IN THE SUPREME COURT OF THE STATE OF NEVADA

OTIS BARDLEY,
Appellant,
vs.
EMPLOYMENT SECURITY DIVISION, STATE OF NEVADA, CYNTHIA JONES, IN HER CAPACITY AS ADMINISTRATOR OF THE EMPLOYMENT SECURITY DIVISION AND CAROL STEWART, IN HER CAPACITY AS CHAIRPERSON OF THE EMPLOYMENT SECURITY DIVISION BOARD OF REVIEW,
Respondents.

No. 55254

ORDER OF AFFIRMANCE

Appeal from a district court order denying petition for judicial review of a denial of unemployment benefits. Eighth Judicial District Court, Clark County; Michelle Leavitt, Judge.

I.

Otis Bardley had a beer at the Green Valley Ranch Resort, Spa & Casino less than an hour before he was to begin a shift as a porter there. A fellow employee saw Bardley drinking and reported this to Bardley's supervisor. After Bardley clocked in for work, the supervisor asked him to take a blood alcohol test. Bardley's blood alcohol content tested at .02. He was suspended and, ultimately, discharged.

Bardley sought unemployment benefits but was denied them by respondent Employment Security Division of the Nevada Department of Employment, Training, and Rehabilitation ("ESD"). It found that the firing was prompted by Bardley's misconduct—failing a toxicology test during his shift. See NRS 612.385. Bardley appealed to the division's

Appeals Tribunal and a full evidentiary hearing was held before a referee. His main argument was that he was not aware of the policy that led to his termination.

The referee found that Bardley had consumed alcohol on the premises before his shift; his failing the toxicology test, she concluded, violated company policy and constituted misconduct. Regarding Bardley's claim of ignorance she found that Bardley had not received Green Valley Ranch's full alcohol-free workplace policy as detailed in the employee manual. However, she concluded that an excerpt from the employee manual given to Bardley as part of his employment packet clearly indicated that management had the right to "use various methods to determine compliance with its substance abuse-free workplace policy," including toxicology tests for alcohol use. Thus, the referee affirmed the ESD's denial of benefits. Bardley appealed to the Board of Review, which summarily affirmed the Appeals Tribunal's decision. NRS 612.515. Thereafter, Bardley petitioned the district court for judicial review of the matter, a plea which was denied. Bardley appeals the district court's order denying his petition for judicial review.

II.

"When a party challenges a district court's decision to deny a petition for judicial review of an administrative agency's determination, our function, which is identical to that of the district court, is to review the evidence presented to the agency and ascertain whether the agency abused its discretion by acting arbitrarily or capriciously." Father & Sons v. Transp. Servs. Auth., 124 Nev. 254, 259, 182 P.3d 100, 103 (2008) (citing Gandy v. State ex rel. Div. Investigation, 96 Nev. 281, 282, 607 P.2d 581, 582 (1980)).

"[E]ven though we review de novo any questions purely of law, the Board's fact-based legal conclusions with regard to whether a person is entitled to unemployment compensation are entitled to deference." Clark County Sch. Dist. v. Bundley, 122 Nev. 1440, 1445, 148 P.3d 750, 754 (2006). Notably,

> [w]hen analyzing the concept of misconduct, the trier of fact must consider the legal definition in context with the factual circumstances surrounding the conduct at issue. Misconduct then becomes a mixed question of law and fact. Findings of misconduct must be given deference similar to findings of fact, when supported by substantial evidence . . . .

Garman v. State, Employment Security Dep't, 102 Nev. 563, 565, 729 P.2d 1335, 1336 (1986) (internal citations omitted).

"Disqualifying misconduct occurs when an employee deliberately and unjustifiably violates or disregards her employer's reasonable policy or standard . . . ." Bundley, 122 Nev. at 1445-46, 148 P.3d at 754. "'Carelessness or negligence on the part of the employee of such a degree as to show a substantial disregard of the employer's interests or the employee's duties and obligations to his employer are also considered misconduct connected with the work.'" Kolnik v. State, Emp. Sec. Dep't, 112 Nev. 11, 15, 908 P.2d 726, 729 (1996) quoting Barnum v. Williams, 84 Nev. 37, 41, 436 P.2d 219, 222 (1968). "Mere inefficiency or failure of performance because of inability or incapacity, ordinary negligence in isolated instances, or good faith errors in judgment or discretion are excluded in the definition of misconduct." Barnum v. Williams, 84 Nev. 37, 41, 436 P.2d 219, 222 (1968). And to constitute misconduct sufficient to prevent the employee from receiving unemployment benefits, the misconduct "must have an element of

wrongfulness." Garman, 102 Nev. at 565, 729 P.2d at 1336; Lellis v. Archie, 89 Nev. 550, 553, 516 P.2d 469, 471 (1973) (concluding that "objection to the change of [work] stations by [claimant] lack[ed] any element of wrongfulness").

III.

Bardley accedes to the referee's factual findings. But he draws a distinction between substance abuse—which he knew was prohibited—and alcohol use. He claims ignorance of the policy, which was delineated in the full employee manual, that unauthorized use of alcohol on the employer's premises was prohibited. Furthermore, according to Bardley, testing at .02 reveals only alcohol use and not abuse. Thus, the argument goes, without knowing of the prohibition he could not deliberately violate it and, therefore, did not engage in misconduct.

The referee's findings defeat Bardley's position. The standard employment packet Bardley received warned that Green Valley Ranch could perform drug and alcohol testing on its employees to deter substance abuse, including use of alcohol on the premises. It also directed him to the full alcohol policy, which explicitly prohibited the unauthorized use of alcohol and working under the influence of alcohol. We conclude that the referee properly applied the law of misconduct and the record contains substantial evidence to justify her findings; she did not act arbitrarily and capriciously. Under these circumstances, our courts will not disturb the administrative body's conclusions. Bundley, 122 Nev. at 1444-1445, 148 P.3d at 754.

We have carefully considered all of Bardley's arguments[1] and determined that the district court correctly denied Bardley's petition for judicial review.

ORDER the judgment of the district court AFFIRMED.

_____, J.
Cherry

_____, J.
Gibbons

_____, J.
Pickering

cc: Hon. Michelle Leavitt, District Judge
William F. Buchanan, Settlement Judge
Nevada Legal Services/Las Vegas
State of Nevada/DETR
Eighth District Court Clerk

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[1]One of which is that the policy did not bear a reasonable relationship to the work performed. See Clevenger v. Employment Security Dep't, 105 Nev. 145, 150, 770 P.2d 866, 868 (1989) ("When off-the-job conduct violates an employer's rule or policy . . . an analysis must be made to determine if the employer's rule or policy has a reasonable relationship to the work to be performed . . . ."). The stated purposes of the policy were to protect guests and employees, and preserve the company's business and reputation, among other things. As Bardley's employment required contact with guests it is quite clear that the policy bears a reasonable relationship to the work performed.