

IN THE SUPREME COURT OF THE STATE OF NEVADA

NADINE GOODWIN,

Plaintiff/Appellant,

vs.

CYNTHIA JONES and RENEE
OLSON, as former and present
Administrators;
STATE OF NEVADA, DEPARTMENT
OF EMPLOYMENT, TRAINING AND
REHABILITATION, EMPLOYMENT
SECURITY DIVISION,

Defendants/Respondents.

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On Appeal from the Second Judicial District Court of the State of Nevada
In and for the County of Washoe

APPELLANT'S OPENING BRIEF

Brian Morris, Esq.
Nevada Bar No. 5431
59 Damonte Ranch Parkway, B-221
Reno, Nevada 89521
775-323-2800
email: brmorris@lawforthepeople.com

Attorney for Appellant

NRAP 26.1 DISCLOSURE STATEMENT

Appellant is an individual and as such she does not have a parent corporation nor is there a publicly held company that owns 10% or more of stock in any company owned by her. The same is true of her counsel.

The names of all law firms whose partners or associates have appeared for the Appellant in the case or who are expected to appear in this court are only the undersigned.

The undersigned counsel of record certifies that the following are persons and entities as described in NRAP 26.1(a), and must be disclosed. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

Not applicable

Dated this 9th day of July, 2013.

/s/
Brian Morris, Esq.

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Jurisdictional Statement

This is an appeal from a final Order denying the request in a petition for judicial review. This is an appealable determination and this Court's jurisdiction is based on NRAP 3A(b)(1).

The date the underlying decision was made final was December 20, 2012. The Appeal in this matter was timely as the final Order was entered on December 20, 2012 and the Notice of Entry of Order was filed on December 21, 2012 with the Notice of Appeal being filed on January 23, 2013.

This appeal is from a final Order.

Statement of Issues Presented for Review

1. Did the District Court err by finding that Ms. Goodwin was disqualified from unemployment benefits based on committing an act of misconduct in connection with her work?
2. Is not graduating from college with a Bachelor's degree within a specified time limit an intentional act with an element of wrongfulness?
3. Is not taking enough college classes within a specified time limit (established by a third party) an act connected with work?
4. Did Ms. Goodwin's the employer meet its evidentiary burden and show any willful violation of an employment related policy

Statement of the Case

Ms. Goodwin ("Goodwin") worked for Bristlecone Family Resources ("Bristlecone") and was terminated from her employment for not obtaining a college degree. She was then denied unemployment benefits on the grounds that not obtaining her college degree was misconduct associated with her employment. Ms. Goodman is appealing the denial of her unemployment benefits.

Statement of Facts

1. Ms. Goodwin worked for Bristlecone as the Adult and Family Drug Court Administrator. (JA 81).
2. Goodwin's primary responsibility in this position was planning and coordinating the administrative and operational activities of the Family Drug Court program. (JA 81).
3. Goodwin worked forty (40) hours a week for Bristlecone. (JA 45:22-23).
4. Goodwin was a single mother in addition to working full time for Bristlecone and was constantly in school working on her Bachelors of Arts (B.A.) degree. (JA 45, 55, 59:1-3, 87).
5. Goodwin was scheduled to complete her B.A. in January of 2012. (JA 56, 53, 90).
6. While not a job function, Bristlecone listed that Goodwin was to “secure and maintain BADA Intern/BADA Counselor status when appropriate”. (emphasis added) (JA 82, ¶ 21)
7. Goodwin was under the impression that her Internship would be extended based on conversations she had with the Board of Examiners for Alcohol, Drug and Gambling Counselors (“Board”). (JA 87).
8. Goodwin was terminated on July 8, 2011. (JA 45, 78).
9. Goodwin was discharged for losing her drug and alcohol (counselor) internship license. (JA 46, 86).
10. Goodwin’s internship was still valid when she was terminated. (JA 101).
11. When Goodwin finished her BA degree, she was qualified to apply for a full license. (JA 103).
12. Bristlecone’s policy allowed for a job reassignment if one loses their intern status. (JA 85).

13. Bristlecone would have put Goodwin in an administrative role instead of terminating her if they had one open. (JA 52:22-23).
14. The Board's position was that one may reapply for an internship if they did not finish their college degree within ten years and the Board would consider such an application, otherwise the Board "could lose a large number of interns in the future." (JA 98-99).
15. Goodwin was always in contact with the Executive Director of the Board and was always taking college classes, doing her required hours, and taking her required CUE's. (JA 59:23-24, 61:1-2, 15-18).
16. Goodwin was under the belief the Board was going to extend her license for another six months as well as the Executive Director of the Board. (JA 58:7-11; 91).
17. Goodwin was not able to go to school full time as well as work and take care of her children. (JA 61:25-27).
18. Goodwin has always taken the maximum classes possible and only two classes were offered every 6 weeks. (JA 63-64).
19. Goodwin was not given any warnings prior to her termination. (JA 87).
20. Goodwin obtained her Associate's Degree. (JA 68 - 69).
21. Goodwin was only four (4) classes shy of obtaining her Bachelors Degree when she was terminated. (JA 26).

Summary of Argument

To be denied unemployment benefits, an employee must have engaged in misconduct – which is defined in part as conduct while on the job. Goodwin did not engage in any misconduct in connection with work and cannot meet the legal definition of misconduct. Additionally, the employer did not meet its evidentiary burden and show any willful violation of an employment related policy.

Argument

Introduction

This is an appeal from a district court order not granting relief requested in a petition for judicial review. While the appeal is from the district court order, this appeal will be referencing the evidence presented before the Nevada Department of Employment, Training & Rehabilitation ("DETR") as that was the tribunal that took the evidence in this matter and rendered the decision the district court reviewed.

There has been no dispute as to the reason Ms. Goodwin was denied her unemployment benefits – which is because she did not finish her Bachelor's degree within a specified time frame. The DETR labeled this as an act of misconduct in connection with her employment and the district court decided to not interfere with this decision.

1. The employer never showed any misconduct of Goodwin.

While Nevada is a right to work state and employees may be fired at any time with or without cause, a termination does not automatically equate to an employee not being entitled to unemployment benefits. In fact, unemployment benefits are one of the few rights an employee has in this state. The purpose of Nevada's unemployment system is to provide temporary benefits to those that have involuntarily lost their employment. *Clark County Sch. Dist. v. Bundley*, 148 P.3d 750, 754, 122 Nev. 1440 (2006).

To be denied unemployment benefits, an employee must either leave their employment without good cause (N.R.S. § 612.380(1)), or be fired for misconduct (N.R.S. § 612.385). "[T]he unemployment compensation law, NRS Chapter 612, presumes that an employee is covered by the system." *Clark County Sch. Dist. v. Bundley*, 148 P.3d at 754 (employer did not meet its burden showing excessive

absences constituted willful misconduct). Only proof of willful misconduct can overcome this presumption. However, it is the burden of the employer to show misconduct in fact occurred by a preponderance of the evidence. *Id.* at 756. Misconduct must also involve an “element of wrongfulness.” *Id.* at 756 (citation omitted). Misconduct warranting termination and misconduct warranting a denial of unemployment benefits are two separate issues. *Id.* (footnote 13)(citation omitted). Disqualifying misconduct requires an employee to “deliberately and unjustifiably violate(s)” a policy. *Id.* at 754. Only after “the employer makes an initial showing of willful misconduct” does the burden shift to the employee. (emphasis added). *Id.* at 756. When the record is absent of showing that an employee acted intentionally, misconduct is not shown. *Kolnik v. Nevada Employment Sec. Dept.*, 908 P.2d 726, 729, 112 Nev. 11 (1996).

In this matter it is undisputed that Goodwin was terminated for not obtaining her bachelors degree and that she was denied her unemployment benefits for this reason. The premise was that Goodwin was unable to perform her duties unless she had a valid intern license or a full license as a Drug and Alcohol Counselor from the Board (requiring her to obtain her Bachelors Degree within a specified time frame). However, there is a complete lack of evidence that she was actually required to be licensed, or that she intentionally failed to obtain a bachelors degree. In short, there is a complete void and lack of evidence that there was any misconduct in this matter - which was the employer's burden.

a. There is no evidence that Goodwin needed to be a licensed intern.

Ms. Goodwin's position with Bristlecone was that of an administrator. There was no showing that such a position had a legal requirement that one be licensed by the State of Nevada and the DETR did not conduct any type of inquiry into this issue. As such, the employer did not sustain its burden on establishing the

primary element on which the DETR based its misconduct finding.¹ Without showing a license was required by law to be an administrator, then it is a legal impossibility to even allege not having one is somehow misconduct.

b. There is no evidence that Goodwin was not progressing towards her Bachelors degree within a known deadline date.

Since misconduct is legally premised on some sort of wrongfulness, it must also be shown that Goodwin was aware of any deadline to obtain her Bachelors degree as well as intentionally neglecting it. The only testimony was not that Goodwin was neglecting any deadline, but that she had been staying in touch with the Board and believed she had more time. (JA 56). The employer also testified that Goodwin's supervisor was supposed to be monitoring Goodwin and her license requirements and timeframes, but the employer's witness was unsure if this occurred and no evidence was presented that this in fact had occurred. (JA 50). More importantly, Ms. Goodwin's off-duty class schedule and pursuit of a college degree cannot be considered in a misconduct analysis (discussed below).

Even assuming the off duty pursuit of a college degree can somehow be used in a misconduct analysis, the next requirement would be to show that Goodwin intentionally failed to obtain her college degree. The only evidence presented is to the contrary where Goodwin testified that she had always taken the maximum classes possible and only two classes are offered every 6 weeks. (JA 63-64). Any presumption as to the number of requisite classes required as well as when they are offered is mere speculation as there again was no evidence presented - which was the employer's burden.

¹ The employer never alleged misconduct against Goodwin.

c. The employer did not view Goodwin as having engaged in any misconduct.

While the employer never argued that Goodwin's inability to complete her college degree had any element of wrongfulness, was done deliberately to harm the employer or that it was even misconduct, it should also be noted that the employer did not view Goodwin as having engaged in any sort of misconduct. In fact, her employer presented the opposite and stated it would have retained her if they would have had another opening within the company. (JA 52:22-23). This is consistent with the employer's own internal policy of retaining and repositioning an employee if they lose any required license.² (JA 85). So by the employer's own policy, Goodwin was only terminated due to it not having a position available for her and not for any misconduct.

2. Being an intern does not equate to misconduct.

Goodwin was hired knowing she was an intern and that she was not yet fully licensed. The employer could have hired a fully licensed individual, but chose not to perhaps to not have to pay the greater salary such a licensed person would require. Hiring such a person always contains a business risk that one may never get their license. What if an intern gets seriously injured in an automobile accident and needs time off for Family and Medical Act Leave purposes? If this would have occurred during the last semester and prevented the final classes from being taken, such an accident cannot be considered misconduct. Another possibility is that one simply does not pass one or more classes. Clearly failing a class due to

² This policy shows the employer being aware of the real possibility that not all interns will be granted full licensure, and that the employer's business model takes this into account and chooses to hire them anyway.

not understanding the material cannot be considered misconduct even though it prevents one from getting a degree and thus their license. The next step down the slippery slope would be designating how many hours a day one must study (personal activity not connected with work) to avoid misconduct allegations. In this case, the employer made a business decision to only hire an intern with the restrictions that go along with that designation instead of a fully licensed individual. With this choice the employer reaps any benefits as well as risks any consequences. But such a decision by the employer cannot be spun into misconduct allegations merely because an intern in the end does not receive their full license. Simply being no longer qualified to perform a job does not create a misconduct situation.

3. Goodwin did not perform any wrongful act while at work.

In addition to the employer not alleging or showing any deliberate wrongdoing by Goodwin, the legal definition of misconduct cannot be legally met. Misconduct is defined as follows.

NRS 612.385 Discharge for misconduct. A person is ineligible for benefits for the week in which the person has filed a claim for benefits, if he or she was discharged from his or her last or next to last employment for misconduct connected with the person's work, . . . (emphasis added)

An employee may not be denied unemployment benefits for off duty conduct even if the employer disapproves of any off duty conduct. To be denied unemployment benefits based on misconduct, the misconduct must be specifically connected with the person's work. Off-duty conduct or events are not grounds for denying unemployment benefits. This is amplified in *Evans*, where an employee was granted unemployment benefits after being terminated for not being at work after she was arrested - which prevented her from working. *State, Employment Sec.*

Dept. v. Evans, 901 P.2d 156, 111 Nev. 1118 (1995) (none of the statutory grounds for denying unemployment were present). The same is true in this matter. None of the limited reasons for denying unemployment benefits are present.

Goodwin was terminated for not successfully completing her college bachelor's degree. There was no allegation of any misconduct at work and as previously presented, her employer would have retained her had they had another position available. So the issue becomes whether Goodwin's off-duty activities can be used as a basis to deny her unemployment benefits on the grounds of misconduct. For any off-duty conduct to be considered misconduct, the conduct must violate an employer's rule, the rule it must have a rationale relationship to the employee's work to be performed, and there must have been an intentional violation of the rule. *Clevenger v. Nevada Employment Sec. Dept.*, 770 P.2d 866, 868, 105 Nev. 145, 150 (1989). Any violation must also have an element of wrongfulness.

Nevada decisions have stated that the employee's conduct which prompted the termination must have an element of wrongfulness in order to constitute misconduct so as to prevent the terminated employee from receiving unemployment benefits.

Kolnik v. Nevada Employment Sec. Dept., 112 Nev. 11, 15-16 (1996) (quoting *Garman v. State, Employment Security Dep't*, 102 Nev. 563, 565 (1986)).

None of the necessary requirements are present in this matter. First respondent cannot show where Goodwin actually violated any of her employer's rules or that being a licensed intern is actually required for the administrative position held by Goodwin. Instead, the issue is Goodwin's inability to finish her bachelor's degree within the time frame specified by someone other than her employer. Next, the misconduct (the actual taking of general college courses) does

not have any sort of relationship to the work Goodwin actually performs.³ Lastly, there was no showing of her willfully not completing her college degree in the timeframe given. In fact, the evidence and testimony is the opposite. Ms. Goodwin had always taken classes and gone to school. (JA 55:24-25). She had also been talking to the Board of examiners. (JA 56:11-15). All that occurred was that she was unable to take enough classes to finish her Bachelor's degree even though she was taking the maximum classes she could. (JA 63 - 64). The actual taking of college classes of course was not misconduct and was not even required by her employer. Any requirement to take college classes was instead a requirement imposed by the State Board for her to later become a licensed drug and alcohol counselor so she could work as a counselor (versus an administrator) if she desired. The only evidence presented showed that Goodwin was a single mother taking care of her three children, working full time, going to school, and taking the maximum classes offered that would apply towards her degree requirements. Because there was no showing that Goodwin did some intentional wrong act that was actually connected with her work performance, there simply was no misconduct.

Conclusion

Based on Ms. Goodwin not having done any intentional wrongdoing and that no such allegation or proof was presented, the decision to deny her unemployment benefits must be reversed. Additionally since the taking of college

³ Using illegal drugs off-duty was found to be misconduct with it having a relationship to the work performed because it affects actual work performance and safety. *Clevenger*, 105 Nev. at 150.

classes is not an act connected with her employment, the legal definition of misconduct could not be met – which also requires that Ms. Goodwin be granted her unemployment benefits.

Affirmation

I certify that this filing does not contain the social security number of any person.

Dated this 9th day of July, 2013.

/s/
Brian Morris, Esq.

CERTIFICATE OF COMPLIANCE

I hereby certify that this brief complies with the formatting requirements of NRAP 32(a)(4), the typeface requirements of NRAP 32(a)(5) and the type style requirements of NRAP 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using a Times New Romans font with a font size of 14.

I further certify that this brief complies with the page or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the brief exempted by NRAP 32(a)(7)(C), it does not exceed 11 pages.

Finally, I hereby certify that I have read this brief, and to the best of my knowledge, information, and belief, it is not frivolous or interposed for any improper purpose. I further certify that this brief complies with all applicable Nevada Rules of Appellate Procedure, in particular NRAP 28(e)(1), which requires every assertion in the brief regarding matters in the record to be supported by a reference to the page and volume number, if any, of the transcript or appendix where the matter relied on is to be found. I understand that I may be subject to sanctions in the event that the accompanying brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

Dated this 9th day of July, 2013.

_____/s/
Brian Morris, Esq.

CERTIFICATE OF SERVICE

I certify that on the 9th day of July, 2013, I filed the foregoing with the Clerk of the Court, which sent notification of such filing using the electronic filing/notification system to:

J. Thomas Susich, Esq.
1675 East Prater Way, Ste. 103
Sparks, Nevada 89434

/s/
Brian Morris, Esq.
Attorney for Appellant Nadine Goodwin