

IN THE SUPREME COURT OF THE STATE OF NEVADA

DENISE CLARKE,  
Appellant,

vs.

PARK PLACE, D/B/A CAESARS  
PALACE; AND EMPLOYMENT  
SECURITY DIVISION OF THE  
NEVADA DEPARTMENT OF  
EMPLOYMENT, TRAINING AND  
REHABILITATION,  
Respondents.

No. 42299

**FILED**

MAR 27 2006

JANETTE M. BLOOM  
CLERK OF SUPREME COURT  
BY *J. Richards*  
CHIEF DEPUTY CLERK

ORDER OF AFFIRMANCE

This is a proper person appeal from a district court order denying a petition for judicial review of an administrative decision that denied unemployment benefits. Eighth Judicial District Court, Clark County; David Wall, Judge.

Appellant Denise Clarke challenges a decision of the Nevada Employment Security Division (NESD) Board of Review concluding that, because of Clarke's misconduct, she was not entitled to unemployment benefits. When reviewing an administrative decision, this court, like the district court, examines the evidence that was presented to the review board in order to ascertain whether that board acted arbitrarily or capriciously, thereby abusing its discretion.<sup>1</sup> While any pure questions of law are reviewed de novo, the administrative decision's fact-based legal

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<sup>1</sup>State, Emp. Sec. Dep't v. Holmes, 112 Nev. 275, 279, 914 P.2d 611, 614 (1996); see also NRS 233B.135(3).

conclusions are entitled to deference.<sup>2</sup> Thus, with regard to factual determinations, we review the record to determine whether those determinations are supported by substantial evidence.<sup>3</sup> Substantial evidence is evidence that a reasonable mind could find adequately supports a conclusion.<sup>4</sup> In no case may we substitute our judgment for that of the board as to the weight of the evidence.<sup>5</sup>

Under NRS 612.385, Clarke is prohibited from receiving unemployment benefits “if [she] was discharged from [her employment] for misconduct connected with [her] work.” For NRS 612.385 purposes, misconduct occurs when an employee deliberately violates or disregards “standards of behavior [that her] employer has the right to expect.”<sup>6</sup> Misconduct under the statute is described as something more than “ordinary negligence in isolated instances, or good faith errors in judgment or discretion.”<sup>7</sup> Carelessness and negligence may amount to misconduct, however, if the circumstances under which they are committed “show a substantial disregard of the employer’s interests or the employee’s duties

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<sup>2</sup>Kolnik v. State, Emp. Sec. Dep’t, 112 Nev. 11, 16, 908 P.2d 726, 729 (1996).

<sup>3</sup>Holmes, 112 Nev. at 279, 914 P.2d at 614; Kolnik, 112 Nev. at 16, 908 P.2d at 729.

<sup>4</sup>Kolnik, 112 Nev. at 16, 908 P.2d at 729.

<sup>5</sup>Holmes, 112 Nev. at 279, 914 P.2d at 614.

<sup>6</sup>Kolnik, 112 Nev. at 15, 908 P.2d at 728-29 (quoting Barnum v. Williams, 84 Nev. 37, 41, 436 P.2d 219, 222 (1968) (internal citations not identified)).

<sup>7</sup>Id. at 15, 908 P.2d at 729.

and obligations to [her] employer.”<sup>8</sup> Essentially, before unemployment benefits may be denied for misconduct, it must be shown that the act or acts leading to termination involved “an element of wrongfulness.”<sup>9</sup> Whether Clarke’s acts were of such a nature as to constitute misconduct is therefore a fact-based question of law, and the review board’s decision is entitled to deference.<sup>10</sup>

Before her employment was terminated, Clarke had worked for respondent Caesars Palace as a bartender since 1983. In October 2002, Clarke admittedly faced a substantial shortage in the amount of cash that she was supposed to turn over to Caesars Palace at the end of her shift. Clarke was accordingly suspended pending investigation of possible violations of Caesars Palace’s code of conduct,<sup>11</sup> and discharged a few days later. As a result, Clarke filed a grievance with her union, and the matter was eventually scheduled for arbitration.

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<sup>8</sup>Id.

<sup>9</sup>Id., at 15-16, 908 P.2d at 729.

<sup>10</sup>Id. at 16, 908 P.2d at 729.

<sup>11</sup>Clarke notes that, under Caesars Palace’s corrective action plan codes, she was not suspended for “misconduct” or “gross negligence,” but rather for “negligence,” “willful neglect,” “willful violation of policy and procedures,” and “cash overage/shortage.” In reviewing decisions under unemployment benefits law, however, alleged misconduct must be examined in light of the definition given to “misconduct” under that law, not under the employer’s code. Nevertheless, we note that even if the employer’s code were conclusive, negligence and the willful violation of policy and procedure may amount to “misconduct” under NRS 612.385.

Clarke also filed an application with respondent NESD for unemployment benefits. Caesars Palace contested the application, however, arguing that Clarke had been discharged for misconduct.

Ultimately, the NESD review board determined that the following acts constituted misconduct and denied Clarke benefits. First, Clarke left her cash drawer unattended for twenty minutes while she waited, at the other end of the bar, for migraine medication to take effect. Second, at the end of her shift, Clarke again left her cash drawer unattended in the accounting area and also commingled her tip money with Caesars Palace's funds, in violation of work policy, when she exchanged small notes for larger notes. Third, Clarke used paperclips to keep together the large notes in her drawer, also in violation of work policy. Finally, the large cash variance itself violated Caesars Palace's policy.

The review board noted that, as a long-time employee of Caesars Palace, Clarke was familiar with the policies that she had signed, and the board concluded that any one of these violations (save with regard to the paperclip policy) amounted to misconduct. In particular, the board determined that Clarke had failed to conduct her duties in a manner sufficient to meet Caesars Palace's reasonable expectations.

Having reviewed the record, we conclude that the administrative decision denying Clarke unemployment benefits under NRS 612.385 is supported by substantial evidence. As a Minnesota court has stated, an "employer has the right to expect scrupulous adherence to procedure by employees handling the employer's money."<sup>12</sup> Clarke's

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<sup>12</sup>McDonald v. PDQ, 341 N.W.2d 892, 893 (Minn. Ct. App. 1984).

failure to comply with that procedure constitutes a substantial disregard for interests of, and her duties and obligations to, Caesars Palace.<sup>13</sup> Although we do not agree that Clarke substantially disregarded the Caesars Palace commingling policy,<sup>14</sup> if any such policy existed at the time, the review board considered the surveillance tape and concluded that Clarke had improperly left her drawer unattended several times, and Clarke herself admitted to violating the paperclip policy. These policies were clearly designed to prevent shortages, and thus we must defer to the board's conclusion that Clarke's disregard of them even once constituted misconduct.<sup>15</sup>

Further, we note that Clarke has had ample opportunity to present evidence.<sup>16</sup> We also note that Clarke appropriately petitioned for

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<sup>13</sup>Id.

<sup>14</sup>See Merriam Webster's Collegiate Dictionary 231 (10th ed. 1997) (defining "commingle" as "to blend thoroughly into a harmonious whole [or] to combine (funds or properties) into a common fund or stock"). In this case, Clarke exchange of smaller notes from her cash tips with larger notes from Caesars Palace's funds does not appear to constitute "commingling," as money from the two sources were never blended into a "whole" or combined.

<sup>15</sup>See Ress v. Abbott Northwestern Hosp., Inc., 448 N.W.2d 519, 524 (Minn. 1989) (recognizing that even "[a] single incident where an employee deliberately chooses a course of action adverse to the employer can constitute misconduct").

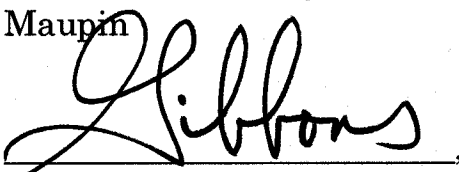
<sup>16</sup>See NRS 233B.121(4) and NRS 233B.123 (governing the parties' right to provide evidence to the administrative agency in a contested case); NRS 233B.135(1)(b) (providing that judicial review must be "[c]onfined to the [administrative] record"). Although certain documents offered by Clarke were not admitted into the administrative record, and thus not considered by the review board, those documents pertained to another's account of the events documented on the surveillance tapes and Clarke's

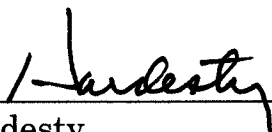
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judicial review of the administrative decision. Consequently, the district court properly refused to consider her request for compensation from Caesars Palace in regard to her termination, which issue was pending arbitration, and, in a June 26, 2003 order, dismissed the claims for damages.<sup>17</sup> Accordingly, for the above reasons, we affirm the district court's order denying Clarke's petition for judicial review.

It is so ORDERED.

 J.

Maupin  
 J.  
Gibbons

 J.  
Hardesty

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own account of the pertinent night's events. At the hearing, Clarke was able to watch the tape and to explain any differences she felt existed between what Caesars Palace's representatives provided and what she believed happened. Accordingly, Clarke was not deprived of any opportunity to present evidence.

<sup>17</sup>See NRS 233B.135(3) (providing that on judicial review, the court may remand, affirm, or set aside the administrative decision, but not recognizing any right to award damages); see generally MGM Grand Hotel v. Insley, 102 Nev. 513, 517, 728 P.2d 821, 824 (1986) (recognizing that claims alleging violations of a labor contract or state tort law involving an interpretation of that contract are preempted by Section 301 of the Labor Management Relations Act). Further, as this court's powers on appeal from an order denying judicial review are similarly limited, we deny appellant all other requested relief pertaining to the termination.

cc: Hon. David Wall, District Judge  
Denise Clarke  
Crowell Susich Owen & Tackes  
Fisher & Phillips, LLP  
Clark County Clerk