NO. 65681

IN THE SUPREME COURT OF THE STATE OF NEVADA

NEVADA DEPARTMENT OF EMPLOYMENT, TRAINING & REHABILITATION, EMPLOYMENT SECURITY DIVISION,

Appellant,

vs.

CALVIN STEVEN MURPHY,

Respondent.

On Appeal from the Eighth Judicial District Court
of the State of Nevada, in and for
the County of Clark
District Court Case No. A689756

APPELLANT'S OPENING BRIEF

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NRAP 26.1 DISCLOSURE STATEMENT

The Nevada Employment Security Division of the Nevada Department of Employment, Training and Rehabilitation; Renee Olson and Katie Johnson, in their official capacities as Administrator and Chairperson of the Board of Review, respectively, are "governmental parties" and are therefore not required to file a disclosure statement under NRAP 26.1.

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JURISDICTIONAL STATEMENT

This Court has jurisdiction to consider the Appellant's appeal from the Eighth Judicial District Court under the provisions of Nevada Revised Statute 612.530(6). The final order of the District Court denying the Petition for Judicial Review was filed on March 31, 2014. (Joint Appendix, 132-133) Respondent Calvin Steven Murphy sent a Notice of Entry of Decision and Order to Appellant on May 8, 2014. Said Notice of Entry was filed with the District Court on May 8, 2014. (JA, 129-131) The Notice of Appeal was filed timely under Nevada Rule of Appellate Procedure 4(a)(1) on May 13, 2014. (JA, 134-135)

STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

Did the District Court properly reverse the decision of the Board of Review under the standards established per NRS 612.385, NRS 612.380 and this Court's decision in *State, Employment Security Department v. Evans,* 111 Nev. 1118, 901 P.2d 156 (1995)?

STATEMENT OF THE NATURE OF THE CASE

Calvin Steven Murphy (claimant) was employed as a maintenance employee from July 13, 2011, to June 10, 2012, by Greystone Park Apartments (employer). (JA, 27) Claimant was terminated by the employer for misconduct. (JA, 27)

Claimant filed a claim for unemployment insurance benefits. The claim was reviewed by the Administrator through an investigator known as an

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adjudicator. The adjudicator issued a determination on June 25, 2013, finding that the claimant abandoned his job by failing to report for work and was disqualified from receiving benefits under NRS 612.380. (JA, 77) Claimant appealed and an evidentiary hearing was held before the Administrative Tribunal (referee) on July 30, 2013. (JA 31-56) The referee issued a decision on July 31, 2013, affirming the determination denying benefits under NRS 612.385, finding that the claimant was guilty of misconduct as opposed to job abandonment under NRS 612.530. (JA, 29-51)

Claimant then filed an appeal to the Board of Review. The Board issued an order on September 19, 2013, adopting the findings of fact and conclusions of law of the referee and affirming the decision denying benefits. (JA, 23) In its order, the Board notified the claimant that any appeal to the District Court had to be filed by October 11, 2013. (JA, 1-2)

Claimant filed the Petition for Judicial Review with the District Court on August 21, 2013. (JA, 5-8) The Petition was fully briefed and oral argument was provided to the District Court. On April 24, 3013, the District Court entered an order reversing the Board of Review, finding that the claimant was entitled to unemployment benefits.[1] (JA, 127-128) The instant appeal to this Court followed.

[1] The district court held that "...the failure to show up for work may be sufficient for terminating employment, but without more, failure to show up for work alone is not misconduct as a matter of law..." This statement fails to take into consideration that the clamant admitted that he missed work due to his own off-duty criminal conduct. Thus, there was a showing of "more" which the court ignored. See additional argument below.

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STATEMENT OF THE FACTS

The Board of Review is the final fact-finder under NRS 612.530. The Board adopted the factual findings of the referee. The referee and Board found as follows:

1. The claimant appealed from a determination denying benefits under the voluntary leaving provisions of Nevada Revised Statutes (NRS) 612.380. The determination included a ruling that the employer's experience rating record would not be charged under NRS 612.551. The parties were notified that the additional issue pursuant to NRS 612.385, whether the claimant's discharge was for reasons associated with misconduct, would also be addressed. (JA, 27)

2. Claimant filed an unemployment benefit claim effective June 2, 2013. A determination denying benefits was issued on June 25, 2013, pursuant to NRS 612.380. The claimant filed a timely appeal. (JA, 27)

3. Claimant was employed from July 13, 2011, through June 10, 2012, as a maintenance employee. Claimant last worked a completed shift on June 1, 2012. (JA, 27)

4. Claimant was discharged for being a no call/no show on June 4, 2012. (JA, 27)

5. On June 1, 2012, claimant was arrested due to a warrant issued for his arrest for charges stemming from possession of stolen property. Claimant

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was charged by the District Attorney's Office sometime in May, 2012 for possession of stolen property. (JA, 28)

6. On June 2, 2012, claimant's girlfriend (Tina) informed the apartment manager (Inez) of the claimant's incarceration. Claimant's girlfriend did not tell the manager when the claimant would be getting out of jail nor how long he would be incarcerated. (JA, 28)

7. Claimant's next scheduled day of work was June 4, 2012. The employer did not receive contact from the claimant or anyone else on his behalf on June 4, 2012, informing them of his inability to report for work. Claimant could not call the employer himself from jail to inform the employer that he would be unable to report for work on June 4, 2012. (JA, 28)

8. Claimant did not know how long he would be incarcerated until his Preliminary Hearing, which was held on June 10, 2012. On June 10, 2012, claimant was sentenced to one year in jail for possession of stolen property. (JA, 28)[2]

9. Claimant's girlfriend spoke with the manager sometime after June 10, 2012, and asked if she could pick up the claimant's check, which the

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[2] The referee's finding is a bit confusing. It is unlikely that the claimant entered a plea or was sentenced to a year in jail at a preliminary hearing. The claimant testified that he was sentenced to a year in jail for possession of stolen property at some time after June 10, 2012. (JA, 55-56) The conviction must have been pursuant to a plea since the claimant indicated that the sentence was imposed around the time frame of June 10, 2012, and since the length of the sentence indicates that the charges were reduced to a gross misdemeanor. (JA, 53; 56)

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manager approved. The manager informed claimant's girlfriend the employer could no longer hold claimant's job for him. Claimant's girlfriend picked up claimant's check from the supervisor. (JA, 28)

10. Claimant was in jail for a year. Claimant was released from jail on June 3, 2013. (JA, 28)

11. Claimant was aware of the employer's no call/no show policy, which informed staff that they were subject to termination when being a no call/no show for their shift. (JA, 28)

From these findings, the referee and Board of Review made the following legal conclusions:

1. It is questionable whether this decision should be made under the voluntary quit provisions of Section 612.380 of Nevada law, or under the discharge for misconduct provisions of Section 612.385 of the law. In either case, however, a disqualification period would be assessed. (JA, 28)

2. For Unemployment purposes, the claimant's separation is deemed a discharge since the claimant was separated in accordance with company policy. (JA, 28)

3. Claimant was discharged for being a no call/no show on June 4, 2012. Claimant maintains he was incarcerated and unable to call out or report for his scheduled shift. (JA, 29)

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4. In *State, Employment Security Department v. Evans*, 111 Nev. 1118, 901 P.2d 156 (1995), the Nevada Supreme Court held that when a claimant is incarcerated before a determination of guilt and dutifully calls his employer to report continued absences because the claimant cannot pay the bail, there is no misconduct under NRS 612.385. (JA, 29)

5. This case differs from *Evans*. Here, claimant admitted during the evidentiary hearing that he was guilty of the criminal conduct and was arrested on a bench warrant issued due to charges brought against him in May, 2012. The claimant's admitted off-duty criminal conduct is connected with the work because said conduct resulted in the claimant's inability to report for work, dutifully notify the employer, and perform his job duties. Therefore, claimant's off-duty criminal conduct which adversely affected his ability to fulfill his dutiful obligations to the employer, demonstrated a deliberate violation or disregard of reasonable standards of conduct and thus contains the element of wrongfulness. Disqualifying misconduct connected with the work has been established. (JA, 29)

SUMMARY OF ARGUMENT

Nevada Legal Services, which represents the claimant in this matter, has argued in this case and others involving incarceration, that this Court's decision in *State, Employment Security Department v. Evans, supra,* established as a matter of law that NRS 612.385 does not apply when an employee misses work because of incarceration. ESD maintains that the blanket assertion that *Evans* created an

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exception for all claimants who fail to report for work due to incarceration is a misreading of the *Evans* decision and also fails to take into account this Court's subsequent decision in *Clark County School District v. Bundley,* 122 Nev. 1440, 148 P.3d 750 (2006). Additionally, the position asserted by claimant's counsel is inconsistent with established case law throughout the United States on this issue.

The administrative tribunals and the Board of Review have consistently ruled that missing work due to incarceration for a crime which the claimant committed is misconduct under NRS 612.385. The referees and Board of Review have consistently found that there is a sufficient connection with work because of the resultant failure of the claimant to report for work as scheduled. The administrative tribunals and Board of Review have also consistently held that a claimant incarcerated because of an inability to post bail, where no conviction or admission of guilt is present, is also guilty of misconduct if that claimant does not take all necessary and reasonable steps available to accurately inform his employer of his incarceration and the status regarding the criminal charges filed against the claimant. The administrative tribunals and the Board of Review have held that their rulings are consistent with the language in *Evans, supra,* and are also consistent with this Court's decision in *Bundley, supra.* The District Courts in the majority of the cases have agreed with the Board of Review's decisions regarding the application of *Evans*. ESD has appealed this case and others so that this Court can examine its previous decisions and the case law of other states in formulating a

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clear decision which will provide guidance to ESD, the administrative tribunals, the Board of Review and the District Courts on this issue.

ESD maintains that the administrative tribunals and the Board of Review have correctly interpreted *Evans, supra,* and *Bundley, supra,* as set forth herein and that the decision of the District Court in this case should be reversed and the decision of the Board of Review reinstated.

STANDARD OF REVIEW

If supported by evidence and in the absence of fraud, the decision of the Board is conclusive. NRS 612.530(4); *State Employment Sec. Dept. v. Weber*, 100 Nev. 121, 676 P.2d 1318 (1984). In reviewing the Board's decision, this Court is limited to determining whether the Board acted arbitrarily or capriciously. *State Emp. Sec. Dept. v. Taylor*, 100 Nev. 318, 683 P.2d 1 (1984); *McCracken v. Fancy*, 98 Nev. 30, 31, 639 P.2d 552 (1982); *Bryant v. Private Investigator's Lic. Bd.*, 92 Nev. 278, 549 P.2d 327 (1976); *Lellis v. Archie*, 89 Nev. 550, 516 P.2d 469 (1973).

In performing its review function, this court may not substitute its judgment for that of the Board of Review, *Weber, supra*; *McCracken, supra*, nor may this court pass upon the credibility of witnesses or weigh the evidence, but must limit review to a determination that the Board's decision is based upon substantial evidence. NRS 233B.135(3).

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Substantial evidence has been defined as that which "a reasonable mind might accept as adequate to support a conclusion." *Richardson v. Perales*, 402 U.S. 389 (1971). Stated another way, it has been held that "substantial evidence" means only competent evidence which, if believed, would have a probative force on the issues. *State ex rel. Util. Consumers Council v. P.S.C.*, 562 S.W.2d 688 (Mo. App. 1978). Evidence sufficient to support an administrative decision is not equated with a preponderance of the evidence, as there may be cases wherein two conflicting views may each be supported by substantial evidence. *Robinson Transp. Co. v. P.S.C.*, 159 N.W.2d 636 (Wis. 1968).

The burden to be met by ESD is to show that the Board's decision is one which could have been reached under the facts of this case. This Court is confined to a review of the record presented below, *Lellis, supra*, at 553-554, and the Board's action is not an abuse of discretion if it is supported by substantial evidence in the record. *State, Dept. of Commerce v. Soeller*, 98 Nev. 579 at 586, 656 P.2d 224 (1982); *Lellis, supra*; *North Las Vegas v. Pub. Serv. Comm'n*, 83 Nev. 278, 426 P.2d 66 (1967); *Randono v. Nev. Real Estate Comm'n*, 79 Nev. 132, 379 P.2d 537 (1963).

In the case of *Clark County School District v. Bundley,* 122 Nev. 1440, 148 P.3d 750 (2006), this court stated as follows:

> When reviewing an administrative unemployment compensation decision, this court, like the district court, examines the evidence in the administrative record to

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> ascertain whether the Board acted arbitrarily or capriciously, thereby abusing its discretion. With regard to the Board's factual determinations, we note that the Board conducts de novo review of appeals referee decisions. Therefore, when considering the administrative record, the Board acts as 'an independent trier of fact,' and the Board's factual findings, when supported by substantial evidence, are conclusive.
>
> Accordingly, we generally review the Board's decision to determine whether it is supported by substantial evidence, which is evidence that a reasonable mind could find adequately upholds a conclusion. In no case may we substitute our judgment for that of the Board as to the weight of the evidence. Thus, even though we review de novo any questions purely of law, the Board's fact-based legal conclusions with regard to whether a person is entitled to unemployment compensation are entitled to deference.

Therefore, while a party who is appealing an adverse determination may have the burden of producing sufficient evidence to convince the administrative tribunal that his case has been proved by a preponderance of the evidence, the reviewing court may only determine whether there was substantial evidence in the record from which a reasonable fact-finder could have concluded whether the case was proved by a preponderance of the evidence. In other words, the burden to be met by ESD, at this level, is to show that the Board's decision is one which could have been reached under the evidence in the record; not that it is the "only" decision or even the "best" decision which may be suggested by the evidence contained within the record.

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ARGUMENT

A. THIS COURT'S DECISION IN *STATE, EMPLOYMENT SECURITY DEPARTMENT V. EVANS, SUPRA,* DOES NOT EXEMPT INCARCERATED CLAIMANTS FROM THE PROVISIONS OF NRS 612.385.

The thrust of claimant's attorneys' position in this case, as well as many others, is that the Nevada Supreme Court has held that NRS 612.385 does not apply when an employee misses work because of incarceration. The claimant in this case, and others, cites as authority for this position the case of *State, Emp. Sec. Dep't. v. Evans,* 111 Nev. 1118, 1119, 901 P.2d 156, 156 (1995). The majority decision in *Evans* is four paragraphs long. It states:

> The district court reversed a decision of the Employment Security Department which denied Marilyn Evans' unemployment benefits. Evans lost her job because she had been arrested and was forced to remain in jail pending trial because she could not afford bail. She was terminated during the time that she was in jail awaiting trial. The district court correctly held that Evans' missing work because she could not afford to post bail was not sufficient grounds to deny benefits.
>
> There are three possible statutory grounds for denial of unemployment benefits: (1) NRS 612.380--voluntarily leaving employment without good cause; (2) NRS 612.383--discharge for crimes committed in connection with employment; and (3) NRS 612.385--misconduct connected with work. None of these three statutory grounds are implicated in this case. *See also* Clevenger v. Employment Security Dep't, 105 Nev. 145, 149, 770 P.2d 866, 868 (1989) ('Nevada law requires that an employee's misconduct be connected with his or her

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> work before that person can be deemed ineligible for unemployment benefits').
>
> The facts of this case are not in dispute. Neither Evans' pretrial incarceration nor her criminal acts were connected with her employment. Further Evans failure to be available for work was due to her pretrial incarceration which was predicated on her inability to obtain bail, not her criminal conduct.
>
> Evans is guilty of no "misconduct" and no "deliberate violation or disregard on [her part] of standards of behavior which [her] employer has the right to expect." Barnum v. Williams, 84 Nev. 37. Evans dutifully notified her employer of this fact. Her absence from work was neither deliberate nor voluntary. There being no statutory or other legal basis for denying unemployment insurance benefits to Evans, the judgment of the district court is affirmed.

The *Evans* decision is not clearly written and is susceptible to various interpretations. ESD asserts that the majority in *Evans* did not hold that NRS 612.385 never applies to persons who miss work due to incarceration. Crimes "connected with work," which result in incarceration, can constitute misconduct under NRS 612.385 per *Evans*. For example, the majority points out that "...failure to be available for work was due to [Evans'] pretrial incarceration which was predicated on her inability to obtain bail, not her criminal conduct. [Emphasis Supplied] Thus, the majority decision appears to hold that incarceration for criminal conduct can be "misconduct" under NRS 612.385, so long as certain factors exist in the case.

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One factor is whether the claimant's incarceration and inability to report for work is the result of the claimant's poverty not his criminal conduct. Another factor is that the claimant must dutifully notify his employer of his incarceration and also must keep that employer notified of the status of his case. It is therefore submitted that any inquiry regarding the application of NRS 612.385 to a claim for benefits from a person who misses work due to incarceration requires that the finder-of-fact answer three questions:

1. WAS THE FAILURE TO REPORT FOR WORK THE RESULT OF THE CLAIMANT'S CRIMINAL CONDUCT OR THE INDIGENCE OF THE CLAIMANT?

The claimant, in the instant case, testified that he was arrested on a warrant which charged him with possession of stolen property. (JA, 55) Claimant was arrested on June 1, 2012. (JA, 53) Claimant testified that the police had found out that he was the one who possessed the stolen property. (JA, 55-56) Claimant was asked why he was in jail. He testified: "Because of the stolen property they gave me one year." (JA, 56) Claimant admitted during his testimony that he was charged with possession of stolen property and that he was sentenced to one year in jail. (JA, 56)

Claimant also testified that his bail was initially set at $40,000.00 and that that he couldn't post it. Per claimant's testimony, he was convicted around June 10, 2012. (JA, 57)

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The referee found, based on the claimant's testimony and the evidence in the record, that the claimant's incarceration was due to his criminal conduct not his indigence. (JA, 29) This Court has held that neither the District Court nor the Supreme Court can "...pass upon the credibility of witnesses or weigh the evidence..." *Lellis v. Archie, supra. See also* NRS 233B.135(3), which states: "The court shall not substitute its judgment for that of the agency as to the weight of the evidence on a question of fact." Factual findings of the Board of Review if supported by evidence in the record are conclusive. NRS 612.530(4). There is substantial evidence in the record that the claimant was incarcerated because he willfully and intentionally chose to commit a crime. Neither this Court nor the District Court has the authority to substitute alternative factual findings for those of the Board of Review under these circumstances. NRS 612.530(6); *Weber, supra.*

2. WAS THERE A NEXUS BETWEEN THE CLAIMANT'S CRIMINAL CONDUCT AND HIS WORK?

The claimant's off-duty conduct was connected with work:

In the instant case, the administrative tribunal as affirmed by the Board of Review carefully analyzed the facts and compared those facts to the existing statutory and case law. Claimant maintains that his failure to report for work was not "connected to work." Certainly the failure of an employee to report for work when assigned is "connected to the work." The law has recognized the connection for many years. See *Kraft v. ESD*, 102 Nev. 191, 717 P.2d 583 (1986);

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Employment Security Department v. Nacheff, 104 Nev. 347, at 349, 757 P.2d 787 (1988). This Court, in a case decided in 2006, eleven years after the decision in *Evans, supra*, reaffirmed that an unexcused absence from work is misconduct connected with the work under NRS 612.385. In *Clark County School District v. Bundley, supra,* this Court stated: "As recognized by the Supreme Court of Florida, when an employee is absent without authorization, that conduct is inherently detrimental to the employer's interests in efficiently operating its business. And if the unauthorized absences are many, their excessiveness tends to show a willful disregard of such interests. Accordingly, if an employer shows a clear pattern of unauthorized absenteeism, a presumption of willful misconduct arises, which can be rebuffed only if the former employee shows that the absences did not constitute misconduct within the meaning of NRS 612.385."

The evidence in this case is un-rebutted that the claimant was absent from work on June 4, 2012, and was in jail for a year thereafter. (JA, 56) In *Bundley, supra,* this Court held that once the pattern of unexcused absences is proved, the burden shifts to the claimant to prove that the absences were "reasonable and justified." *Id.,* 122 Nev. 1440 at 1448.

In the case at bar, the administrative tribunal examined the evidence and concluded that the claimant had not proved that his conduct was "reasonable or justified." The claimant's only "proof" was that his absence from work was due to the fact that he was convicted of possession of stolen property and was sentenced

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to a year in jail. The administrative tribunal and the Board of Review found that the claimant provided no evidence that would support a conclusion that his conduct which resulted in his failure to report for work was "reasonable and justified." There is no basis upon which a reasonable fact-finder could have concluded that the claimant's absence from work was reasonable or justified.

Nevada Legal Services, however, relying on *Evans, supra,* argues that this Court created a special exemption for incarcerated claimants because it is "impossible" for incarcerated claimants to appear for work. One cannot argue that a person who is incarcerated cannot report for work; but, that analysis does not in any way address the issue of who was at fault for the impossibility. *Evans* indicates that when the incarceration is the result of the claimant's criminal conduct and not his indigence, then NRS 612.385 does apply. In this case, there is a finding by the agency based upon substantial evidence in the record that the claimant's failure to report for work was due to incarceration which resulted from the claimant's intentional criminal conduct.

The standard is that unemployment insurance is paid to persons who are rendered unemployed through no fault of their own. *Sherman/Bertram, Inc. v. California Department of Employment,* 202 Cal.App.2d 733 (CA, 1962). Here, the referee and Board of Review found that claimant's knowing decision to receive and possess stolen property established that the claimant's alleged "impossibility" to report for work was his own fault. Certainly there is no reasonable analysis that

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would indicate that the employer was somehow at fault for the claimant's conduct. This Court has consistently held that persons who are tardy or miss work are not entitled to unemployment benefits. Thus, when an employee's car breaks down on his way to work, his tardiness is not justified. (*Kraft, supra.*) When an employee who is ill and calls and notifies his employer that he is ill and won't be in for a few days is not justified in being absent because he did not call the employer every day. (*Nacheff, supra.*) A school teacher who is absent due to the illness of her children may not be justified in staying home with them unless she calls her employer regularly to report their illness and provides the employer with written excuses from the children's doctors. (*Bundley, supra.*)

Evans, as clarified by *Bundley,* holds that off-duty criminal conduct which results in the failure of the claimant to report for work is misconduct under NRS 612.385 because the absences resulting from the claimant's criminal conduct are not "reasonable" or "justified" as required under *Bundley.* The referee and Board of Review are the sole judges of the facts and the District Court had no jurisdiction to substitute its own "facts" for those found by the referee and Board of Review. NRS 612.530.

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3. DID THE CLAIMANT KEEP HIS EMPLOYER DUTIFULLY NOTIFIED OF HIS LOCATION AND THE STATUS OF HIS CRIMINAL PROCEEDINGS?

Here, the claimant maintains that asking his girlfriend to tell his employer that he was in jail was sufficient notice to comply with *Evans*. The evidence establishes that the claimant's girlfriend made two contacts with the employer. On June 2, 2012, she told a manager that the claimant was in jail. The manager asked the girlfriend to "keep her informed." (JA, 61) The claimant's girlfriend did not contact the employer again for approximately ten days. The only reason she contacted the employer some ten days later was because she wanted to pick up the claimant's paycheck. The claimant asked her to go pick up his check. (JA, 60) The girlfriend was allowed to have the check and again was asked by a manager to keep the employer "informed" of the claimant's status. (JA, 62) There is no evidence that the girlfriend or the claimant attempted to contact the employer again until after the claimant was released from jail approximately a year later. The claimant did not ask anyone to request that he be given a leave of absence. (JA, 60)

Misconduct has been defined by the this Court as the deliberate violation or disregard of an employer's reasonable policy or procedure or conduct that falls below the standard the employer has the right to expect. *Barnum v. Williams, supra*; *Bundley, supra.* There is substantial evidence in the record that

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the claimant knew of the employer's policies, deliberately committed a crime, was incarcerated, told his girlfriend to tell the employer he was in jail, and then two weeks later, he told his girlfriend to go pick up his check from his employer.

In *Evans, supra,* this Court stated that Evans remained in "dutiful" contact with her employer. "Duty" is defined in *Black's Law Dictionary,* 9th Ed., as "[a] legal obligation that is owed or due to another and that needs to be satisfied..." The evidence establishes that claimant had the opportunity to request a leave of absence and to keep his employer informed of his status; however, he did neither.

In *Kraft, supra,* this Court stated: "It is the duty of the employee to have regard for the interests of his employer and for his own job security and to act as a reasonably prudent person would in keeping contact with his employer." 102 Nev. 191 at 194; 717 P2d 583 at 585. Claimant's effort to notify his employer of his status was, at best, minimal. This Court is asked to clarify what is "dutiful notice." Certainly the claimant did not provide the type of notice that was given by Evans to her employer. In the dissenting opinion in *Evans,* it was revealed that the claimant not only kept in contact with her employer, she actually applied for and received three 30-day leaves of absence before being finally terminated. *Evans, supra,* 111 Nev. 1118, 1120.

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B. IT IS GENERALLY HELD THROUGHOUT THE UNITED STATES THAT FAILURE TO REPORT FOR WORK DUE TO INCARCERATION RESULTS IN A DENIAL OF UNEMPLOYMENT INSURANCE BENEFITS, ESPECIALLY WHERE THE INCARCERATION WAS THE FAULT OF THE CLAIMANT.

The examination of case law in the United States shows that almost all states that have considered the issue have concluded that incarceration does not provide justification for receipt of unemployment insurance benefits. Some states have actually passed statutes prohibiting the award of unemployment insurance benefits to persons who were rendered unemployed because they failed to report for work due to incarceration or a violation of law. See *Alexander v. Michigan Employment Security Commission,* 144 N.W. 2d 850 (Mich. 1966); Kentucky Revised Statute 341.370(6).

Some states have held that incarceration alone, regardless of the ability to post bail or whether there is evidence that the claimant committed a crime, amounts to a voluntary quitting of employment and thus a denial of benefits. *Fennell v. Board of Review,* 688 A2d 113 (NJ APP, 1996); *In the Matter of the Claim of Martin F. Opoka,* 232 A.D.2d 718 (NY APP, 1996).

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Many states have held that when a claimant was at fault for his incarceration his absence from work is misconduct. *Sherman/Bertram, Inc. v. California Department of Employment,* 202 Cal.Rptr. 130 (CA APP, 1962); *Parker v. Department of Labor and Employment Security,* 440 So.2d 438 (FL APP, 1983); *Ford v. Labor and Industrial Relations Commission of Missouri,* 841 S.W.2d 255 (MO, APP 1992); *Bivens v. Allen,* 628 So.2d 765 (AL APP, 1993); *Stanton v. Missouri Division. of Employment Security,* 799 S.W. 2d 202 (MO APP, 1990); *Johnson v. State Department of Industrial Relations,* 447 So.2d 747, 749 (AL APP, 1983), *Weaver v. Daniels,* 613 S.W.2d 108 (AR APP, 1981); *Carter v. Caldwell,* 261 S.E.2d 431 (GA, 1979); *Grimble v. Brown,* 171 So.2d 653 (LA, 1965); *Yardville Supply Company v. Board of Review,* 554 A.2d 1337 (NJ, 1989).

In Minnesota it has been held that conduct which results in incarceration and failure to report for work must result in a denial of benefits as a matter of public policy. "[P]ublic Policy prohibits treating illegal failure to pay speeding tickets as ordinary negligence or inadvertence. Smith's unavailability for work due to his incarceration amounted to disregard of attendance standards which his employer had the right to expect him to obey." *Smith v. American Indian Chemical Dependency Diversion Project,* 343 N.W.2d 43 (MN APP, 1984)

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In Pennsylvania the court held that failure of a claimant to keep his employer duly notified of his status while incarcerated was in and of itself misconduct which justified the denial of benefits. *Commonwealth v. Unemployment Compensation Board of Review,* 447 A.2d 328 (PA APP, 1982).

It is submitted that this Court in *Evans, supra,* made the same decision. Failure to dutifully notify your employer of your incarceration is misconduct under NRS 612.385. Instructing a surrogate to simply inform your employer that you have been incarcerated is neither dutiful nor appropriate notice because no information is imparted to the employer from which he can determine when or whether the employee will be returning to work. In the case of *Clark County School District v. Bundley, supra*, this Court held as follows:

> Generally ... an employee's absence will constitute misconduct for unemployment compensation purposes only if the circumstances indicate that the absence was taken in willful violation or disregard of a reasonable employment policy (i.e., was unjustified and, if appropriate, unapproved), or lacked the appropriate accompanying notice. *Id.,* at 1446.

C. DO THE PROVISIONS OF NRS 612.383 PREVENT THE APPLICATION OF NRS 612.385 TO CLAIMANTS WHO FAIL TO REPORT FOR WORK DUE TO INCARCERATION?

The claimant argued below that NRS 612.383 limits the analysis of criminal conduct upon which resultant misconduct can be based under NRS 612.385. In the instant case, the claimant was not denied benefits for possession of

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stolen property; he was discharged and denied benefits because he unjustifiably failed to comply with the employer's attendance policies. Obviously, reasons for not coming to work generally take place off-duty. If the claimant had passed out from intoxication and did not report for work because he was on a weeklong bender, there would be no issue in this case. Such voluntary conduct would not be an excuse for missing work. The claimant attempts to create an incarceration exception out of whole cloth. The claimant is essentially arguing that because he was in jail, the claimant has a free ride and the reasons for why he was in jail cannot be taken into consideration when determining whether his off-duty conduct unjustifiably resulted in his failure to report for work.

Under *Bundley, supra,* the referee is required to inquire as to the reasons for a violation of an employer's policy; in this case, the policy involved absences from work. In order to determine if the claimant was in fact justifiably absent from work, the referee was required to inquire into the reasons for the incarceration. Under NRS 612.500, the administrative tribunal is required to develop all of the facts without regard to common law and statutory rules. Under *Nevada Employment Security Department v. Holmes,* 112 Nev. 275, 914 P.2d 611 (1996), this Court held that off-duty criminal conduct which is related to the work is misconduct if there is a factual connection to the reasonable policies of the employer.

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NRS 612.383 is clearly meant to apply to criminal conduct directly involved in the work. Said conduct is deemed misconduct *per se* under NRS 612.383. NRS 612.383 is not intended to establish as a matter of law that absence from work due to off-duty criminal conduct can never result in a denial of unemployment insurance benefits under NRS 612.385. NRS 612.383 was not employed by the majority in *Evans, supra,* as a basis for granting benefits to Evans. This Court's analysis in *Evans* regarding whether Evans' absence was due to criminal conduct and whether Evans gave dutiful notification demonstrates that this Court does not agree with the claimant's assertions regarding NRS 612.383 in this case.

CONCLUSION

There is substantial evidence in the record that the claimant was properly determined not to be entitled to unemployment insurance benefits by the agency tribunals. The Administrative Record contained substantial evidence upon which the agency tribunals based their conclusions of law. This Court has held that the Board of Review's fact-based conclusions of law must be given deference by a reviewing court. *Bundley, supra; Fremont Hotel v. Esposito,* 104 Nev. 394, 760 P.2d 122 (1988).

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In fact, this Court has held that a reviewing court must treat the fact-based conclusions of law of the Board of Review as conclusive if there is evidence in the record to support the conclusions of law. In *Garman v. State, Employment Security Department,* 102 Nev. 563, 565, 729 P.2d 1335 (1986), this Court stated:

> Findings of misconduct must be given deference similar to findings of fact, when supported by substantial evidence [in the Administrative Record].

The District Court's decision should be reversed and the decision of the Board of Review should be reinstated.

DATED this 5th day of November, 2014.

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ATTORNEY'S CERTIFICATE OF COMPLIANCE

1. I hereby certify that this Opening 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 Opening Brief has been prepared in a proportionally spaced typeface using Microsoft Word 2010 in 14 point Times New Roman.

2. I further certify that this Opening Brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the Opening Brief exempted by NRAP 32(a)(7)(C), it does not exceed 30 pages.

3. Finally, I hereby certify that I have read this appellate 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 Opening 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.

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I understand that I may be subject to sanctions in the event that the accompanying Opening Brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 5th day of November, 2014.

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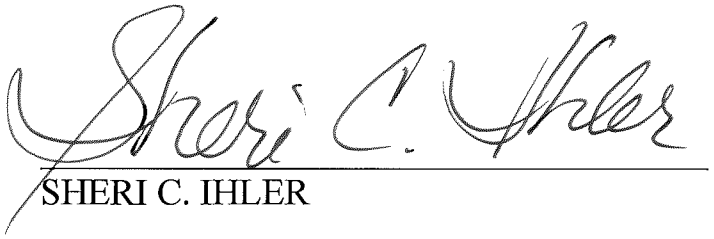
CERTIFICATE OF SERVICE

Pursuant to NRAP 25(d)(1)(B), I hereby certify that I am an employee of the State of Nevada, over the age of 18 years; and that on the date hereinbelow set forth, I electronically filed the foregoing APPELLANT'S OPENING BRIEF with the Clerk of the Nevada Supreme Court; and, as a consequence thereof, electronic service was made in accordance with the Master List as follows:

RON SUNG, ESQ.
I. KRISTINE BERGSTROM, ESQ.
JANET TROST, Settlement Judge

DATED this 5th day of November, 2014.



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