

IN THE SUPREME COURT OF THE STATE OF NEVADA

MARK LA BIANCA,
Appellant,

vs.

NEVADA DEPARTMENT OF
EMPLOYMENT, TRAINING AND
REHABILITATION, EMPLOYMENT
SECURITY DIVISION,
Respondent.

No. 54761

FILED

SEP 28 2010

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY S. Young
DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order denying a petition for judicial review in an unemployment benefits action. Second Judicial District Court, Washoe County; Connie J. Steinheimer, Judge.

Appellant Mark La Bianca challenges an administrative decision by respondent denying him unemployment benefits. Specifically, benefits were denied after respondent concluded that the termination of appellant's employment as a bartender at a casino, based on an alleged sexual harassment policy violation that occurred when appellant attempted to slap a co-worker on the buttocks as she walked by was a discharge for misconduct, as set forth in NRS 612.385.


On appeal, La Bianca argues that the administrative decision is arbitrary and capricious and not supported by substantial evidence because an act intended to be a playful encouragement to resume work has been misconstrued. He contends that this is demonstrated by the fact that, among other things, he was friends with the co-worker, she was not


offended by the exchange, and that he never actually touched the co-worker's buttocks. According to La Bianca, these factors, in addition to his accompanying remark "Go get 'em Speedy" indicate the nonsexual nature of the incident. Respondent disagrees, arguing, among other things, that the attitude that such conduct is permissible can lead to a hostile work environment.

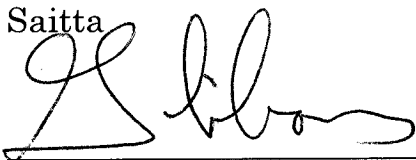
Under NRS 612.385, a person is ineligible for unemployment benefits if he or she is discharged from his or her employment for "misconduct connected with the person's work." NRS 612.385 provides that misconduct "occurs when an employee deliberately and unjustifiably violates or disregards [his or] her employer's reasonable policy or standard, or 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 or her] employer.'" Clark County Sch. Dist. v. Bundley, 122 Nev. 1440, 1445-46, 148 P.3d 750, 754-55 (2006) (footnote omitted) (quoting Kolnik v. State, Emp. Sec. Dep't, 112 Nev. 11, 15, 908 P.2d 726, 729 (1996); see also Barnum v. Williams, 84 Nev. 37, 41, 436 P.2d 219, 222 (1968) (quoting with approval an administrative agency definition of misconduct excluding "[m]ere inefficiency or failure of performance because of inability or incapacity, ordinary negligence in isolated instances, or good faith errors in judgment or discretion"). The administrative board's determination of whether acts constitute misconduct is a fact-based question of law entitled to deference from this court. Bundley, 122 Nev. at 1446, 148 P.3d at 755. Having reviewed the parties' briefing and La Bianca's appendix and considered La Bianca's arguments in light of this deferential standard, we conclude that the

district court properly denied his petition for judicial review, and thus, we affirm that decision.

It is so ORDERED.


_____, J.
Cherry


_____, J.
Saitta


_____, J.
Gibbons

cc: Hon. Connie J. Steinheimer, District Judge
Nicholas F. Frey, Settlement Judge
Timothy P. Post
John Thomas Susich
Washoe District Court Clerk