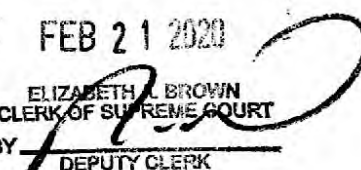


IN THE COURT OF APPEALS OF THE STATE OF NEVADA

MICHELLE ANNETTE VIDAL,
Appellant,
vs.
EMPLOYMENT SECURITY DIVISION,
STATE OF NEVADA; RENEE OLSON,
IN HER CAPACITY AS
ADMINISTRATOR OF THE
EMPLOYMENT SECURITY DIVISION;
AND J. THOMAS SUSICH IN HIS
CAPACITY AS CHAIRPERSON OF THE
EMPLOYMENT SECURITY DIVISION
BOARD OF REVIEW,
Respondents.

No. 78797-COA

FILED
FEB 21 2020
ELIZABETH L. BROWN
CLERK OF SUPREME COURT
BY 
DEPUTY CLERK

ORDER OF AFFIRMANCE

Michelle Annette Vidal appeals the district court's order denying her petition for judicial review of unemployment benefits under the provisions of NRS 612.385. Eighth Judicial District Court, Clark County; Tierra Danielle Jones, Judge.

Vidal was employed as a bartender in Las Vegas at Nevada Restaurant Services Inc., d/b/a Dotty's (hereinafter NRSI) from March 21, 2017 to May 4, 2018.¹ Vidal's duties included cleaning, attending to customers, selling cigarettes and drinks, stocking inventory, cooking, and receiving and taking inventory of shipments.

On May 1, 2018, Vidal received a shipment of cigarettes during her shift. Vidal did not immediately stock the shipment inside a secure counter, but instead, placed the cigarettes behind the counter, unsecured. Vidal then left the cigarettes unprotected for approximately 90 minutes to

¹We do not recount the facts except as necessary for our disposition.

clean an area at the front of the casino. While Vidal was cleaning, 17 cigarette cartons were stolen from the unprotected location. Documents submitted by NRSI confirm that surveillance video shows Vidal's location near the front entrance at the time the theft occurred, although Vidal initially stated that she was cleaning a bathroom. Vidal reported the incident, was questioned by senior staff, and was suspended pending an investigation. On May 4, 2018, at the conclusion of an internal investigation, NRSI fired Vidal for failing to safeguard company property.

Vidal filed for unemployment benefits. The Employment Security Division's adjudicator denied Vidal's benefits because her conduct was classified as "misconduct" which disqualified Vidal from receiving benefits as stated under NRS 612.385. Vidal appealed the denial of benefits, and was granted a hearing. The appeals referee found Vidal ineligible for unemployment benefits pursuant to NRS 612.385 for misconduct because he determined that Vidal "demonstrated a deliberate violation and disregard of the employer's reasonable standards of conduct." The appeals referee also determined that this "conduct contained the element of wrongfulness" and that the "disqualifying misconduct connected with the work had been established."

Vidal appealed the referee's decision to the Employment Security Division Board of Review. The board unanimously declined further review, thus affirming the decision of the appeals referee. Vidal filed her petition for judicial review, which was denied. This appeal followed.

On appeal, Vidal argues that there was no carelessness or negligence on her part demonstrating a substantial disregard of her duties as an employee of NRSI. Vidal further argues that this was an isolated incident in which a good faith error in judgment occurred, thereby excluding her actions from misconduct, and denial of benefits under NRS 612.385.

Lastly, Vidal argues that the appeals referee was mistaken in his finding that she was outside at the time of the theft. We disagree.

This court reviews a decision denying unemployment benefits to determine whether the administrative agency acted arbitrarily or capriciously. See *McCracken v. Fancy*, 98 Nev. 30, 31, 639 P.2d 552, 553 (1982). Generally, this court looks to whether substantial evidence supports the agency's decision. *Clark Cty. Sch. Dist. v. Bundley*, 122 Nev. 1440, 1445, 148 P.3d 750, 754, (2006). We review questions of law de novo, but fact-based legal conclusions are entitled to deference. *Id.* "Substantial evidence is that which a reasonable mind might accept as adequate to support a conclusion." *United Exposition Serv. Co. v. State Indus. Ins. Sys.*, 109 Nev. 421, 424, 851 P.2d 423, 424-25 (1993).

Under NRS 612.385, a person discharged "for misconduct connected with the person's work" is ineligible for unemployment compensation. The Nevada Supreme Court has defined "[m]isconduct" as "unlawful, dishonest or improper behavior." *State, Emp't Sec. Div. v. Murphy*, 132 Nev. 202, 207, 371 P.3d 991, 994 (2016). It has further stated:

Disqualifying misconduct occurs when an employee deliberately or unjustifiably violates or disregards 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 [her] employer. As we have previously suggested, because disqualifying misconduct must involve an element of wrongfulness, an employee's termination, even if based on misconduct, does not necessarily require disqualification under the unemployment compensation law.

Bundley, 122 Nev. at 1445-56, 148 P.3d at 754-55 (footnotes and internal quotations omitted). The determination of whether an employee's actions

constituted disqualifying misconduct is a fact-based question of law entitled to deference. *Id.* at 1446, 148 P.3d at 755.

Initially the employer bears the burden of showing by a preponderance of the evidence that the employee engaged in disqualifying misconduct under NRS 612.385. *Id.* at 1448, 148 P.3d at 756. If the employer meets this burden, the burden then “shifts to the former employee to demonstrate that the conduct cannot be characterized as misconduct within the meaning of NRS 612.385, for example, by explaining the conduct and showing that it was reasonable and justified under the circumstances.” *Id.* at 1448, 148 P.3d at 756.

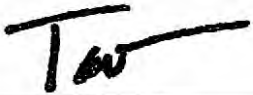
Here, although NRSI was not present at the hearing with the referee, it met its burden by submitting a written response to Vidal’s claim, which noted that surveillance recordings show that Vidal failed to safeguard company property. Additionally, NRSI presented emails that described Vidal’s location at the time of the theft. This evidence undermines Vidal’s argument that the appeals referee was mistaken regarding her location at the time of the theft and clearly established she was not where she said she was. Further, the appeals referee found that Vidal demonstrated a deliberate violation and disregard of the employer’s reasonable standards of conduct because she did not place the cigarettes in a protected area and left them unattended for a significant period, and thus, committed disqualifying misconduct evidencing wrongfulness. Therefore, the burden shifts to Vidal to show that her actions are not characterized as misconduct within the meaning of NRS 612.385.

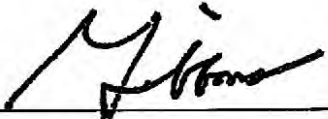
The record indicates that the appeals referee concluded that Vidal was outside near the front entrance at the time the theft occurred. Further, NRSI documents show that Vidal left the cigarettes unattended for 90 minutes during which time they were stolen. Vidal initially stated that


she was cleaning a restroom at the time of the incident, however according to NRSI emails, Vidal was cleaning near the front entrance. The appeals referee found that as an employee of NRSI, Vidal violated her basic duty to protect her employer's assets. While cleaning is a task that Vidal was employed to perform, the appeals referee determined that Vidal did not offer good cause for leaving the cigarettes unprotected, and that Vidal demonstrated a deliberate disregard of the employer's standards of conduct. NRSI also submitted its employee handbook, which required Vidal to "protect[] property from destruction, sabotage, theft or any other crime."

Substantial evidence supports the appeals referee's finding that Vidal demonstrated a deliberate violation of her duty to protect the employer's assets. The record supports the finding that Vidal offered no credible evidence to establish good cause for leaving the cigarettes unprotected. Further, the evidence that Vidal did present was refuted by surveillance video. Thus, the appeals officer could reasonably conclude Vidal failed to provide sufficient evidence to demonstrate that she left the cigarettes unattended with good cause. Therefore, she did not satisfy her burden of proving that she made a reasonable and good faith attempt to protect her employer's assets. Thus, the administrative agency's decision was not arbitrary, capricious or an abuse of discretion. Accordingly, we

ORDER the judgment of the district court AFFIRMED.


_____, J.
Tao


_____, C.J.
Gibbons


_____, J.
Bulla

cc: Hon. Tierra Danielle Jones, District Judge
Nevada Legal Services/Las Vegas
State of Nevada/DETR
Eighth District Court Clerk