

IN THE SUPREME COURT OF THE STATE OF NEVADA

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Tracie K. Lindeman
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NADINE GOODWIN,

Plaintiff/Appellant,

vs.

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

Defendants/Respondents.

No. 62493

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

APPELLANT'S REPLY BRIEF

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Introduction

Goodwin initially referred to Respondent as the Department of Employment, Training and Rehabilitation (DETR) in her Opening Brief, but will refer to Respondent in this Reply Brief as it referred to itself in its Answering Brief as the Employment Security Division (ESD).

Goodwin will also address each of ESD's arguments, but submits the main issue is whether there was evidence as to whether Goodwin was reckless or careless in pursuing her Bachelor's degree.

Goodwin's Disagreements with ESD'S Statement of Facts

ESD's Fact 2: Goodwin disagrees that evidence was submitted showing a condition of her employment was to obtain a bachelor's degree in ten years. JA 27 is ESD's Findings (and not evidence to support those findings). JA 79 is merely the employer's written response to the ESD when contesting the unemployment benefits and JA 90-91 is Goodwin's letter to ESD discussing her communications with the Licensing Board and does not discuss any policy of her employer.

ESD's Fact 3: JA 27 is ESD's Findings of Facts (not the underlying evidence) and JA 82 does not reference maintaining an intern certification on a yearly basis. Instead it merely states "maintaining (a) BADA Intern(ship) . . . when appropriate." (JA 82, ¶ 21)

ESD's Fact 4: Goodwin disagrees that evidence has been submitted showing she was required to have a license to perform the job for which she was hired.

ESD's Fact 8: While probably not relevant, there is no showing of when Goodwin could have taken any examination.

ESD's Fact 10: Goodwin disagrees that evidence has been submitted showing she was required to have a license to perform the job for which she was

hired. Goodwin acknowledges that on July 15, 2011 after she was terminated she wrote the Board of Examiners inquiring about getting licensed. (JA 103).

ESD's Fact 11: JAD 28 is not evidence and is only ESD's own finding of facts.

ESD's Facts 12 to 17: These are not facts or evidence and only contains ESD's own finding of facts.

ESD's Fact 18: Goodwin disagrees that evidence has been submitted showing she was required to have a license to perform the job for which she was hired.

Argument

Contrary to ESD's assertion, its citation to JA 55 in the record does not show Goodwin was aware that she needed to maintain any type of license when she accepted her position with her employer. (ESD's Answering Brief, 11:1-3). The citation to the record does not show this when she was hired in 2003 or when she received a promotion in 2006. (ESD's Answering Brief, 16:16-17). There is also no testimony that Goodwin simply did not obtain her degree because she believed she would obtain a license extension. (ESD's Answering Brief, 14:4-6).

1. Lateral transfer within Goodwin's employer.

ESD argues that the employer was not required to offer Goodwin other employment. Goodwin is not taking a position on this and merely presented in her Opening Brief that her employer would have done so if it had such a position available. This was presented for the sole purpose of showing that her employer considered her a good and valued employee since actual misconduct by Goodwin is being analyzed by this Court.

2. Goodwin's actions cannot be considered misconduct.

ESD argues that Goodwin misconstrues the legal definition of misconduct and cites to several cases. One case is *Freemont Hotel v. Esposito*, 104 Nev. 394, 760 P.2d 122 (1988). While ESD went into many of the facts of the case, it did not mention the pivotal fact - that the employer stated if the drug test showed the employee was on valid prescription medications (as the employee claimed), then she need not worry. 104 Nev. at 396. In said case, the employee was not terminated for using drugs, but for direct insubordination after being requested several times to take a drug test and after being informed several times that any prescribed medication would not be held against her - yet the employee directly refused to do what the employer instructed her to do. *Id.* This naturally is not the case at bar. There is no showing that Goodwin refused to take needed college courses.

ESD also cites to *Barnum v. Williams*, 84 Nev. 37, 436 P.2d 219 (1968) for the definition of misconduct. While this definition has been elaborated upon by this Court since *Barnum*, this case defined misconduct as:

"a deliberate violation or disregard on the part of the employee of standards of behavior which his 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."

Barnum, 84 Nev. at 41.

As previously presented by Goodwin, subsequent cases have established some sort of an element of wrongfulness and deliberate action (or inaction) is needed - which is consistent with *Barnum*. In this matter, there has been no evidence or showing that Goodwin performed a deliberate violation or conscious disregard of any employer rules, or that she was careless or negligent to such a degree to show a substantial disregard of her employer's interest.

ESD goes on to argue that failing to maintain credentials or a license is misconduct and cites the Pennsylvania case of *Jones v. Unemployment Compensation Board of Review*, 518 A.2d 1150 (Pa. 1986) for this proposition. *Jones* is distinguishable in that the teacher in that case was found to have:

"delayed pursuing the last required college course work for nearly nine months until the summer of 1981, allowing two college semesters to pass without completing any course work."

Jones, 518 A.2d at 1153

The Court in *Jones* found that an inquiry had been made into why the courses were not completed and determined that the teacher simply made no attempt to complete her course work. In the case at bar, no such inquiry was made.

In a case distinguishing *Jones*, the mere fact of not completing required courses or the inability to complete courses was not held as a reason for denying unemployment benefits. See *Washington Regional Medical Center v. Employment Security Department*, 979 S.W.2d 94, 95 (Ark. 1998) (inability to obtain a satisfactory score on an exam is not grounds to deny unemployment benefits). In this matter, there was simply no inquiry into the ability of Goodwin to take and complete courses and the only testimony showed she always took the maximum classes possible and only two classes were offered every 6 weeks. (JA 63-64). It should also be noted that Pennsylvania uses a different standard in denying unemployment benefits and apparently holds that becoming incarcerated amounts to misconduct to where unemployment benefits are to be denied. *Jones*, 518 A.2d at 1153. Nevada on the other hand holds that being incarcerated does not amount to misconduct as defined by Nevada law. See *State, Employment Security Department v. Evans*, 111 Nev. 1118, 901 P.2d 156 (1995).

ESD also discusses that certain professionals like doctors and attorneys must keep current with continuing education classes to maintain their licenses. The distinction though is that such professionals are not required to take a particular

class and can choose any class (usually just a couple of hours in length) versus needing a particular class for a degree that may not be offered every semester as well as the doctor or attorney only needing to attend the short class - which is different than being required to pass an examination. Taking ESD's finding to the true logical conclusion, had Goodwin finished her college degree but was unable to pass her licensing examination this too would be misconduct. ESD's underlying argument is that Goodwin simply did not obtain her license - which prevented her continued employment. Thus ESD's silent theme is that: 1) Goodwin had the ability to take more courses (which is not substantiated by the evidence), 2) she naturally would have passed all her courses and obtained her Bachelor's degree, and 3) then would have obtained her license with its requirements.¹ This of course is not correct and no such guarantee could ever be given, just as many college graduates start medical school or law school, yet are unable to pass all the courses and graduate. This is not necessarily from a lack of effort and may be from an inability. The employer took the risk that Goodwin would not obtain her license when it decided to hire an "intern" at presumably lower wages and not one already licensed. But Goodwin not obtaining her license does not make it misconduct.

3. Any off duty conduct was not related to Goodwin's work.

The relevant Nevada statute at issue is very clear that to be denied unemployment benefits on the grounds of misconduct, it must be connected to the person's work. Therefore two elements must be met. The first is that the conduct

¹ The relevant allegation (which was not made) is that Goodwin did not obtain her licensing, which had more requirements than just completing a Bachelor's degree such as successfully passing an examination. NAC 641C.220. The test may also not be taken more than three times without special approval. NAC 641C.220(5).

must rise to the level of being "misconduct" and then it must be related to the person's work.

The two issues in this appeal regarding any off-duty conduct are that: 1) there was no conduct related to Goodwin's work and, 2) there is a void of evidence to make such a determination. ESD cites to several cases to show the standard necessary for off-duty conduct to be connected with work. However these cases are not on point with the current issue. ESD first cites to *Clevenger v. Nevada Employment Sec. Dept.*, Nev. 145, 150, 770 P.2d 866, 868 (1989) and then to *Nevada Employment Sec. Dept. v. Holmes*, 112 Nev. 275, 914 P.2d 611 (1996). In *Clevenger* an employee working as an explosives operator was denied unemployment benefits for using illegal drugs off-duty in violation of the employer's rules. *Clevenger v. Nevada Employment Sec. Dept.*, 770 P.2d 866, 867, 105 Nev. 145, 147 (1989). In *Clevenger*, this Court found that there must be a rule regarding off-duty conduct and that it must have a reasonable relationship to the job.

When off-the-job conduct violates an employer's rule or policy, such as prohibiting the use of marijuana, an analysis must be made to determine if the employer's rule or policy has a reasonable relationship to the work to be performed; and if so, whether there has been an intentional violation or willful disregard of that rule or policy.

Id., 105 Nev. at 150

Naturally this Court found that a rule prohibiting the use of using illegal drugs off duty that can remain in the body for employees that work with explosives was reasonably related to the work to be performed. The need for a policy related to off-duty conduct to have a rational relationship to work is obvious. Otherwise an employer could make up any policy or goal it desires (even virtually unobtainable ones such as obtaining a college degree in two years) and then claim the goal was not met and therefore misconduct occurred.

In this matter, there is no showing that the employer even had a policy that was violated. As such, the elements set forth in *Clevenger* can not be met. While ESD stated that obtaining a Bachelor's Degree was a condition of her employment, the portions of the record cited to are not evidence of this statement.²

The next case cited of *Nevada Employment Sec. Dept. v. Holmes*, 914 P.2d 611, 112 Nev. 275 (1996) was another application of the *Clevenger* analysis where an employee was denied unemployment benefits after testing positive at work for using illegal drugs.

ESD argues that Goodwin was aware of the timeframe in which to obtain her Bachelor's degree or that she would lose her job. But again, this is not what was stated in the record as well as not being indicative of an the employer having some rule that Goodwin violated. What Goodwin testified to was that she was aware that the Nevada Board of Licensing had a ten year limit on obtaining a Bachelor's Degree. (JA 55:8-19) She continued her testimony that she "always went to school, went the whole time." (JA 55:24-25). Whether the employer could allow Goodwin to continue working in her current position if she did not obtain her Bachelor's Degree is not relevant to whether Goodwin engaged in any off-duty conduct that rises to the level of misconduct.³ Additionally, the Board of

² JA 27 is ESD's Findings (and not evidence to support those findings). JA 79 is merely the employer's written response to the ESD when contesting the unemployment benefits and JA 90-91 is Goodwin's letter to ESD discussing her communications with the Licensing Board and does not discuss any policy of her employer.

³ As argued in Goodwin's Opening Brief, while the employer may have desired Goodwin to maintain her license there was no showing that a license was legally required for the administrative duties she was performing.

Examiners had the ability to allow individuals to continue as an intern if they did not obtain a college degree within ten years - which Goodwin was actively pursuing. While ESD stated that the Board considered such a possibility after one finished their education requirements, the record does not actually state that it would be limited to those that finished their degree. Instead the Board was aware it was potentially facing losing some interns and it stated that it would consider allowing individuals that did not meet the time limit for their educational requirement to simply start a new application (without limiting this to only after a degree is obtained). (JA 98-99). Since the Board has the ability to regulate interns and determine the requirements for one to become licensed, it has the ability to make whatever changes it desires for interns. N.R.S. § 641C.200.

ESD's argument is that Goodwin did not act reasonably to protect her employer. But what ESD did was leap to the conclusion that misconduct must have occurred due to Goodwin not obtaining her Bachelor degree without analyzing the steps necessary to make such a determination. ESD cites to *Kraft v. Nevada Employment Sec. Dept.*, 717 P.2d 583, 102 Nev. 191 (1986) for the proposition that incompleteness itself amounts to misconduct.⁴ I

The determination that Goodwin engaged in off-duty misconduct is premised on improper assumptions. The ESD simply leapt to the conclusion that not obtaining a degree in ten years must be misconduct. What other possible explanation could there be? But not everyone is fortunate to go to college right after high school and obtain a scholarship or have it paid for. In other words, many

⁴ The employee's car broke down on the way to work, but the employee did not take any action to notify his employer of this including walking to a nearby phone given that he " was in a business district, near a large casino". *Id.*, 102 Nev. at 195. In *Kraft*, it was found that the employee failed to act reasonably.

people are not in a situation in life like many that go on to medical school or even law school. Others have life events that affect their ability to accomplish certain activities over a time frame that others easily accomplish them in. It is because of this that an analysis needed to be done to determine if Goodwin effectively worked towards her Bachelor's degree or if she was "reckless" in her pursuit. This is the analysis that was not performed by ESD and where the record is completely void. ESD actually suggests such an analysis is needed where it states "an employee must take prudent steps to comply with expectations" (ESD's Answering Brief, 20:18-20). There was simply no inquiry into whether Goodwin was acting unreasonable or imprudent or how often classes were being offered in the specific courses she needed in order to complete her degree, etc. The only testimony on this issue at all was from Goodwin where she stated she "always went to school, went the whole time" and that Goodwin always took the maximum classes possible and only two classes were offered every 6 weeks. (JA 55:24-25) (JA 63-64).

4. The requirement for Goodwin to be licensed was not established.

ESD argues that substantial evidence exists that Godwin needed to be a licensed intern to perform her job as an Administrator (versus a counselor). While Goodwin concedes the employer did make this statement in the ESD hearing, any desire it may have had for her to be licensed is not the same as a legal requirement that she be licensed.⁵ That is a question of law to which no facts were presented to allow such a conclusion to be found. If in fact Goodwin was not required to be licensed, then the premise for her termination is incorrect and there could be no misconduct.

⁵ Employers also cannot have the expectation that anyone it hires will necessarily pass necessary examinations.

Goodwin's position was that of "Adult & Family Court Administrator". (JA 81). Her job description provides the following:

"Primary Responsibilities:
Plans and coordinates the day-to-day administrative and operational activities of the Family Drug Court program."

Id.

As an example, part of her responsibilities include negotiating contracts. Id. She is also to "maintain (a) BADA intern (license) ... when appropriate." (emphasis added) (JA 82). If maintaining a license was an actual requirement it would have been so stated.

It is legal error for ESD to find a license is required without any supporting evidence other than a statement that one is required. This is different from testimony as to what color the traffic light was or what an employee did on a particular day. There must be supporting evidence that Goodwin in fact performed functions that required her to be licensed under Nevada law. This did not occur. Given the language of Goodwin's job description of being an administrator, there was no showing that Goodwin was in fact performing work that required a license pursuant to Nevada law. The only factual evidence in the record is that she was an administrator without any inquiry into why a license would be required to perform the particular job functions. As such, the employer did not present any facts to sustain its burden on establishing the primary element on which the ESD based its misconduct finding.

ESD also argues that Goodwin presented an inconsistent argument in her Opening Brief. (ESD's Answering Brief, 22:20-22; 23:1-3). But Goodwin was merely presenting an argument based on the employer's position of her needing a license. Goodwin has never conceded her position did in fact require a license. Additionally, the citation to JA 55 (which ESD continuously cites to) simply does

not state that Goodwin was aware she had to obtain her degree in order to keep her job.

Conclusion

Goodwin's denial of ESD benefits was based on the mere assumption that ten years is always plenty of time for any individual in which to obtain a college degree and is based further that all people who attempt to obtain a college degree can in fact pass all the courses. In addition to any off duty requirement of obtaining a college degree not being connected with the actual work being performed, there was simply no analysis or inquiry into whether there was any recklessness or intentional conduct sufficient to rise to the legal definition of misconduct, including any showing of wrongfulness. Therefore the employer did not meet its burden in establishing misconduct - even though the employer was actually just answering ESD's questions. Additionally it was not shown that Goodwin even needed to have a license to perform her work as an administrator especially since Goodwin's job description did not actually require it. Based on the record being void that any off duty conduct was done with recklessness or intentional wrongdoing by Goodwin, Ms. Goodwin should be awarded her unemployment benefits.

Affirmation

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

Dated this 17th day of October, 2013.

/s/
Brian Morris, Esq.

CERTIFICATE OF COMPLIANCE

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

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

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

Dated this 17th day of October, 2013.

/s/
Brian Morris, Esq.

CERTIFICATE OF SERVICE

I certify that on the 17th day of October, 2013, I filed the foregoing with the Clerk of the Court, which sent notification of such filing using the electronic filing/notification system to:

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I additionally certify that on the 17th day of October, 2013, I emailed a copy of this filing to J. Thomas Susich at his email address of:

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/s/
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