingly violated the rule.” As illustrated by Best Buy’s evidence, there was no basis for this conclusion of law. Accordingly, the Board erred in concluding that Baumberger was discharged for just cause.

Reversed and remanded for reinstatement of Baumberger's benefits.

BAKER, C.J., and BARNES, J., concur.