

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

EMPLOYMENT SECURITY DIVISION,  
 STATE OF NEVADA; RENEE OLSON,  
 IN HER CAPACITY AS  
 ADMINISTATOR OF THE  
 EMPLOYMENT SECURITY DIVISION;  
 AND KATIE JOHNSON, IN HER  
 CAPACITY AS CHAIRPERSON OF THE  
 EMPLOYMENT SECURITY DIVISION,  
 Appellants,  
 vs.  
 ALBERTO RAMIREZ,  
 Respondent.

No. 65544

FILED

APR 13 2015

TRACIE K. LINDEMAN  
 CLERK OF SUPREME COURT  
 BY *[Signature]*  
 DEPUTY CLERK

ORDER OF AFFIRMANCE

This is an appeal from a district court order reversing an appeals referee's decision to uphold the denial of unemployment benefits. Eighth Judicial District Court, Clark County; Kenneth C. Cory, Judge.

SOS Security, LLC employed respondent Alberto Ramirez until his discharge on April 26, 2013. On April 10, 2013, Ramirez was arrested for driving under the influence of intoxicating liquor and driving on a suspended license. Once incarcerated, Ramirez attempted to call SOS from jail to notify his supervisor that he would be absent from work the following day. However, because SOS did not accept collect calls, Ramirez did not speak to his supervisor as only collect calls were allowed from the detention center. Ramirez then called his mother and asked her to call SOS on his behalf to notify his supervisor of his inability to report to work.

Ramirez's mother called SOS the same day and notified SOS that Ramirez would not report to work for two days because he was sick. On April 11, 2013, Ramirez's mother again called SOS to notify it that

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Ramirez would not report to work for the rest of the week and through the weekend because he was sick. On April 13, 2013, Ramirez's mother called SOS a final time confirming Ramirez's illness and inability to report to work for the rest of the week and weekend. During each conversation, SOS informed Ramirez's mother that per SOS policy, it needed to speak directly with Ramirez. The mother responded that Ramirez could not come to the phone and also told SOS that he had lost his cell phone.

Ramirez was released from custody on April 16, 2013. Ramirez reported to work the next day and informed his supervisor that he missed work because he was incarcerated. The supervisor suspended Ramirez pending an investigation; ultimately, SOS discharged Ramirez for misconduct for not following the call-in procedure that required Ramirez to report any absence himself, unless physically unable. Thereafter, Ramirez initiated a claim for unemployment benefits effective April 21, 2013, through appellant, the Employment Security Division (ESD). ESD denied Ramirez's claim, citing Ramirez's violation of SOS's call-in procedure, and Ramirez appealed the denial to an appeals referee.

The appeals referee conducted a hearing and upheld ESD's denial of unemployment benefits. Specifically, the appeals referee determined that Ramirez's conduct constituted misconduct because his mother lied about the reason Ramirez was unable to report to work. In addition, the appeals referee found that Ramirez's criminal conduct was connected to his inability to report to work because he was incarcerated. The appeals referee relied on Ramirez's alleged admission of guilt in the hearing to make the findings. Ramirez filed an appeal with the board of review, which declined to review of the case. Ramirez then filed an appeal with the district court. The district court summarily reversed the appeals referee citing legal error. ESD now appeals the district court's decision.

Like the district court, this court reviews administrative decisions in unemployment benefits matters to determine whether the administrative agency acted arbitrarily or capriciously or committed any legal error. NRS 233B.135(3); *see also McCracken v. Fancy*, 98 Nev. 30, 31, 639 P.2d 552, 553 (1982). This court is not required to give deference to administrative determinations regarding pure issues of law; however, mixed issues of law and fact are given deference and will not be disturbed if supported by substantial evidence. *See Kolnik v. Nev. Emp't 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). ESD's main contention is that the appeals referee's conclusion finding misconduct was correct and therefore the district court erred in finding that the appeals referee committed legal error. We disagree with ESD.

An employee is ineligible for unemployment benefits if: (1) the employee's actions are connected to work; and (2) the employee's actions constitute misconduct. NRS 612.385. The analysis of whether misconduct disqualifies an employee from obtaining unemployment benefits is separate from the analysis regarding termination, and requires the trier of fact to apply the legal definition of misconduct to the factual circumstances of the case. *Clark Cnty. Sch. Dist. v. Bundley*, 122 Nev. 1440, 1446, 148 P.3d 750, 755 (2006). Misconduct is defined as a "deliberate violation or disregard on the part of the employee of standards of behavior which his employer has the right to expect." *Barnum v. Williams*, 84 Nev. 37, 41, 436 P.2d 219, 222 (1968). Further, the misconduct requires some degree of wrongfulness. *Kolnik* at 16, 908 P.2d at 729.

First, we review the record to determine whether Ramirez's conduct was connected to his work. The Nevada Supreme Court has held that in addressing unemployment benefits, criminal conduct does not per

se constitute misconduct. *State, Emp't Sec. Dept. v. Evans*, 111 Nev. 1118, 1119-20, 901 P.2d 156, 156 (1995). In *Evans*, respondent Marilyn R. Evans was arrested on charges unrelated to her work and remained incarcerated for over three months due to her inability to obtain bail. *Id.* at 1119-20, 901 P.2d at 156. The court found no connection between Evans' criminal conduct, or her incarceration, and her work. *Id.* at 1119, 901 P.2d at 157. Further, Evans' conduct did not amount to misconduct because she dutifully notified her employer of her incarceration. *Id.* at 1119, 901 P.2d at 157.

Here, the appeals referee found a connection between Ramirez's criminal conduct and his work based on his incarceration. According to the decision of the court in *Evans*, however, neither Ramirez's criminal conduct, nor his resulting incarceration, without more, can create the necessary connection to his work to constitute misconduct. To conclude otherwise is legal error, as the district court found.<sup>1</sup>

Failure to provide a reason for an absence constitutes misconduct only if an employer has a policy requiring that a reason be given. *See, Broome v. Miss. Emp't Sec. Com'n*, 921 So.2d 334, 338 (Miss. 2006) (it was misconduct for an employee to have his girlfriend call the employer and provide a false reason for his absence since the employer had a policy requiring that the reason be stated); *see also Barnett v. Miss.*

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<sup>1</sup>ESD also contends that Nevada law follows other jurisdictions in denying unemployment benefits based on criminal conduct. ESD cites to fifteen cases to support this assertion; however, nine of the cases address situations where the employer determined that the employee voluntarily quit, while only six cases address misconduct. These six cases represent the split in jurisdictions that do not follow *Evans*. We cannot overrule *Evans* as the Court of Appeals must follow the precedents of the Nevada Supreme Court. *See People v. Solorzano*, 63 Cal. Rptr. 3d 659, 664 (2007), *as modified* (Aug. 15, 2007).

*Emp't Sec. Com'n*, 583 So.2d 193, 196 (Miss. 1991). Initially, the burden of proving misconduct is on the employer. *Bundley*, at 1448, 148 P.3d at 756. The appeals referee, relying on SOS's call-in policy, concluded that Ramirez's conduct was misconduct because Ramirez's mother, acting as Ramirez's authorized agent, falsified the reason for Ramirez's absence.<sup>2</sup> The policy states that "[u]nless physically unable to notify your supervisor of an illness or absence, all call-ins must be made by the employee."

Unlike in *Broome* and *Barnett*, however, SOS does not require the employee to give the reason for the absence. Ramirez was unable to contact SOS because SOS does not accept collect calls. SOS's policy allows for third parties to notify it of absences, and does not require that a reason be given for the absence.<sup>3</sup> Therefore, the appeals referee's conclusion that Ramirez's mother's false statements constituted misconduct is not supported by substantial evidence because notice was given and the purported reason for the absence was immaterial.<sup>4</sup>

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<sup>2</sup>Because we conclude that Ramirez's conduct was not misconduct as there was no connection shown to his work, we do not address the issue of whether Ramirez's mother's actions of providing false information were within the scope of the agency relationship.

<sup>3</sup>An employee's absence without authorization is detrimental to his employer because it affects the manner in which the employer can operate efficiently. *Bundley*, at 1450, 148 P.3d at 757 (2006). Here, because Ramirez was unable to personally notify SOS, and he adequately notified it of the absence in advance through his mother, the employer had time to make accommodations for the absence.


<sup>4</sup>The appeals referee relied on two conclusions in rendering the decision: (1) admitted guilt of the criminal conduct (although Ramirez claims his statement was misinterpreted by the referee); and (2) falsifying the reason for the absence. First, guilt of criminal conduct is not per se misconduct. Second, the referee characterized the notice to the employer from the mother as *attempted* notice; but this was actual notice that also contained unnecessary information about the reason for his absence. The

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It was therefore legal error for the appeals referee to conclude that Ramirez's alleged criminal conduct and incarceration was connected to his work. Further, the appeals referee's conclusion that Ramirez's mother's false statements constituted misconduct is also legal error. We therefore,

ORDER the judgment of the district court AFFIRMED.

  
\_\_\_\_\_, C.J.  
Gibbons

  
\_\_\_\_\_, J.  
Tao

  
\_\_\_\_\_, J.  
Silver

cc: Hon. Kenneth C. Cory, District Judge  
Janet Trost, Settlement Judge  
State of Nevada/DETR  
Nevada Legal Services/Las Vegas  
Eighth District Court Clerk

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call from the jail was the attempted notice. Ramirez himself provided accurate information to SOS upon his return to work.