IN THE SUPREME COURT OF THE STATE OF NEVADA

JAMES MORGAN,
Appellant,
vs.
EMPLOYMENT SECURITY DIVISION, STATE OF NEVADA; CYNTHIA JONES, IN HER CAPACITY AS ADMINISTRATOR OF THE EMPLOYMENT SECURITY DIVISION; KATIE JOHNSON, IN HER CAPACITY AS CHAIRPERSON OF THE EMPLOYMENT SECURITY DIVISION BOARD OF REVIEW; AND INTERSTATE MANAGEMENT CO., LLC, AS EMPLOYER,
Respondents.

No. 59840

FILED

DEC 14 2012

TRACIE K. LINDEMAN
CLERK OF SUPREME COURT
BY D. Malone
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 action. Eighth Judicial District Court, Clark County; Kathy A. Hardcastle, Judge.

Appellant was an employee of respondent Interstate Management Co., LLC operating as Renaissance Las Vegas Hotel, where he worked as a banquet set-up houseperson. His employment was terminated after he failed to show up for work without calling and informing his employer that he would be unable to work a scheduled shift. Thereafter, appellant filed a claim for unemployment benefits, which respondent State of Nevada Employment Security Division denied. Specifically, the appeals referee found that appellant's repeated failure to follow the employer's attendance policy demonstrated an element of wrongfulness and constituted misconduct that warranted appellant's disqualification from unemployment benefits. The Employment Security Division's Board of Review affirmed the appeals referee's determination, and appellant filed a petition for judicial review in the district court. The

district court denied the petition, and this appeal followed. On appeal, appellant argues, among other things, that the appeals referee incorrectly found that his termination was for misconduct so that he was disqualified from receiving unemployment benefits.

In reviewing an administrative decision in an unemployment benefits matter, this court, like the district court, determines whether the board acted arbitrarily or capriciously. NRS 233B.135(3)(f); McCracken v. Fancy, 98 Nev. 30, 31, 639 P.2d 552, 553 (1982). This court may decide pure issues of law without giving deference to the agency's determination, but mixed questions of law and fact are entitled to deference and the agency's conclusions will not be disturbed if they are supported by substantial evidence. See Kolnik v. State, Emp. Sec. Dep't, 112 Nev. 11, 16, 908 P.2d 726, 729 (1996); see also Leeson v. Basic Refractories, 101 Nev. 384, 385-86, 705 P.2d 137, 138 (1985). "Substantial evidence is that which a reasonable mind could find adequate to support a conclusion." Kolnik, 112 Nev. at 16, 908 P.2d at 729. Further, this court's review is limited to the record below. NRS 233B.135(1)(b); McCracken, 98 Nev. at 31, 639 P.2d at 553.

Under NRS 612.385, if a person was discharged from work for "misconduct," he or she is ineligible for unemployment benefits. A willful violation of duties or disregard for an employer's interests may constitute such misconduct. Employment Sec. Dep't v. Verrati, 104 Nev. 302, 304, 756 P.2d 1196, 1197-98 (1988) (defining misconduct as a "deliberate violation or a disregard" of reasonable standards of behavior, or carelessness or negligence showing a substantial disregard of the employee's duties).

Having reviewed appellant's arguments and the record on appeal, we conclude that substantial evidence supports the finding that

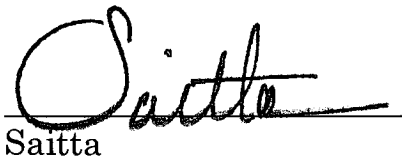
appellant was discharged for reasons constituting misconduct that disqualified him from receiving unemployment benefits under NRS 612.385. The record reveals that appellant failed to work his scheduled shift on October 9, 2010, and did not inform his employer of this absence in accordance with the employer's attendance policy. Although appellant asserts that he attempted to contact his employer but could not reach anyone because of a problem with the telephone system, the appeals referee determined that appellant had "several options for notifying the employer of impending absences," and that it was "virtually impossible to be unable to reach someone personally," as required by the employer's attendance policy. This is a fact-based determination that this court gives deference to on appeal. See Lellis v. Archie, 89 Nev. 550, 554, 516 P.2d 469, 471 (1973) (recognizing that this court will not substitute its judgment for that of the referee on issues of credibility or the weight of the evidence).

The record also supports the appeals referee's finding that appellant had violated the employer's attendance policy on numerous other occasions, and had received three written warnings regarding failure to comply with the attendance policy since May 2010, and appellant does not dispute this finding. This court has recognized that an employee's absence constitutes misconduct under NRS 612.385 when the "circumstances indicate that the absence was taken in willful violation or disregard of a reasonable employment policy . . . or lacked the appropriate accompanying notice." Clark County Sch. Dist. v. Bundley, 122 Nev. 1440, 1446, 148 P.3d 750, 755 (2006); see also Nevada Emp. Sec. Dept. v. Nacheff, 104 Nev. 347, 349, 757 P.2d 787, 788 (1988) (concluding that an employee's absence from work for two consecutive days without notifying or attempting to notify the employer in advance constituted misconduct

under NRS 612.385); Kraft v. Nev. Emp. Sec. Dep't, 102 Nev. 191, 194, 717 P.2d 583, 585 (1986) (noting that an employee commits misconduct disqualifying the employee from receiving unemployment benefits if the employee unreasonably fails to give the employer notice of anticipated absences or tardiness).

Based on these determinations, we conclude that substantial evidence in the record supports the appeals referee's ruling that appellant's conduct constituted misconduct under NRS 612.385 and thereby disqualified him from receiving unemployment benefits. See Kolnik, 112 Nev. at 16, 908 P.2d at 729 (explaining that whether an employee's negligence constituted willful misconduct is a question of law, but when the agency's conclusion of law is closely related to the facts, it is entitled to deference if it is supported by substantial evidence). Accordingly, we conclude that the board's decision to affirm the appeals referee's ruling was not arbitrary or capricious, and thus we affirm the district court's denial of appellant's petition for judicial review.

It is so ORDERED.[1]



_____, J.
Saitta

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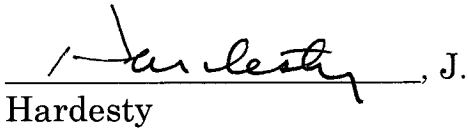

_____, J.
Hardesty

[1]Having considered appellant's remaining arguments, we conclude that they lack merit.

cc: Department 4, Eighth Judicial District Court
James Morgan
State of Nevada/DETR
Eighth District Court Clerk