IN THE SUPREME COURT OF THE STATE OF NEVADA

EUGENIO DOLORES,

Appellant,
vs.

Supreme Court No. 72126
District Court Case No. A732941

EMPLOYMENT SECURITY DIVISION, STATE OF NEVADA and RENEE OLSON, in her capacity as Administrator of the EMPLOYMENT SECURITY DIVISION; KATIE JOHNSON, in her capacity as Chairperson of the EMPLOYMENT SECURITY DIVISION; BOARD OF REVIEW,
Respondents,
_____/

APPELLANT'S OPENING BRIEF

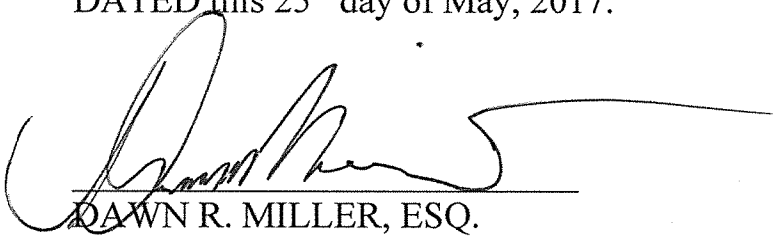
Appeal from Denial of Petition for Judicial Review
District Court- Department 27
Clark County, Nevada

DAWN R. MILLER, ESQ.
Nevada Bar No. 10933
NEVADA LEGAL SERVICES, INC.
530 S. 6th Street
Las Vegas, Nevada 89101
(702) 386-0404 ext. 111
Attorney for Appellant

NRAP RULE 26.1 DISCLOSURE

The undersigned counsel of record certifies that there are no persons and entities as described in NRAP 26.1(a) that must be disclosed because undersigned counsel has no parent corporation and no shareholders. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

DATED this 25th day of May, 2017.



DAWN R. MILLER, ESQ.
Nevada Bar No. 10933
NEVADA LEGAL SERVICES, INC.
530 S. 6th Street
Las Vegas, Nevada 89101
(702) 386-0404, ext. 111
Attorney for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES AND REGULATIONS

MISCELLANEOUS

JURISDICTIONAL STATEMENT

NRS 612.530(6) vests the Court with jurisdiction over the instant appeal. Appellant filed his appeal with the Nevada Supreme Court on January 30, 2017. The district court denied relief to Appellant and on December 16, 2016, Respondent mailed notice of entry of order. The district court's denial of the instant petition is an appealable order pursuant to NRAP 3A(b)(1).

Routing Statement

The Nevada Supreme Court should retain jurisdiction under NRAP 17(a)(13) and (14) because this appeal raises issues of first impression that also involve a question of statewide public importance. This case asks this Court to interpret the legal definition of the voluntary and good cause elements contained in NRS 612.380. Specifically, this case argues that when an employee submits a resignation, with no intent to quit work, after being presented with a quit-or-be fired option from their employer, after a newly revised policy renders the employee unable to remain employed, and termination is certain, that employee did not voluntarily quit employment and/or has established good cause to quit.

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. When an employee submits a resignation, with no intent to quit, after being presented with a quit-or-be-fired option from the employer, that employee has not *voluntarily* quit pursuant to NRS 612.380.

II. When a change in work requirements renders an employee unable to remain employed, and termination is certain in lieu of a resignation, the employee has *good cause* to quit pursuant to NRS 612.380

STATEMENT OF THE CASE

A. Nature of the Case

Pursuant to NRS 612.530(6), Appellant, EUGENIO DOLORES (hereinafter "Dolores") filed his appeal with this Court after the district court denied his Petition for Judicial Review. Previously, Respondent, Nevada Employment Security Division (hereinafter "ESD") denied Dolores's claim for unemployment insurance benefits.

B. Course of Proceedings

Dolores worked for Southwest Airlines Company (hereinafter "Southwest") as a ground agent for over seven years, from March 25, 2008 to August 30, 2015. JA, 55. Dolores's date of separation was September 13, 2015. JA,39. He filed for unemployment benefits soon thereafter. JA, 55.

In the Initial Determination dated October 14, 2015, ESD denied unemployment benefits on the basis that he voluntarily quit without good cause. JA, 89. Dolores filed a timely appeal on October 21, 2015. JA, 93. An administrative hearing was held before an Appeals Referee on December 3, 2015. JA, 59.

Following the hearing, the Appeals Referee entered a written decision, dated December 10, 2015, finding claimant had not established good cause to voluntarily quit pursuant to NRS 612.380. JA, 44-48. Consequently, Dolores was denied benefits.

On December 20, 2015, Dolores appealed the Referee's decision to Respondent Board of Review (hereinafter "Board"). JA, 43. In a decision dated February 12, 2016, the Board affirmed the Appeals Referee decision. JA, 30. On March 4, 2016, Dolores filed a Petition for Judicial Review in District Court. JA, 1-4. The district court denied Dolores's Petition. JA, 165-166. On December 16, 2016, notice of entry of order was mailed to Dolores. JA, 163-166. On January 3, 2017, Dolores filed his appeal with this Court. JA, 167-168.

STATEMENT OF FACTS

Dolores worked for Southwest Airlines as a full time ground agent from March 25, 2008 to August 30, 2015. JA, 55. Dolores's direct supervisor was James Chantrill (hereinafter "Chantrill"). JA, 56. As a ground agent, Dolores was required to have a SIDA[1] badge. JA, 58. The SIDA badge is required by the Transportation Security Administration (hereinafter "TSA"). JA, 66. The SIDA

[1] SIDA stands for "Security Identification Display Area". (JA, 65) It is a special security area designated by an airport operator in the US to comply with Federal Aviation Administration (FAA) requirements directed by Federal Aviation Regulation (FAR) part 107.205.

badge must be renewed every year, within thirty days preceding the employee's birthday. JA, 66.

In July 2015, the TSA changed their protocol requiring employees to be re-fingerprinted every two years beginning in 2015. *Id.* Prior to July 2015, employees only had to submit to a fingerprint background check at the time of hire. *Id.* Dolores was one of the first employees subjected to the new protocol since his birthday was August 3, 2015. JA, 67. Dolores completed his renewal by his birthday. JA, 58.

On September 1, 2015, Dolores received a phone call from a TSA investigator indicating the background check revealed a felony conviction. JA, 57. Dolores explained he did not have a felony, it was lessened to a misdemeanor.[2] *Id.* Still, Dolores's SIDA badge was confiscated and he was told to wait for an answer. *Id.* The TSA did request a copy of the disposition letter from District court, which Dolores provided. JA, 59. Dolores discussed the matter with Southwest on September 1st and September 2nd. JA, 62. Southwest gave Dolores ten days of personal leave to resolve the issue. JA, 71. After ten days lapsed, the TSA still refused to issue Dolores's SIDA badge. JA, 59. Chantrill contacted Dolores and

[2] On or around November 28, 2014, Dolores was charged with credit card fraud. (JA, 57) The charge was lessened to a gross misdemeanor of attempted forgery (JA, 95)

presented two alternatives: quit or be fired. JA, 63. On September 13, 2015, Dolores provided a letter resignation. JA, 83.

Chantrill appeared on behalf of Southwest at the Appeals Referee Hearing. JA, 50. Chantrill confirmed Southwest provided a quit or be fired option and testified if Dolores did not resign he would have been fired. JA, 71, 65. He testified, aside from the SIDA issue, Dolores was not in jeopardy in losing his job and was a good employee. JA, 66. Chantrill testified Southwest had no input or control over the SIDA badge other than to ensure that employees renew thirty days before their birthday. *Id.* Chantrill confirmed that originally Southwest only ran fingerprints at the time of hire, but the TSA changed the protocol in July of 2015 requiring fingerprinting every two years starting in 2015. JA, 66-67. Dolores, being an August 3rd renewal, was one of the first employees subjected to the new rule. JA, 67.

At the hearing, Dolores testified he was forced to resign. JA, 56. Chantrill informed him *he had an option to quit or resign.* JA, 63. Dolores testified he resigned because TSA would not return his badge, Southwest only gave him a short period of time to resolve the issue, and if stays he will be fired anyways. JA, 59. Dolores testified if he didn't resign, he could not get profit sharing retirement money to provide for his family. JA, 59-60. For Dolores, termination meant he would not be eligible for profit sharing retirement funds, unless and until, the

Union *cleared* the termination. JA, 60. Dolores understood if he stayed he would be fired and believed it would take a long time for the Union "to do his case". JA, 59. Dolores testified there was no other job he could do at Southwest without a SIDA badge but wished they had one so he could keep working. JA, 64. He testified he tried to 'clear it' by providing the disposition letter and thought after providing the requested information everything would be resolved. JA, 59. Dolores testified he "loved his job". JA, 61.

Dolores was never given any written reprimands during his employment nor was he ever told his job was in jeopardy. JA, 60-61. Neither the FBI background results, nor the newly revised TSA protocol was presented at the hearing. JA, 63.

In the decision, the Appeals Referee found the claimant chose to resign his employment as his off duty conduct prevented him from obtaining a security clearance for the TSA, which was required for the claimant to report to work. JA, 45. The employer gave the claimant the option to resign in lieu of discharge as he would be required to be discharged since he could not report to work to fulfill his obligations. *Id.* The claimant chose to resign to collect his vacation pay and profit sharing. *Id.* The referee found the claimant's reasons for leaving the employment were not compelling as resignation in lieu of discharge is not considered good cause and found claimant has not established good cause for voluntarily leaving available work. *Id.* The referee noted it is questionable whether this decision

should be made under the provisions of Section 612.380, or the provisions of Section 612.385 and affirmed the initial determination denying benefits under NRS 612.380. *Id.*

SUMMARY OF ARGUMENT

The district court erred as a matter of law in upholding the Appeals Referee Decision finding Dolores *voluntarily* quit when an employee submits a resignation, with no intent to quit, after being presented with a quit-or-be-fired option from the employer, has not *voluntarily* quit under NRS 612.380. Alternatively, the court erred as a matter of law in upholding the Appeals Referee decision finding no good cause to quit when a change in work requirements renders the employee unable to remain employed, and the employee quit in lieu of certain termination. 'Voluntarily' and 'good cause' are not defined by statute or case law. Therefore this case involves the appropriate statutory interpretation of the legal definition of 'voluntarily' and 'good cause' within NRS 612.380.

ARGUMENT

Standard of Review

This Court may "set aside the agency's final decision . . . because it is, among other things, affected by error of law. . . ." *Father & Sons v. Transp. Servs. Auth.,* 124 Nev. 254, 259, 182 P.3d 100, 104 (2008). This Court reviews errors of law *de novo. Clark County School Dist. v. Bundley*, 122 Nev. 1445, 148 P.3d at

754 (2006). Purely legal questions, including statutory construction, are reviewed de novo. Id. at 1440, 750. *see also Sonia F. v. Eighth Judicial Dist. Court*, 125 Nev. 495, 499, 215 P.3d 705, 707 (2009). "Statutory interpretation is a question of law that this court reviews de novo." *Torrealba v. Kesmetis*, 124 Nev. 95, 101, 178 P.3d 716, 721, (Nev. 2008). We interpret statutes in accordance with their plain meaning and generally do not look beyond the plain language of the statute absent ambiguity. *Id.* Furthermore,

> it is the duty of this court, when possible, to interpret provisions within a common statutory scheme 'harmoniously with one another in accordance with the general purpose of those statutes' and to avoid unreasonable or absurd results, thereby giving effect to the Legislature's intent. *Id.*

This court must review the District court's decision de novo as this is a case of statutory interpretation which is a question of law. It is the duty of the Supreme Court to interpret the legal definitions of 'voluntarily' and 'good cause' and apply those legal definitions to the facts of this case.

I. <u>When an employee submits a resignation, with no intent to resign, after being presented with a quit-or-be-fired option from the employer, that employee has not voluntarily quit pursuant to NRS 612.380</u>

Pursuant to NRS 612.380(1)(a), a person is ineligible for benefits for the week in which the person has *voluntarily* left his or her last or next to last employment without good cause until the person earns remuneration in covered employment.

(emphasis added) Voluntarily is not defined by statute nor is it defined by Nevada case law. Nonetheless, voluntarily is an element of NRS 612.380 and must be established when determining eligibility for unemployment benefits.

Dolores was found ineligible for unemployment benefits because the Referee concluded he voluntarily quit without good cause. A discussion on 'good cause' will follow. First, this court must interpret the meaning of voluntarily in the context of the statute and apply that meaning to the circumstances of this case.. In the end, this Court should conclude that when an employee with no independent intent to quit, selects resignation after being presented with a quit-or-be-fired option from the employer, that that employee has not voluntarily quit pursuant to NRS 612.380.

There is no Nevada case law defining voluntary for purposes of NRS 612.380. There is only a single Nevada case dealing with eligibility for unemployment pursuant to NRS 612.380. However, *Nevada Employment Sec. Dep't v. Weber*, 100 Nev. 121, 676 P.2d 1318 (1984) offers no guidance or clarification on the voluntary or good cause element of NRS 612.380. This Court interprets statutes in accordance with their plain meaning and generally does not look beyond the plain language of the statute absent ambiguity. *Torrealba,* 124 Nev. 95, 101, 178 P.3d 716, 721, (Nev. 2008). NRS 612.380 includes the language "voluntarily".

Looking at the plain meaning, voluntary means: "1. done by design or intention <voluntary act >." BLACK'S LAW DICTIONARY 753 (2nd Pocket ed. 1996).

Dolores did not *intend* to quit his employment nor did he *design* this outcome. It is undisputed that Dolores was presented a quit-or-be-fired alternative and it is also undisputed that if Dolores did not resign he would be fired. Dolores was aware if he did not resign he would be fired which is why he believed he was "forced to resign". JA, 56. Dolores did not put into action a plan to leave employment and never expressed any desire to quit employment. Dolores was only given the ability to select the designation for his separation; it did not permit Dolores to remain employed. Chantrill was clear that, while Dolores was a good employee, Dolores would be fired if he didn't resign. JA, 65-66. Therefore termination was imminent and unavoidable. Dolores knew "they're going to fire me anyway" and if he didn't [resign] he wouldn't get profit sharing retirement money necessary to provide for his family. JA, 59. Despite his desires, Dolores would be unemployed one way or another. He separated in the manner that was most financially sound since resigning allowed him to automatically collect profit sharing retirement funds.

Dolores's behavior shows intent to preserve employment. Dolores renewed his SIDA badge as he did every year, unaware of the new protocol. After completing his renewal, Dolores worked for nearly one month before the TSA confiscated his

badge. Dolores made efforts to resolve by providing the disposition letter with a continued belief that "everything will be okay". JA, 59. He sought assistance from the Union and waited ten days anticipating the matter would be resolved. Dolores did not turn in a resignation until after the ten days lapsed, the TSA refused to issue his badge, and the employer presented a quit-or-be-fired option. Dolores testified he "loved his job" and said he wished there was a position available so he could keep working. JA, 64. Such actions and statements indicate an employee who desires to remain employed, not an employee who voluntarily quit.

"It is the duty of this court, when possible, to interpret provisions within a common statutory scheme 'harmoniously with one another in accordance with the general purpose of those statutes' and to avoid unreasonable or absurd results, thereby giving effect to the Legislature's intent." *Torrealba,* 124 Nev. 95, 101, 178 P.3d 716, 721, (Nev. 2008) The protective purpose behind Nevada's unemployment compensation system is to provide temporary assistance and economic security to individuals who become involuntarily unemployed. To further this purpose, NRS Chapter 612, presumes an employee is covered by the system and does not allow the employee to waive his or her rights under the system. *NRS 612.700.* Because NRS Chapter 612 provides temporary assistance to unemployed individuals, it "should be afforded liberal construction to

accomplish its beneficial intent." *Welfare Division v. Washoe County*, 88 Nev. 635, 637, 503 P.2d 457, 458 (Nev. 1972)

The voluntary element of NRS 612.380 should be interpreted harmoniously with the purpose and legislative intent of the unemployment statute. It is inappropriate to deny Dolores unemployment benefits for *voluntarily quitting* work when Dolores did not chose to become unemployed and had no ability to maintain his employment. If he did not submit a resignation he would have been terminated. The purpose behind unemployment compensation is to provide temporary financial relief to those who are unemployed through no fault of their own. Dolores worked for Southwest for seven and a half years without incident. JA, 60. Dolores was a good employee and, if not for the newly revised TSA protocol, Dolores' badge would have been renewed and he would have continued to work. Without the badge, Southwest had no employment for him. Dolores did not want to quit but continued employment was not available. It would be inconsistent with the protective purpose behind Nevada's unemployment statute to deny a worker temporary assistance and economic security because he resigned after his employer issued a quit-or-be-fired option, termination was imminent, and the employee exercised no intent or desire to be unemployed.

While not binding in Nevada, out-of-state jurisdictions look to the employee's intentions and desires in assessing the voluntariness of a quit.

Resignations induced under pressure or resigning pursuant to a quit-or-be-fired choice is not voluntary. Instead the focus is on the imminence of termination.

Voluntarily is defined as proceeding from one's own choice or full consent and a resignation induced under pressure is not of an employee's free choice or given "with full consent." *Anchor Motor Freight, Inc. v. Unemployment Ins. Appeal Bd., 325 A.2d 374* (1974) Dolores did not exercise free choice in resigning. He resigned because, if he didn't, he would be fired. Dolores did not even contemplate resignation until, after the TSA persisted in their refusal and his employer presented the quit-or-be-fired choice. Until then, Dolores believed the matter would be resolved and he would return to work.

Submitting a letter of resignation, absent any intent to quit employment, does not equate to a voluntary quit. *Swanson v. State*, 759 P.2d 898 (Idaho 1988). Swanson was grieving and suffering physical conditions causing depression, irritability, and irrational upsets. Id. at 899. After a work-related scuffle, claimant tendered a resignation but two hours later, rescinded the resignation, which her employer refused to accept. *Id.* Swanson was granted unemployment as the resignation was submitted without a real intention to quit. *Id.* The appeals examiner reversed, which was affirmed by the Commission. *Id.* at 900. The Supreme Court of Idaho concluded the unemployment statute requires an intent to leave employment and absent the necessary intent, the ramifications of the action

should not be considered." *Id.* Thus, the commission erred as a matter of law in failing to consider Swanson's intention and reasoned denying unemployment benefits would contravene the liberal construction necessary to effectuate the purpose of the Employment Security Act. *Id.* at 901.

In *Cal. Portland Cement Co. v. Ariz. Dep't of Econ. Sec.*, 960 P.2d 65, 66 (Az. App. 1998), an employee had brought a discrimination claim against her employer. As part of a settlement proposal, the employer required the employee to resign. *Id.* The employee demanded the language be changed to 'voluntary retirement', so that she would be eligible for retiree medical program. *Id.* The employee testified she had not planned on retiring and did not want to do so but retired only because the settlement agreement required it. *Id.* Claimant was awarded unemployment benefits and the employer appealed. *Id.* The Court of Appeals of Arizona affirmed. *Id.* at 68. The court reasoned an employee quits when he acts to end the employment and intends this result. *Id.* Here, the employee had no independent desire to resign or retire from her employment but did desire to settle the litigation. *Id.* at 67. As a condition of the settlement the employer required the employee to retire from work. *Id.* Citing *Employment Sec. Comm'n v. Magma Copper Co.*, 366 P.2d 84 (1961) the court noted the better view is in cases which focus upon the volition and intent of the individual workman at the time his employment is terminated." *Id.*

Quitting pursuant to a quit-or-be-fired choice is not "voluntary" for unemployment eligibility purposes. *Williams v. United States*, 571 A.2d 212, 1990 D.C. App. LEXIS 50 (D.C. 1990); *Green v. District of Columbia Department of Employment Services*, 499 A.2d 870, 877 (D.C. 1985); *Thomas v. District of Columbia Department of Labor*, 409 A.2d 164, 174 (D.C. 1979); *Vennell v. Department of Employment Sec.*, 449 A.2d 899, 1982 Vt. LEXIS 528 (Vt. June 8, 1982). Here, Dolores did not submit a resignation because he wanted to quit; he quit because he knew he would be fired. In this case, termination was certain and therefore Dolores's separation was not voluntary.

In *Thomas v. District of Columbia Dep't of Labor*, 409 A.2d 164 (D.C. 1979), a hospital switchboard operator indicated personal reasons for her resignation, but thereafter applied for unemployment benefits, citing her imminent discharge as her reason for resigning. *Id.* at 166. Claimant received admonitions, a suspension, and was called into supervisor's office and told disciplinary action was going to be taken against her. *Id.* at 167. A union representative suggested she resign as there was intent to remove her and she would be unsuccessful challenging such proposal. *Id.* The D.C. Court of Appeals took issue with the Boards finding of voluntariness-- "a conclusion with crucial legal significance". *Id.* at 169. While a mutually agreed-upon agreement operates to the advantage of employee and employer, it is not proper to take a quit, tendered in lieu of termination, out of its

context and regard it as dispositive on the issue of voluntariness. *Id.* at 170. The board must look to the statutory purpose to provide income for workers who are unemployed through no fault of their own. *Id.* The court concluded employees quitting pursuant to a quit-or-be-fired choice is not per se "voluntary" for unemployment purpose. *Id.* at 172. In approaching the voluntariness inquiry reasonably, the focus should be on the imminence of a threatened termination. *Id.*

For Dolores, termination was imminent and unavoidable. Dolores was aware if he didn't quit he would be fired. If a job by virtue of its conditions would be unavailable, then from a legal standpoint, there is no free exercise of the will and the employee has not voluntarily quit. *Rhodes v. Rutledge*, 327 S.E.2d 466, 468 (W.Va. 1985) Despite Dolores's desire to keep his job, continued work at Southwest was no longer available. Therefore he did not exercise the will to voluntarily quit. Dolores quit out of necessity, not out of preference or desire.

By its plain meaning, a voluntary quit requires the Court to find Dolores actually intended to quit and acted in a way consistent to achieve that result. Dolores did not intend to quit and did not put into action any plan to leave employment. Dolores testified he loved his job and wanted to continue working. If not for the newly revised TSA protocol, Dolores would have continued employment. After his badge was confiscated, Dolores behaved in a manner consistent with trying to maintain employment by providing the disposition letter

and waiting ten days anticipating resolution. The TSA refused to issue his badge and Dolores was unable to continue employment. Southwest present a quit-or-be-fired alternative. Only then did Dolores submit a letter of resignation, knowing termination was certain. A resignation tendered in lieu of an imminent termination is not voluntary. Since termination was certain and work was no longer available, from a legal standpoint, Dolores did not voluntarily quit pursuant to NRS 612.380.

II. When a change in work requirements renders an employee unable to remain employed, and termination is certain in lieu of a resignation, the employee has *good cause* to quit pursuant to NRS 612.380

Pursuant to NRS 612.380(1)(a), a person is ineligible for unemployment benefits when a person has voluntarily left employment *without good cause.* (emphasis added) *Good cause* is not defined by statute nor by Nevada case law. According to the DETR Appeals Handbook, good cause for leaving work can be established if there is a compelling reason to quit and there are no other reasonable alternatives but to quit. Nevada Dept. of Employment, Training, & Rehabilitation, *Appeals Handbook, Nevada Unemployment Compensation Program* at 18 (Revised May 2016)

While there is no Nevada precedent on point, this Court in *Garman v. State, Emp. Sec. Dep't*, 102 Nev. 563, 564, 729 P.2d 1335, 136 (1986), assessed unemployment eligibility when a claimant was terminated after a change in work

requirements made it impossible for claimant to continue her employment. The claimant told the employer she could not work from 8:30 a.m. to 4:30 p.m., she could only work from 6:00 a.m. to 2:00 p.m. *Id.* at 564, 1336. The employer approved the individualized schedule but later told claimant she was required to work from 8:30 a.m. to 4:30 p.m. *Id.* Garman refused due to school and family commitments; she was terminated. *Id.* The Court concluded there was no basis for a finding of misconduct when Garman did not refuse to work assigned hours, she refused to acquiesce to a change in her condition of employment. *Id.* at 567, 1338. While Garman deals with a discharge scenario assessed under the misconduct statute, its holding is consistent with the conclusion that an employee should not be faulted if the employer changes the work requirements thereby impeding continued employment. When there is a change in employment requirements, leaving the employee unable to maintain their employment, that employee has a compelling reason to quit. For six years, Dolores successfully renewed his badge. Then in July 2015 the TSA revised their protocol, requiring additional background checks. Based on the result of that background check, without warning, Dolores's badge was confiscated. Without his badge, Dolores was unable to maintain his employment. Consequently, Southwest present a quit-or-be- fired alternative. If Dolores did not quit, termination was certain. Since the newly revised TSA policy imposed an additional restriction making it impossible for Dolores to maintain his

employment, and termination was certain in lieu of his resignation, Dolores had good cause to quit.

Other jurisdictions hold that an employer's imposition of a substantial unilateral change in the terms of employment constitutes a necessitous and compelling cause for an employee to quit. *Middletown Twp. v. Unemployment Comp. Bd. of Review,* 40 A.3d 217 (Pa. 2012). A claimant must establish that (1) circumstances existed that produced real and substantial pressure to quit, (2) like circumstances would compel a reasonable person to act in the same manner, (3) the claimant acted with ordinary common sense, and (4) the claimant made a reasonable effort to preserve employment. *Id.* at 228. Substantiality is measured by the impact on the employee, and whether the change involves any real 'difference' in employment conditions. *Id.*

Here, the newly revised TSA protocol prevented Dolores from obtaining his SIDA badge. Without the SIDA badge, Dolores was unable to maintain his employment with Southwest since the badge is required for airport security clearance. The newly revised, stricter protocol created a significant difference in Dolores's employment conditions since he was unable to renew his SIDA badge after the newly revised protocol. With the TSA refusing to issue his badge, Southwest intended to terminate Dolores's employment but gave him a quit-or-be-fired alternative. Dolores knew he would be fired if he did not resign and knew if

he resigned he would receive his retirement funds without risk. The circumstances produced real and substantial pressure for Dolores to quit. A reasonable employee facing such circumstances would resign, not only to avoid the blemish of a termination on their record, but also to collect the payout of employee funds to which they are entitled. Dolores made reasonable efforts to preserve his employment such as providing the requested information to the TSA, waiting ten days, and seeking assistance from the Union. Dolores did not thoughtlessly launch into resigning from his job. Dolores had no other alternatives as the new protocol prohibited him from obtaining his SIDA badge, without his badge continued work was not available, and if he didn't quit, termination was certain. Dolores had good cause to quit.

While not binding in Nevada, out-of-state jurisdictions hold that when an employee is facing a prospective discharge, resigning in lieu of that prospective discharge is for "good cause" if a reasonable person facing that prospect of discharge would consider the prospect so grave that resigning was the only reasonable option. In *McDowell v. Employment Dep't*, 236 P.3d 722, 724 (Or. 2010) the claimant, who worked as a teacher, showed a 10-minute clip from the film "Glengarry Glen Ross" which contained some profanity. The personnel director indicated he would be recommending discharge and advised claimant he had the option to resign instead of being fired. *Id.* at,724. Claimant sought advice

from the union but was told the board would not overrule a district recommendation and advised he should resign before being fired. *Id.* Claimant did resign and unsuccessfully sought unemployment. *Id.* at 724-725. The Oregon Supreme court concluded good cause is an objective standard that asks whether a "reasonable and prudent person" would consider the situation so grave that he had no reasonable alternative to quitting. *Id.* at 726. When an employee is facing a prospective discharge, whether resigning in lieu of that prospective discharge is for "good cause" depends on whether a reasonable person facing that prospect of discharge would consider the prospect so grave a circumstance that resigning was the only reasonable option. *Id.* at 730.

Dolores' circumstances were very grave. Facing the steadfast refusal of the TSA and the knowledge that he cannot continue his job without the badge, Dolores knew his employment would be terminated. Furthermore his employer told him point-blank he could quit, "or be fired". This case does not involve '*a possibility*' of termination nor did Dolores think he '*might be*' fired. Termination was not prospective; it was certain and immediate. By resigning, Dolores preserved a favorable employment record and was assured his profit sharing funds. Dolores knew he would be unemployed either way and made decisions that best enabled him to withstand the financial difficulty and ensure faster re-employment. A reasonable person facing the same prospect as Dolores would have considered the

circumstances so grave that resigning was the only reasonable option. Dolores would be fired and hindsight speculation about the outcome of a union challenge has no relevance on Dolores's reasonable belief of the seriousness of his circumstances and the absence of any alternatives.

CONCLUSION

The purpose behind NRS Chapter 612 is to provide unemployed workers with temporary assistance and economic security. It is the duty of this Court to interpret the statutory provisions harmoniously with this general purpose. Dolores was denied unemployment because he was found to have voluntarily quit work without good cause. While both 'voluntary' and 'good cause' are included in the statutory language of NRS 612.380, neither term has been defined by law.

Dolores's unemployment was neither voluntary nor without good cause. An employee has not 'voluntarily' quit work when, like Dolores, they have no intention or plan to become unemployed but turn in a letter of resignation after being presented with a quit-or-be-fired alternative from their employer and termination is certain. In such circumstances, the employee did not voluntarily quit. Alternatively, an employee, like Dolores, has good cause to quit when a newly revised policy with stricter requirements prevents the employee from maintaining their employment and when termination is certain in lieu of a resignation.

Dolores respectfully requests that this Court reverse the order of the District court thereby finding Dolores eligible for unemployment benefits.

NRAP 28.2 CERTIFICATE

1. 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 Microsoft Office Word 2010 in Times New Roman 14 point font.

2. 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 30 pages and is proportionately spaced, has a typeface of 14 points or more, and contains approximately 6,024 words (less than 14,000).

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 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 25th day of May, 2017.

Respectfully submitted,

Nevada Legal Services, Inc.

Dawn R. Miller, Esq.
Nevada Bar No. 10933
530 S. 6th Street
Las Vegas, Nevada 89101
(702) 386-0404 ext. 111
Attorney for Appellant

CERTIFICATE OF SERVICE

I hereby certify that on the 25th day of May, 2017, I served the following recipient electronically, pursuant to NRAP 25(c)(1)(E) and NEFCR 9:

Laurie L. Trotter, Esq.
l-trotter@nvdetr.org
Senior Legal Counsel
NV Department of Employment, Training, & Rehabilitation: Employment Security Division

An Employee of Nevada Legal Services