IN THE SUPREME COURT OF THE STATE OF NEVADA

THOMAS P. FLYNN,
Appellant,
vs.
NEVADA EMPLOYMENT SECURITY DEPARTMENT; STATE OF NEVADA; STANLEY P. JONES, IN HIS CAPACITY AS EXECUTIVE DIRECTOR OF THE NEVADA EMPLOYMENT SECURITY DEPARTMENT; LINDA K. LEE, IN HER CAPACITY AS CHAIRWOMAN OF THE NEVADA SECURITY DEPARTMENT BOARD OF REVIEW; AND ATC/VANCOM,
Respondents.

No. 47052

FILED

APR 09 2007

JANETTE M. BLOOM
CLERK OF SUPREME COURT
BY
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is a proper person appeal from a district court order denying a petition for judicial review in an unemployment benefits matter. Eighth Judicial District Court, Clark County; Sally L. Loehrer, Judge.

In reviewing an appeal from a district court order denying a petition for judicial review of an administrative decision, we, like the district court, examine the administrative decision for clear error or

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arbitrary abuse of discretion.[1] As the Board of Review adopted the appeals referee's findings, we examine the appeals referee's decision on appeal. The appeals referee's decision will not be disturbed if it is legally sound and supported by substantial evidence.[2] Further, this court may not substitute its judgment for that of the appeals referee as to credibility determinations or the weight of the evidence.[3] While purely legal questions may be decided without deference to the appeals referee's determination, the appeals referee's conclusions of law with regard to whether a person is entitled to unemployment compensation, which will necessarily be closely related to her view of the facts, are entitled to deference; thus, we may not disturb those fact-based conclusions if they are supported by substantial evidence.[4] Our review is limited to the record.[5]

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[1]Construction Indus. v. Chalue, 119 Nev. 348, 352, 74 P.3d 595, 597 (2003); see also Clark County Sch. Dist. v. Bundley, 122 Nev. ___, ___, 148 P.3d 750, 754 (2006).

[2]Ayala v. Caesars Palace, 119 Nev. 232, 235, 71 P.3d 490, 491-92 (2003); see also Bundley, 122 Nev. at ___, 148 P.3d at 754.

[3]Chalue, 119 Nev. at 352, 354, 74 P.3d at 597, 598 (citing United Exposition Service Co. v. SIIS, 109 Nev. 421, 425, 851 P.2d 423, 425 (1993)); see also Bundley, 122 Nev. at ___, 148 P.3d at 754; NRS 612.530(4).

[4]Bundley, 122 Nev. at ___, 148 P.3d at 754.

[5]Ayala, 119 Nev. at 235, 71 P.3d at 491; Carson Ready Mix v. First Nat'l Bk., 97 Nev. 474, 635 P.2d 276 (1981).

Under NRS 612.385, a former employee is disqualified from receiving unemployment benefits if the employer shows that the employee's discharge was related to misconduct at work, and that showing is not rebutted by the employee.[6] Disqualifying misconduct occurs when an employee (1) deliberately and unjustifiably violates or disregards a reasonable employment policy or standard, or (2) otherwise acts in such a careless or negligent manner as to "show a substantial disregard of the employer's interests or the employee's duties and obligations to his employer."[7] Generally, if the circumstances indicate that the employee was absent from work and the absences were unapproved and unjustified, or that the absences were unreasonably not accompanied by the appropriate notice, the absences or lack of notice will constitute misconduct for unemployment compensation purposes.[8]

Here, the appeals referee heard the testimony of both appellant Thomas B. Flynn and his former supervisor, who represented the employer, respondent ATC/Vancom. The supervisor testified that, according to company records, Flynn left work early on January 12, 2005, failed to report to work from January 13 through his termination date—

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[6]Bundley, 122 Nev. at ___, ___, 148 P.3d at 754, 756.

[7]Id. at ___, 148 P.3d at 755 (quoting Kolnik v. State, Emp. Sec. Dep't, 112 Nev. 11, 15, 908 P.2d 726, 729 (1996) (internal quotations omitted); see also State, Emp. Sec. Dep't v. Holmes, 112 Nev. 275, 282, 914 P.2d 611, 616 (1996) (recognizing that the repetition of acts may show willfulness).

[8]See Bundley, 122 Nev. at ___, 148 P.3d at 757-58; Kraft v. Nev. Emp. Sec. Dep't, 102 Nev. 191, 194, 717 P.2d 583, 585 (1986).

January 28, 2005, and failed to call in to report his absences from January 15 through January 28, 2005. She averred that, under company policy, even reported emergency absences are deemed unauthorized when the employee fails to later return and submit certain forms, presumably pertaining to the absence; accordingly, Flynn was discharged because he had accumulated three unauthorized absences, on January 12, 13, and 14, and did not report to work thereafter.

Although Flynn disputed the supervisor's testimony that he had not called in to report his absences on January 13 through 22, he conceded that he was not entirely certain that he had called on those days; in any case, he admitted that he had not called to report his absences after January 22. Flynn also testified as to his reasons for not working on those days, when he was scheduled to do so, which primarily related to his belief that by working, he would be waiving his right to challenge a one-dollar per hour paycut and his unanswered request for a union hearing.

The appeals referee essentially determined that, by showing that Flynn had accumulated unauthorized absences and failed to call in to report his absences, ATC/Vancom had demonstrated misconduct. The appeals referee then noted Flynn's reasons for his conduct and determined that Flynn had not rebutted ATC/Vancom's misconduct showing by demonstrating that his absences and failures to call in were approved, reasonable, or otherwise justified. As we may not reweigh the evidence and the appeals referee's conclusions are supported by substantial

evidence, they are entitled to deference. Accordingly, the district court's order denying judicial review is affirmed.[9]

It is so ORDERED.

Parraguirre, J.

Hardesty, J.

Douglas, J.

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[9]We have considered the arguments raised in Flynn's district court opening brief and his proper person appeal statement, including that the district court reviewed items outside the official record and refused to act on allegations of perjury, that the matter should have been arbitrated due to an alleged conflict of interest involving the Board of Review and ATC/Vancom, that Flynn acted in good faith and without any element of wrongfulness, and that Flynn was not permitted to present his full case because someone told him that he had nothing to worry about. We conclude that these arguments do not warrant reversal, however, as we have examined the appeals referee's decision, which the Board of Review simply adopted, and determined that it is supported by substantial evidence, even based on Flynn's testimony alone. Further, we note that the Nevada Department of Employment, Training and Rehabilitation's notice of hearing, mailed to Flynn on May 5, 2005, informed him that the hearing would be Flynn's only opportunity to present testimony, witnesses, and documentation supporting his case.

cc: Hon. Sally L. Loehrer, District Judge
Thomas P. Flynn
Kummer Kaempfer Bonner Renshaw & Ferrario/Carson City
Santoro, Driggs, Walch, Kearney, Johnson & Thompson
Eighth District Court Clerk