NO. 72126

IN THE SUPREME COURT OF THE STATE OF NEVADA

EUGENIO DOLORES,

Appellant,

vs.

EMPLOYMENT SECURITY DIVISION,
STATE OF NEVADA, *et al.*,

Respondents.

On Appeal from an Order Denying Petition for Judicial Review
of the Eighth Judicial District Court of
The State of Nevada, in and for Clark County
District Court Case No. A732941

RESPONDENT ESD'S ANSWERING 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 Petition for Judicial Review was filed on December 15, 2016. (Joint Appendix (JA) 165-66) The Notice of Entry of Order was filed with the District Court on December 16, 2016. (JA, 163) The Appellant (herein "claimant") filed a Notice of Appeal on January 3, 2017. (JA, 167) The appeal was therefore filed timely under Nevada Rule of Appellate Procedure 4(a)(1).

ROUTING STATEMENT

Pursuant to NRAP 17(b)(4) the matter is presumptively retained by the Court of Appeals, however Respondents ESD have no objection to the Supreme Court retaining this matter.

STATEMENT OF THE ISSUES

1. The decision of the District Court and the Board of Review should be affirmed, as claimant willfully submitted a resignation letter before all other reasonable alternatives were exhausted; he admittedly did not seek assistance from his collective bargaining unit regarding potential termination, among other viable options. Claimant cannot therefore show that he had good cause for quitting, pursuant to NRS 612.380.

2. Even if this Court concludes that claimant voluntarily quit with good cause, claimant nonetheless committed industrial misconduct, as he (an airline employee) was convicted of fraud and therefore was purportedly unable to maintain the mandatory SIDA (Security Identification Display Area) badge as required by employer.

3. This Court should not consider the new issue, that claimant was subject to a change in work requirements, because it was never considered below, and it is not supported factually.

STATEMENT OF THE NATURE OF THE CASE

Eugenio Dolores (claimant) was employed from March 25, 2008, to August 30, 2015, by Southwest Airlines (employer). (JA, 44) Claimant was a ramp agent. (JA, 44) Claimant voluntarily resigned from his employment on September 13, 2015. (JA, 44; 83)

Claimant filed a claim for unemployment insurance benefits. The claim was reviewed by the Administrator through an investigator known as an adjudicator. The adjudicator issued a determination on October 14, 2015, finding that claimant was not entitled to receive unemployment insurance benefits. (JA, 89) Claimant appealed and an evidentiary hearing was held before the Administrative Tribunal (referee) on December 3, 2015. (JA, 49, 75, 93) At the hearing, claimant was represented by Dawn Miller, Esq. of Nevada Legal Services,

Inc. Employer was represented by James Chantrill. (JA, 50) The referee issued a decision on December 10, 2015, finding that claimant voluntarily resigned from the employment; and as a consequence, was ineligible to receive unemployment insurance benefits. (JA, 46)

Claimant then filed an appeal to the Board of Review (Board). (JA, 43) The Board issued a decision on February 12, 2016, wherein the Board reviewed the record and considered the arguments of the parties. (JA, 30) The Board adopted the findings of fact and the reasoning of the Appeals Referee. (JA, 30) As a result, in effect, the Board adopted the decision of the Appeals Tribunal, who affirmed the determination of the adjudicator. (JA, 30) In its order, the Board notified claimant that any appeal to the District Court had to be filed by March 7, 2016. (JA, 30) Claimant filed the Petition for Judicial Review with the District Court on March 4, 2016. (JA, 18)

The final Order of the District Court Denying Petition for Judicial Review was filed on December 15, 2016. (JA 165-66) Claimant filed a Notice of Appeal on January 3, 2017. (JA, 167)

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. Claimant was employed from March 25, 2008, to August 30, 2015, as an airline ramp agent. (JA, 44)

2. Claimant voluntarily resigned from the employment. (JA, 44)

3. Employer's policy states that all employees are required to have a security clearance from the Transportation Security Administration (TSA) and are required to maintain a Security Identification Display Area (SIDA) badge, and the SIDA badge must be renewed every year. (JA, 44, 58, 105) In the past, TSA had only required airline employee fingerprints for criminal record checks at the time of hire. In July 2015, TSA changed its policy/law to require fingerprints for criminal record checks every two years, when airport employees renew their SIDA badges. (JA, 44, 65-66, 58, 105)

4. Claimant renewed the SIDA badge that TSA assigned to him on August 3, 2015. TSA [initially] denied his SIDA badge renewal because he had a felony on his record. (JA, 44, 57, 105)

5. In December 2014, claimant had been charged with Attempted Forgery, and later entered a guilty plea to the charge of Attempted Forgery, a gross misdemeanor. (R, 44; 95-95) The Judgment of Conviction provides that claimant was not convicted of the gross misdemeanor until August 18, 2015. (JA, 94-95)

6. Claimant advised the employer's Manager of Ramp Operations (MRO) of the issue. (JA, 65) Employer provided claimant ten (10) days of

personal leave to attempt to rectify the problem with his SIDA badge renewal. Without the TSA clearance to work in the airport and the TSA issued SIDA badge, claimant could not perform his duties for employer at the airport. (JA, 45, 58)

7. Employer gave claimant the option to resign in lieu of discharge. (R, 45, 62)

8. Claimant chose to resign effective September 13, 2015, so that he could collect his vacation pay and the benefits he had accrued from employer's profit sharing account. The vacation pay and profit sharing benefits were not available to claimant if employer discharged him. (JA, 45, 60)

9. Claimant was not in jeopardy of losing his job before he attempted to renew the SIDA badge. Employer considered claimant a good employee. (JA, 45, 60-61)

10. The referee inferred that she could have made a finding of misconduct, pursuant to NRS 612.385, and in such case, claimant would have also been ineligible for unemployment benefits. (JA, 46)

11. The referee specifically found that claimant elected to resign from his job because his off-duty conduct prevented him from obtaining a security clearance from TSA, which was required for claimant to report to work at the airport. Employer gave claimant the option to resign or be discharged since he could not report to work at the airport to fulfill his work obligations. Claimant

chose to resign in order to collect his vacation pay and profit sharing benefits [and to avoid having a disciplinary record for the purposes of future employment]. (JA, 36, 45, 111)

12. The referee specifically found that claimant's reasons for leaving the employment were not compelling, as resignation in lieu of discharge is not considered good cause. Claimant did not establish good cause, by a preponderance of the evidence, for voluntarily leaving available work. (JA, 45)

STATEMENT OF THE STANDARD OF REVIEW

If supported by evidence and in the absence of fraud, the Decision of the Board of Review (Board) is conclusive. NRS 612.530(4); *State Employment Sec. Dept. v. Weber*, 100 Nev. 121, 124, 676 P.2d 1318, 1320 (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, 320, 683 P.2d 1, 2 (1984); *McCracken v. Fancy*, 98 Nev. 30, 31, 639 P.2d 552 (1982); *Bryant v. Private Investigator's Lic. Bd.*, 92 Nev. 278, 279, 549 P.2d 327 (1976); *Lellis v. Archie*, 89 Nev. 550, 553-54, 516 P.2d 469, 470 (1973).

In performing its review function, this Court may not substitute its judgment for that of the Board of Review, *Weber*, 100 Nev. at 124; *McCracken*, 98 Nev. at 31, 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).

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, 401 (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, 692 (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, 638 (Wis. 1968).

The burden to be met by Respondent 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,* 89 Nev. 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, 228 (1982); *North Las Vegas v. Pub. Serv. Comm'n*, 83 Nev. 278, 281, 429 P.2d 66, 68 (1967); *Randono v. Nev. Real Estate Comm'n*, 79 Nev. 132, 137, 379 P.2d 537, 539 (1963).

In the case of *Clark County School District v. Bundley,* 122 Nev. 1440, 1444, 148 P.3d 750, 754 (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 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 Respondent 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.

ARGUMENT

1. PROBATIVE AND SUBSTANTIAL EVIDENCE SUPPORTS THE DECISIONS OF THE REFEREE, THE BOARD OF REVIEW, AND THE DISTRICT COURT. SUCH DECISIONS WERE NEITHER ARBITRARY NOR CAPRICIOUS, NOR AN ERROR OF LAW. CLAIMANT CANNOT SHOW THAT HE HAD GOOD CAUSE FOR QUITTING, PURSUANT TO NRS 612.380.

A. Applicable Law

VOLUNTARY QUIT WITHOUT GOOD CAUSE

NRS 612.380, in pertinent part, states:

> 1. Except as otherwise provided in subsection 2, 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:
>
> (a) Without *good cause*, if so found by the Administrator, and until the person earns remuneration in covered employment equal to or exceeding his or her weekly benefit amount in each of 10 weeks.
>
> (b) To seek other employment and for all subsequent weeks until the person secures other employment or until he or she earns remuneration in covered employment equal to or exceeding his or her weekly benefit amount in each of 10 weeks, if so found by the Administrator. (Emphasis added.)

The term "good cause" in the context of NRS 612.380 is not specifically defined in Nevada's statutory or case law. The Board of Review has generally applied the standard that for good cause to exist, the claimant must prove, by a preponderance of the evidence, that he had no reasonable alternative but to quit. The conditions giving rise to the reason to quit must be so compelling that a reasonably prudent person would voluntarily give up gainful employment and join the ranks of the unemployed. The Board also requires that for good cause to exist, the employee must demonstrate that he exhausted all reasonable alternatives before quitting.

In *Famuyiwa v. Employment Security Division*, Case No. 63211 (2014 WL 2038264)(unpublished disposition), this Court upheld the decision of the District Court affirming ESD's decision that claimant did not satisfy his burden of proof to establish good cause for quitting:

> Appellant testified that he left his job because of both his medical condition and his desire to seek employment in his previous line of work. ... We ... conclude that substantial evidence in the record supports the appeals referee's finding that appellant had not quit his job for good cause. *See Kolnik v. Nev. Emp't Sec. Dep't*, 112 Nev. 11, 16, 908 P.2d 726, 729 (1996) (noting that mixed questions of law and fact are entitled to deference and the agency's conclusions will not be disturbed by this court if they are supported by substantial evidence); see also *Wright v. State, Dep't of Motor Vehicles*, 121 Nev. 122, 125, 110 P.3d 1066, 1068 (2005) (recognizing that substantial evidence may be inferred from the lack of certain evidence); *Uhl v. Ballard Med. Prods.*, Inc., 67 P.3d 1265, 1270 (Idaho 2003) (upholding the denial of benefits based on the failure to

> provide sufficient evidence showing the degree of risk to the claimant's health or physical condition by continuing in his job). (Emphasis added)

In *Smith v. State Emp. Sec. Div.*, Case No. 65315 (2015 WL 3370949)(unpublished disposition), this Court concluded that substantial evidence in the record supported the referee's finding that claimant did not establish good cause for quitting, pursuant to NRS 612.380. This Court explained that "[a]lthough harassment by fellow employees can constitute good cause for voluntarily quitting a job if the claimant informed his employer of the harassment and gave his employer an opportunity to understand the nature of his objection before resigning" however, "unsubstantiated complaints do not constitute good cause for voluntarily quitting a job for unemployment benefits purposes." *Id.* (int. cites omitted)

Likewise, the Nevada Supreme Court held in *Burwell v. State, Dep't of Employment, Training and Rehab.*, Case No. 51992 (2009 WL 4302953)(unpublished disposition), found that a claimant did not establish good cause, pursuant to NRS 612.380, because claimant did not meet her burden of proof to show that she "quit her employment without making a sufficient effort to seek accommodation from her employer" such as "asking for a leave of absence or requesting a transfer to a different department."

The Board's application of the law is supported by the above Nevada cases and other cases throughout the United States. In the case of *MaGee v.*

Director, Arkansas Employment Security Department, 55 S.W.3d 321 (Ark. App. 2001), the court held that if a claimant alleges that he was mistreated by his employer he must prove that the level of mistreatment was so severe as to cause a reasonably prudent person to quit his employment. Additionally, the Arkansas court held that to qualify for unemployment benefits, the claimant must prove that he acted in good faith showing a genuine desire to retain his employment and that he took all reasonable steps necessary to avoid the loss of his employment. See also, *Teel v. Daniels,* 606 S.W.2d 151 (Ark. App. 1980)

The State of Utah defines "good cause" in the context of unemployment insurance as follows:

> Good cause as used in unemployment insurance is cause which would justify an employee's voluntarily leaving work and becoming unemployed; the leaving must be for reasons which would reasonably motivate in a similar situation the average worker to give up employment with its wage rewards to become unemployed. To constitute good cause, the circumstances which compel the decision to leave must be real, not imaginary; substantial, not trifling, and reasonable, not whimsical. There must be some compulsion from outside and necessitous circumstances. The standard of what constitutes good cause is the standard of reasonableness as applied to the average individual and not to the supersensitive. *Child v. Board of Review,* 657 P.2d 1375 (Utah, 1983)

In the case of *Calvert v. Alaska Department of Labor*, 251 P.3d 990 (Alaska, 2011), the Alaska Supreme Court defined good cause relating to unemployment insurance benefits as follows:

> To show good cause, a worker must demonstrate that the underlying reason for leaving work was compelling, and that the worker exhausted all reasonable alternatives before leaving the work. The burden of demonstrating both elements of good cause is on the worker.

The Minnesota Court of Appeals found in *Seacrist v. City of Cottage Grove*, that a claimant failed to establish good cause when he voluntarily quit to avoid disciplinary proceedings which would reflect poorly upon his ability to seek other employment as a police chief in Bayport, Minnesota. 344 N.W.2d 889, 890 (Minn.Ct.App. 1984). The Court articulated, "[w]hen an employee, in the face of allegations of misconduct, chooses to leave his employment rather than exercise his right to have the allegations determined, such action supports a finding that the employee voluntarily left his job without good cause." *Id.* citing *Ramirez v. Metro Waste Control Comm'n*, 340 N.W.2d 355 (Minn.Ct.App. 1983). The court explained that "[w]hen an employee says he is quitting, an employer has a right to rely on the employee's word." *Id.*

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MISCONDUCT CONNECTED WITH WORK

NRS 612.385, in pertinent part, states: "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. ..." In *Barnum v. Williams*, 84 Nev. 37, 41, 436 P.2d 219, 222, (1968), this court reasoned that "misconduct" for purposes of NRS 612.385, means a:

> [D]eliberate violation or disregard of reasonable standards of behavior which employer has the right to expect. Carelessness or negligence on the part of the employee of such a degree as to show a substantial disregard of the employer's interests or the employee's duties and obligations to his employer are also considered misconduct connected with the work. Mere inefficiency or failure of performance because of inability or incapacity, ordinary negligence in isolated instances, or good faith errors in judgment or discretion are excluded in the definition of misconduct. Citing to Boynton Cab Co. v. Neubeck, 237 Wis. 249, 296 N.W. 636 (Wis. 1941).

This Court later added to the definition an "element of wrongfulness." *Lellis v. Archie*, 890 Nev. 550, 553, 516 P.2d 469, 471 (1973) and *Garman v. State, Employment Security Department*, 102 Nev. 563, 565, 729 P.2d 1335, 1336 (1986). In *Clark County School District v. Bundley,* 122 Nev. 1440, 1445, 148 P.3d 750, 754-755 (2006), this Court explained:

> Disqualifying misconduct occurs when an employee deliberately and unjustifiably violates or disregards her employer's reasonable policy or standard, or otherwise acts in such a careless or negligent manner as to 'show a substantial

> disregard of the employer's interests or the employee's duties and obligations to [her] employer.' As we have previously suggested, because disqualifying misconduct must involve an 'element of wrongfulness,' an employee's termination, even if based on misconduct, does not necessarily require disqualification under the unemployment compensation law. Instead, determining whether misconduct disqualifies a person from receiving unemployment benefits 'requires a separate and distinct analysis': "[w]hen analyzing the concept of misconduct, the trier of fact must consider the legal definition [of disqualifying misconduct] in context with the factual circumstances surrounding the conduct at issue." (Internal citation omitted)

Accordingly, "misconduct" for purposes of NRS 612.385 is:

- a deliberate unjustifiable violation or disregard for an employer's reasonable policy or standards of behavior an employer can expect, or
- carelessness or negligence of such a degree as to show a substantial disregard of the employer's interests or the employee's duties and obligations, and
- an element of wrongfulness.

In the case of *Fremont Hotel v. Esposito*, 104 Nev. 394, 760 P.2d 122 (1988), this court discussed the issue of "wrongfulness." It held that wrongfulness exists if the trier-of-fact, i.e., the referee and Board, applies the facts to the law and reasonably concludes that the claimant acted contrary to the manner which the employer had the right to expect. *Fremont, supra,* 104 Nev. at 397-98, 760 P.2d at 123-24. In *Fremont*, the court defined "misconduct" as "'any improper or wrong

conduct.'" Citing *Lellis v. Archie*, 89 Nev. 550, 553, 516 P.2d 469, 470–471 (1973) (quoting *Boynton Cab Co. v. Neubeck*, 237 Wis. 249, 296 N.W. 636, 639 (1941)).

This Court may affirm on any ground supported by the record, even if the Board did not rely on the correct ground in reaching its decision. *See Howell v. Ricci,* 124 Nev. 1222, 1231, 197 P.3d 1044, 1050 (2008) ("Thus, although the district court resolved this matter on different grounds, we affirm the district court's denial of the Howells' petition for judicial review because the district court's decision reached the correct result."); *Hotel Riviera v. Torres,* 97 Nev. 399, 403, 632 P.2d 1155, 1158 (1981) ("If a decision below is correct, it will not be disturbed on appeal even though the lower court relied upon wrong reasons.").

B. The District Court Relied Upon Probative and Substantial Evidence in the Record to Find That Claimant Voluntarily Quit Without Good Cause, Pursuant to NRS 612.380.

Claimant did not meet his burden of proof that he voluntarily quit the employment with good cause. This Court should affirm the decision of the District Court and Deny the Petition for Judicial Review.

Claimant did not exhaust all reasonable alternatives before quitting his job and joining the ranks of the unemployed.

Claimant worked as a ramp agent for an airline. (JA, 45, 55) Employer's policy was that its employees must obtain a security clearance and

renew the Transportation Security Administration's (TSA) Security Identification Display Area (SIDA) badge on a yearly basis. (JA, 44, 66, l. 16) Claimant does not dispute having knowledge of employer's policy that SIDA badges must be renewed yearly as a condition of employment. (JA, 58) TSA was established by Public Law 107-71, and maintains authority for security-screening procedures for airport employees with access to secure areas of an airport. TSA's policy is that SIDA badges will not be issued to individuals who have a felony conviction on their record. (JA, 051, 57)

Claimant was convicted of Attempt Forgery in August, 2015. (JA, 94-95) Claimant testified he was charged with "credit card fraud" and that the penalty for the "credit card fraud" was reduced, in his case, from a felony to a gross misdemeanor. (JA, 57) Claimant was advised by TSA Investigator Glenn Glover that the Federal Bureau of Investigation (FBI) checked claimant's fingerprints and discovered that claimant had a felony conviction on his record. (JA, 57) Claimant explained to TSA that the penalty for the fraud charge had been reduced to a gross misdemeanor, and provided TSA with proof regarding his conviction. (JA, 57, 58) TSA confiscated claimant's SIDA badge; however, claimant did not receive a *final* answer from TSA regarding whether the lesser penalty would change TSA's position regarding claimant's access to the SIDA badge. (JA, 57) Claimant testified that he did not hear about the results of his

background check until *after* he resigned. (JA, 46) After being approached by TSA regarding his criminal record, claimant discussed the matter with his employer. (JA, 59) Claimant was given the option to voluntarily quit or be discharged. (JA, 63) Claimant believed that if he was discharged, he would not receive accrued vacation pay and profit sharing benefits. (R, 59; 60)

Despite not having received a final answer from TSA about his SIDA badge status, claimant elected to voluntarily quit from the employment instead of exhausting all reasonable alternatives before quitting. Claimant did not take reasonable steps to clarify his status with TSA, and to file a grievance with the union to resolve the issue regarding the possibility of termination -- just as any reasonable person in his situation would have done under similar circumstances. Claimant decided to voluntarily quit before these other viable options were even attempted. Exhausting these alternatives were reasonable, especially under these circumstances. The Administrative Record provides that TSA's policy concerning SIDA badges is limited to felony convictions and claimant does not have a felony conviction. (JA, 051, 57)

The circumstances in this case show that claimant did not meet his burden of proof to demonstrate a good faith effort and genuine desire to retain his employment or to show that he took all reasonable steps necessary to avoid the loss

of his employment. *Burwell, supra; Calvert, supra*; *MaGee, supra*; *Teel, supra*; *Child, supra*.

Instead, the record shows that claimant became impatient and was unwilling to wait the period of time it would take for the union to assist claimant with his grievance and to request TSA to reconsider the initial decision regarding claimant's SIDA badge status, given that he was not convicted of a felony. (R, 59) The record is absent any evidence that claimant requested a leave of absence (apart from the initial time off that employer freely granted claimant) in order to resolve the TSA's misconception that claimant had a felony conviction on his record which led to TSA's *preliminary* decision to confiscate claimant's SIDA badge. The record is also barren of any evidence that claimant requested employer transfer him to a position outside of the secure zone in the airport, where a SIDA badge is not required. Asking for a leave of absence, or a transfer to another position outside the secure area of the airport are reasonable options given claimant's suggestion that he would have continued to work if the situation with his SIDA badge had been resolved. (OB, 12) This Court articulated that these same reasonable alternatives should have been explored before the claimant quit in *Burwell, supra*. Because in the instant case, claimant took none of the above-mentioned reasonable steps, claimant therefore cannot demonstrate that any reasonable employee in his position would have quit in this situation; and he

cannot demonstrate good cause for voluntarily quitting because he did not exhaust all reasonable alternatives to maintain the employment before joining the ranks of the unemployed. See, *Miller v. Help At Home*, 186 S.W.3d 801, 808-09 (Missouri App.Ct. 2006).

Claimant cannot meet his burden of proof to establish good cause for voluntarily quitting the employment.

Claimant is unable to meet his burden of proof to show good cause for resigning. Claimant cited that the reason he quit his job is because he wanted to receive vacation pay and profit sharing benefits that he could not collect if he were fired. Claimant also wanted to preserve his employee record for future employment purposes. (JA, 36, 60, 106, 111; OB, 5-6) Claimant did not act as a reasonably prudent person, genuinely desirous of maintaining employment, when he elected to collect employee benefits rather than exhaust all reasonable alternatives in an effort to maintain his employment. The record and claimant's Brief indicate that the only action claimant took to maintain his job was to provide TSA with the Judgment Of Conviction; however, claimant's Brief also indicates that claimant could have sought assistance from the union regarding his job status. (R, 029, 078; OB 4, 7) Claimant could also have requested a leave of absence, or could have requested a transfer to another department.

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Claimant incorrectly suggests that he was forced to resign. (JA, 106) Claimant also indicates in his Brief that he could have received assistance from his collective bargaining unit "union" to assist him in getting his job back, but that he would have to "wait for the union to clear the termination." (JA, 106, 110) Claimant failed to exhaust all reasonable alternatives before quitting, and as such, he did not have good cause for voluntarily quitting gainful employment.

Employer met its burden of proof, which was substantiated by claimant's own admissions. Claimant prematurely elected to resign from work rather than exhausting all reasonable alternatives before he became unemployed. This Court cannot reverse such a finding as long as the finder-of-fact applies the facts to the law, as occurred in this case. *Fremont Hotel v. Esposito*, 104 Nev. 394, 760 P.2d 122 (1988). As a result, the decision below was not arbitrary or capricious nor was it clearly erroneous because probative and substantial evidence in the record demonstrate that claimant voluntarily quit without good cause. The referee, the Board of Review, and the District Court properly found that claimant had not proved that a reasonable person under similar circumstances would have rendered himself unemployed.

Claimant incorrectly contends that he did not intend to quit his job.

Probative and substantial evidence in the record demonstrates that claimant intentionally and voluntarily quit the employment. Claimant cannot

demonstrate that, based on the evidence contained in the record, he unintentionally or involuntarily quit. (OB, 10) "A person is disqualified from receiving unemployment benefits when the individual voluntarily and without good cause attributable to the employer discontinued his employment with such employer." *Seacrist v. City of Cottage Grove*, 344 N.W.2d 889, 891 (Minn.App.Ct. 1984). "A termination of employment is considered a voluntary quit when the employee is the moving party in ending the employment relationship." *Fallstrom v. Dept. of Workforce Serv.,* Court of Appeals of Utah, 367 P.3d 1034, 1035 (Utah App.Ct. 2016). "An employee is deemed to have left work voluntarily when he leaves of his own accord, as opposed to being discharged, dismissed, or subjected to layoff by the employer." *Miller v. Help At Home, Inc.*, 186 S.W.3d 801, 806, (Mo.Ct. App. 2006).

Courts nationwide "have adopted the general rule that a claimant who left work due to a reasonable belief that discharge was imminent has nonetheless left voluntarily without good cause attributable to the employer and is therefore ineligible to receive any unemployment compensation benefits." 79 A.L.R.4th 528 §4 (1990). *See also, In re Halas*, 296 A.D.2d 703, 746 N.Y.S.2d 71 (App.Div. 3d Dep't 2002)("It is well settled that leaving work in anticipation of being discharged does not constitute good cause entitling claimant to unemployment insurance benefits); *Claim of Izquierdo*, 238 A.D.2d 654, 655 N.Y.S.2d 682 (3d Dep't 1997),

leave to appeal dismissed, 90 N.Y.2d 990, 665 N.Y.S.2d 954, 688 N.E.2d 1037 (1997)(holding that "[a]n employee who abandons employment in anticipation of discharge will be found to have voluntarily left her employment without good cause); *Beaverton School Dist. v. Employment Div.*, 20 Or. App. 487, 564 P.2d 717 (1977)(holding that claimant quit because "he feared he was going to be dismissed for reasons that would reflect unfavorably upon his performance as an instructor," was not compelling and was found insufficient to establish good cause for quitting.)

The *Seacrist* case is instructive. The *Seacrist* Court held that "[t]he question of whether a termination is voluntary or involuntary is determined 'not by the immediate cause or motive or act but by whether the employee directly or indirectly exercised a free-will choice and control as to the performance or non-performance of the act." 344 N.W.2d at 891. In *Seacrist*, the claimant, a police sergeant, quit his job to protect his employment record for another job opportunity as a police chief. *Id.* The *Seacrist* claimant contended that because the employer demanded a resignation at night and demanded it immediately, claimant proposed that employer used "overpersuasion." *Id.* The *Seacrist* Court explained that employer's alleged confrontation with claimant occurred at night since claimant reported for work at that time because claimant was assigned to work the night shift. *Id.* Since claimant displayed significant disregard for employer's interests

when he appeared impermissibly late for court testimony, appeared late for mandatory training, failed to show up for mandatory shoot qualification, often reported late for his shift, and failed to report for duty when assigned due to an alcohol problem which affected his job performance, and because claimant had refused help from employer for his alcohol problem, and claimant continued to appear tardy for work even after receiving a two-day suspension from work, the police chief and the city commissioner confronted the *Seacrist* claimant to resolve the problem regarding claimant's unreliability at work. 244 N.W.2d at 890-91. Based on the aforementioned facts, the police chief believed that claimant was unfit to supervise public welfare. 244 N.W.2d at 892.

The *Seacrist* Court explained that the fact that claimant was a candidate for another job opportunity supported the finding that claimant's termination was voluntary; electing to resign as opposed to voluntarily quitting was in the best interest of claimant to protect against creating a poor disciplinary record and preserve his chances for another employment opportunity. *Id.*

The *Seacrist* Court found that, pursuant to the collective bargaining agreement, the police chief's plan to seek immediate disciplinary action and discharge given claimant's unreliability at work and claimant's duty to protect public safety was reasonable, given the circumstances. The police chief had no duty to allow claimant an opportunity to resign; permitting claimant's resignation

was an act of mercy. *Id.* Given the options presented claimant, the *Seacrist* Court found that the record supported the decision that claimant willfully and freely decided to voluntarily quit, rather than be discharged. *Id.* The *Seacrist* Court noted that claimant acted as if his separation from the employment was voluntary -- as the resignation letter was unequivocal, claimant said he had another job, he accepted his final check with all benefits. Only until the other job fell through did he raise the issue of whether claimant's resignation was involuntary.

The *Seacrist* Court held that claimant had voluntarily quit, and in so holding explained that "when an employee says he is quitting, *an employer has a right to rely on the employee's word.*" *Id.* (emphasis added) *See also Ramirez v. Metro Waste Control Comm'n*, 340 N.W.2d 355, 356 (Minn.App. 1983).

Here, similar to *Seacrist*, claimant's reason for resigning was not attributable to employer. Claimant took the initiative to handwrite his own letter, and submit the letter to his employer in which he unequivocally articulated his intent to resign from the employment. Claimant's resignation letter states: "To whom it may concern, Due to a personal reason I decided to Resign starting today the 13th of September 2015. I have fun working for Southwest and thanks; Sincerely, Eugenio Dolores." (JA, 83) Claimant did not object to admission of this letter into evidence at the hearing. (JA, 54-55) Claimant does not dispute that he submitted the handwritten letter to employer. (JA, 56) There was no evidence

in the record that employer suggested that claimant write a resignation letter or that employer provided any suggestions regarding the contents of the letter.

The evidence in the record does not support claimant's premise: "Dolores's behavior shows intent to preserve employment." (OB, 10) In fact, probative and substantial evidence in the record shows that claimant fully intended to separate from the employment when he made the conscious choice to submit a written resignation to his employer, which was accepted and relied upon. As such, claimant willfully and intentionally quit his job.

Claimant incorrectly suggests that his resignation was unintentional and involuntary after TSA *initially* decided not to renew is SIDA badge after TSA learned that claimant had been convicted of "credit card fraud." (JA, 049-50; OB, 110) Claimant, however, explained at the hearing and in the briefs he submitted in this case that the reason he quit was because he wanted to collect accrued vacation pay and profit sharing benefits, and because he thought that in quitting, "this would look better for future employment." (JA, 36, 60, 106, 111; OB, 5-6) Claimant testified that he did not want to take the time to file a grievance and wait for the union to assist him in resolving the issue concerning his SIDA badge. Claimant testified, "it would take a long period of time for the union to do my case." (JA, 59) Claimant clearly gave some consideration to his decision to quit the employment. He weighed the pros and the cons of quitting. Claimant clearly

intended, by an act of his own free will, to quit his job. (JA, 36, 60, 106, 111; OB, 5-6) As such, claimant is unable to meet his burden of proof to show that he did not intend to quit or that he involuntarily quit his job.

Claimant inappropriately relies upon *Anchor Motor Freight, Inc. v. Unemployment Ins. Appeal Board of Delaware*, 325 A.2d 374 (1974), in support of his proposition that he should be eligible for unemployment benefits because his resignation was involuntary. (OB, 13) *Anchor Motor Freight, Inc.* provides no legal support in this situation because the facts are inapposite. The *Anchor Motor Freight, Inc.* Court held that claimant's resignation appeared involuntary and induced, as claimant suffered significant pressure from employer to resign. The *Anchor Motor Freight, Inc.* employer constantly asked claimant when she would be taking maternity leave. *Id.* Employer changed claimant's work schedule causing claimant to take a leave of absence earlier than she planned. The employer provided claimant a letter of resignation that employer had previously prepared, telling claimant that if she did not sign it, she would not receive her last paycheck or vacation checks, and that she would be discharged which would cause a "blemish on her employment record." *Id.* The claimant in *Anchor Motor Freight, Inc.* reluctantly resigned having no other alternative.

The facts in this case are clearly distinguished from the facts in *Anchor Motor Freight, Inc.* There was no evidence that employer placed any

pressure upon claimant to resign. Employer did not change claimant's work schedule; employer did not give claimant any ultimatum by which claimant must resign; no evidence suggests that employer proposed that claimant prepare a resignation letter or how it should be drafted. Employer had *no control* over the TSA's security background check and TSA's decision about whether or not to renew the SIDA badge, or whether TSA might reconsider its initial decision regarding TSA's SIDA badge (as claimant did not have a felony conviction on his record). (JA, 66-70)

Unlike the claimant in *Anchor Motor Freight, Inc.*, claimant, here, was subject to a collective bargaining agreement in which he had significant employee rights and protections, including the right to a grievance process, if employer treated claimant improperly or violated the collective bargaining agreement. Claimant had the right to request union assistance in submitting a grievance to resolve his concerns regarding the potential termination of his employment.

The collective bargaining agreement also required that claimant comply with certain duties -- such as requirement to renew his SIDA badge on a yearly basis, as a condition of his employment. (JA, 51) Claimant agreed to work under this condition of his employment when he submitted to the collective bargaining agreement. No evidence in the record suggests that employer pressured

or induced claimant to quit. Employer was merely following the terms of the collective bargaining agreement when employer informed claimant of some of the potential choices he could make. Under the terms of collective bargaining agreement, claimant was not entitled to accrued vacation and pension and profit sharing benefits. *Anchor Motor Freight, Inc.*, therefore, provides no legal support based the dissimilar facts and circumstances of this case.

Swanson v. State, renders no support for claimant's argument that he did not intentionally quit the employment. 114 Idaho 607, 609, 759 P.2d 898, 900 (Idaho 1988). The facts in *Swanson* are clearly distinguishable because the *Swanson* claimant *withdrew her resignation* two hours after it was submitted. 759 P.2d at 899, 114 Idaho at 608. Because such a short time had passed between the time that claimant resigned and withdrew her resignation, the *Swanson* Court found that employer did not detrimentally rely upon the resignation. 759 P.2d 898 at, 114 Idaho at 609. In this case, claimant never withdrew his resignation; employer accepted claimant's resignation and detrimentally relied upon it.

Claimant cites to *Calif. Portland Cement Co. v. Ariz. Dep't of Economic Security*, 192 Ariz. 19, 20, 960 P.2d 65, 66 (App. 1998), in support of the inaccurate proposition that claimant unintentionally quit before he was discharged. However, this case does not support claimant's contention because it involves a separation of employment through a settlement agreement. *Calif.*

Portland Cement Co. provides that "if an employer, as a condition of settlement of disputes between the parties, insists upon a termination for reasons that do not otherwise disqualify the employee for unemployment benefits, the termination will be treated as a discharge rather than a quit." *Id.* 192 Ariz. At 22, 960 P.2d at 68. The facts in *Calif. Portland Cement Co.* do not apply to the facts in this case because claimant in this case did not enter into a settlement agreement with employer. Rather, claimant elected to quit for the purpose of collecting vacation and profit sharing benefits and to preserve his employment record, rather than seek assistance from his union regarding his job status.

Claimant erroneously suggests that *Williams v. United States*, 571 A.2d 212, (D.C. App. Ct. 1990) lends legal support to claimant's proposal that a quit-or-be-fired choice is not voluntary. *Williams* is a criminal case and is not relevant to this unemployment matter. *Green v. Dist. of Columbia Dep't of Employment Serv.*, 499 A.2d 870 (1985) is also distinguished from the present case because *inter alia*, the claimant in *Green* attempted to withdraw his resignation, and some time before claimant resigned, he requested a transfer to another department. Here, claimant never attempted to withdraw his resignation; and in this case, claimant never requested that employer transfer claimant to another department.

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Claimant incorrectly suggests that *Thomas v. Dist. Columbia Dep't of Labor*, 409 A.2d 164 (D.C. App.Ct. 1979) supports the proposition that claimant's resignation in the case was involuntary; the findings of the *Thomas* court are distinguishable from this case because the *Thomas* court found that claimant's discharge was imminent and therefore involuntary. The *Thomas* claimant resigned on the advice of her union and after claimant had been training her replacement. *Id.* Here, the facts are distinguished because claimant stated that he did not seek assistance from his union because he chose not to wait for this assistance. (JA, 110, ll. 15-16). And, there is no evidence that employer had already selected claimant's replacement.

Thomas is additionally distinguishable in that after learning that the discharge was imminent in *Thomas*, the court stopped its analysis and did not provide any findings regarding whether the discharge would have been for reasons of misconduct, for which claimant would also be ineligible for unemployment benefits. Here, the referee made no finding that the discharge was imminent. In fact, the referee in this case found to the contrary: "this Tribunal finds that he has not established good cause, by a preponderance of the evidence, for voluntarily leaving *available* work." (JA, 45) Moreover, the decision of the referee set forth sufficient findings of fact to establish misconduct connected with the work, and inferred that in the event a reviewing court found that employer's discharge of

claimant was actually imminent (such finding is not supported by the facts of this case), the referee would have found that claimant had committed misconduct connect with the work, pursuant to NRS 612.385; in such case claimant would still nonetheless be disqualified for unemployment benefits. (JA, 45)(*See* misconduct analysis in section D.)

Claimant's citation to the Vermont Supreme Court case *Vennell v. Dep't of Employm't Sec.*, 141 Vt. 282, 449 A.2d 899 (1982), does not support claimant's contention that a quit-or-be-fired option converted his voluntary resignation into an involuntary resignation. Similar to the facts in this case that claimant's criminal conviction for "credit card fraud" may have detrimentally impacted his ability to maintain a SIDA badge for working in secured areas of the airport, in *Vennell*, the claimant was convicted of possession of marijuana. The *Vennell* Court found that claimant's resignation from his job as a high school teacher was voluntary and "was solely attributable to his own conduct, and compensation for his unemployment is not within the declared public policy of the state." *Id.* 449 A.2d at 900, 141 Vt. At 283.

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C. This Court Should Decline to Consider a New Issue, That Claimant was Subject to a Change in Work Requirements, as it was Never Considered by the Referee, the Board of Review, or the District Court.

For the first time on appeal, claimant raises a new issue -- that he was subject to a change in work requirements -- which was not raised before the referee at the administrative hearing, nor preserved in the District Court. (OB, 17-21) This Court should decline to consider this new argument. Not only do the facts not support this argument, but this Court does not have jurisdiction to consider this issue because it was not addressed below. See, *Old Aztec Mine, Inc. v. Brown,* 97 Nev. 49, 52, 623 P.2d 981, 983 (1981)("A point not urged in the trial court ... is deemed to have been waived and will not be considered on appeal"); *Oliver v. Barrick Goldstrike Mines*, 111 Nev. 1338, 1344–45, 905 P.2d 168, 172 (1995); *Schuck v. Signature Flight Support of Nevada, Inc.*, 126 Nev. 434, 436, 245 P.3d 542, 544 (2010).

The argument that claimant was subject to a change in work requirements is not supported by the facts contained in the administrative record. Claimant was subject to a collective bargaining agreement, and subject to a condition of employment that employees must obtain a security clearance and renew the TSA's SIDA badge on a yearly basis. (JA, 44, 66, l. 16) Claimant does not dispute having knowledge of employer's policy that SIDA badges must be

renewed yearly as a condition of employment. (JA, 58) This condition of claimant's employment never changed.

Claimant admits that it was actually TSA (not claimant's employer) who "revised their protocol, requiring additional background checks." (OB, 18) Employer's representative testified that employer has no input or control over the issuance of the SIDA badge. (JA, 50) As such, the decision regarding whether a SIDA badge is issued is not attributable to employer. Claimant cannot therefore suggest that employer is responsible for any alleged change in working conditions, and therefore employer's account should not be subject to additional taxes, pursuant to NRS 512.551, based upon an alleged change in TSA policy that is beyond employer's control.

Based on TSA's actions, claimant admits that the TSA SIDA badge was confiscated. (OB, 18) Claimant is *incorrect* in his contention that "If Dolores did not quit, termination was certain." (OB, 18) Claimant's termination was NOT imminent because claimant never received a final decision from TSA about whether his badge would be permanently seized. Claimant admitted that he first heard about the background results *after* he resigned, and that claimant never received an answer from TSA regarding claimant's gross misdemeanor charge regarding the misunderstanding that claimant had a felony conviction. (JA 46, 041) Claimant also testified that it would take the union time to clear his

termination. (JA, 044) Claimant's testimony demonstrates that TSA had not made a final decision regarding the status of his SIDA badge (Claimant testified that he is still awaiting a final decision from TSA, as he appealed the issue (JA, 60, ll. 24-25)), and employer had not made a final decision regarding his termination, as claimant's employment would have continued if he resolved the issue regarding his SIDA badge. (JA, 66, ll. 8-9) Claimant admitted that even if employer had discharged claimant (which employer did not), the collective bargaining unit could still have assisted him in getting his job back. (JA, 59, 26-27) Claimant's argument that the decision to leave the employment was "a compelling reason to quit" clearly fails, because the decision regarding claimant's SIDA badge was not final, and employer's decision to discharge was not imminent.

Claimant offers *McDowell v. Employment Dept. & Klamath Co. School Dist.*, as support for the contention that claimant had good cause for resigning in lieu of prospective discharge. 348 Or. 605, 236 P.3d 722 (2010). The holding in *Klamath* is distinguishable from this case because that court found that even if claimant had been discharged, the discharge would NOT have been for misconduct connected with the work; as the *Klamath* claimant had not been informed about employer's "no profanity" policy, and as such, could not be held accountable for violating it.

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Given that background, The *Klamath* court emphasized that there was a limitation to employer's policy -- that quitting to avoid discharge for misconduct cannot establish "good cause" for quitting; "when a resignation is in anticipation of a discharge not for misconduct, the separation from work may qualify for leaving work for good cause." 348 Or. at 614, 236 P.3d at 727. Here, if a court were to presume that claimant's discharge was imminent and that claimant voluntarily quit with good cause (he did not), the court would then turn to the issue of whether claimant committed misconduct connected with the work as claimant's criminal conviction under that scenario would have caused him to lose access to the TSA SIDA badge and therefore lose access to the secured areas of the airport where he was required to work. Claimant in this situation would have committed misconduct connected with the work, pursuant to NRS 612.385. (Please refer to the analysis set forth in section D, below.) As such, the holding in in *Klamath* is distinguishable from this case because the claimant in *Klamath* did not commit misconduct.

Claimant inappropriately cites *to Middletown Tp. v. Unemploym't Comp. Bd. of Review*, 40 A.3d 217 (Pa. 2012). *Middletown Tp.* holds 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 terminate her employment." *Id.* at 227. *Middletown Tp.* does not apply to the facts

of this case because if there were any change in the terms of claimant's employment, it would have been reflected in the collective bargaining agreement, and claimant could have resolved those concerns through the collective bargaining and grievance processes. Further, any change in the background check procedure for SIDA badges is attributable only to TSA, not to employer. *Middletown Tp.* therefore offers no legal support for claimant's contention. Any reasonable employee in claimant's situation who had a good faith desire to maintain employment would have exhausted all reasonable alternatives before joining the ranks of the unemployed -- and would have first addressed his concerns through the grievance process, requested a leave of absence, and/or requested a transfer to another department rather than losing patience and electing to collect his limited vacation and profit sharing benefits. Claimant cannot meet his burden of proof to establish good cause for quitting his job.

D. If This Court Finds That Claimant had Good Cause for Quitting, Which he Did Not, Claimant Would Nonetheless be Disqualified for Unemployment Benefits Because Claimant Committed Industrial Misconduct, Pursuant to NRS 612.385.

Claimant's discharge was not imminent and therefore he had other viable options that were not exhausted before he quit his job; as such, he cannot establish good cause when he voluntarily quit. In the event, however, this Court

finds that claimant can establish good cause for voluntarily quitting, claimant nonetheless would be ineligible for unemployment benefits because he committed industrial misconduct, pursuant to NRS 612.385. This Court may affirm on any ground supported by the record, even if the Board of Review did not rely on the correct ground in reaching its decision. *See Howell v. Ricci,* 124 Nev. 1222, 1231, 197 P.3d 1044, 1050 (2008); *Hotel Riviera v. Torres,* 97 Nev. 399, 403, 632 P.2d 1155, 1158 (1981).

Presuming claimant's argument that claimant would have been discharged (ESD disputes that the discharge was imminent), Claimant's off-duty conduct (being convicted of "credit card fraud") damaged his ability to maintain a security clearance, which was necessary to maintain a SIDA badge required for access to the secure areas of the airport where he was assigned to work. Claimant's criminal conviction constituted misconduct connected with the work, pursuant to NRS 612.385. This Court recently defined misconduct in *State, Emp't Sec. Div. v. Murphy*,

> "Misconduct" is defined as "unlawful, **dishonest**, or **improper** behavior." *Misconduct, Black's Law Dictionary* (10th ed.2014); *see also Bundley,* 122 Nev. at 1445–46, 148 P.3d at 754–55 (determining that misconduct requires deliberate or careless action in "disregard of the employer's interests" such that there is "an element of wrongfulness" (internal quotations omitted)). Clearly, an employee who has been incarcerated because of criminal conduct is being penalized for unlawful and improper behavior, and in committing that behavior, the employee has carelessly disregarded the employer's interest in having an

available workforce. 132 Nev. Adv. Op. 18, 371 P.3d 991, 994, 2016 WL 1261134 (2016)(emphasis added).

A substantial disregard for employer's interests and employee's duties and obligations to employer amounting to misconduct can be demonstrated by a failure to maintain a certification, or in this case the failure to maintain a TSA SIDA badge. *Goodwin v. Jones*, 132 Nev. ___, 368 P.3d 764, 768 (Nev. App. 2016) (Emphasis added). A willful disregard of an employer's policy can be demonstrated "when the employee knows the policy yet deliberately chooses not to follow the policy." *Id.*

Here, claimant committed "credit card fraud" and was convicted of same. (JA, 79-80) Claimant carelessly disregarded employer's interests in having an available workforce and being able to maintain the TSA SIDA badge necessary to work in the secure areas of the airport. *Murphy*, *supra; Goodwin*, *supra.* The element of wrongfulness was also met in this case when claimant was criminally convicted of a crime of dishonesty: "credit card fraud." *Murphy*, *supra.*

Probative and substantial evidence in the record supports the decision that claimant committed industrial misconduct, pursuant to NRS 612.385, and therefore claimant is ineligible for unemployment benefits.

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CONCLUSION

The District Court appropriately affirmed the Decision of the Board of Review and the referee when it found that substantial evidence in the record supports the finding that claimant voluntarily quit without good cause, pursuant to NRS 612.380; and alternatively, that claimant committed industrial misconduct, pursuant to NRS 612.385.

It is true that the protective purpose behind Nevada's unemployment compensation system is to provide temporary assistance and economic security to individuals who become involuntarily unemployed. (OB, 11) Here, claimant became *voluntarily* unemployed when he willfully and intentionally submitted his letter of resignation. While denial of claimant's Petition for Judicial Review may cause claimant some economic hardship, "the legislature is the parent of unemployment benefits. These benefits are not inherent rights of Nevada citizens. Therefore the legislature may enact any reasonable and nondiscriminatory conditions regarding eligibility and procedure." *Kame v. Emp. Sec. Dept.*, 105 Nev. 22, 26,769 P.2d 66, 68 (1989). The legislature enacted NRS 612.380 as a reasonable condition to eligibility for receipt of unemployment insurance benefits: one who voluntarily quits one's job, without good cause, is not entitled to unemployment benefits. NRS 612.380 should be interpreted in harmony with the intent of the legislature in enacting this reasonable condition to eligibility for

unemployment insurance benefits, in consideration of the fact that unemployment benefits are supported by employer-paid contributions (taxes) and the Nevada Employment Security Division's responsibility for preservation of trust fund assets. NRS 612 §§ 585, 590 & 595.

Therefore, Respondent ESD respectfully requests that the Court affirm the decision of the Eighth Judicial District Court denying the claimant's Petition for Judicial Review and affirming the Decision of the Board of Review and the referee.

DATED this 10th day of July, 2017.

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ATTORNEY'S CERTIFICATE OF COMPLIANCE

1. I hereby certify that this Answering 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 Answering 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 Answering Brief complies with the page- or type-volume limitations of NRAP 32(a)(7) because, excluding the parts of the Answering Brief exempted by NRAP 32(a)(7)(C), it contains 9,073 words.

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 Answering 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 Answering Brief is not in conformity with the requirements of the Nevada Rules of Appellate Procedure.

DATED this 10th day of July, 2017.

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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 RESPONDENT ESD'S ANSWERING 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:

Dawn R. Miller, Esq.
Nevada Legal Services, Inc.

And by mailing within an envelope which was deposited with the State of Nevada Mail for postage and mailing from Carson City, Nevada, addressed as follows:

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DATED this 10th day of July, 2017.

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