IN THE SUPREME COURT OF THE STATE OF NEVADA

| | |
|---|---|
| NADINE GOODWIN,<br><br>Plaintiff/Appellant,<br><br>vs.<br><br>CYNTHIA JONES and RENEE OLSON, as former and present Administrators;<br>STATE OF NEVADA, DEPARTMENT OF EMPLOYMENT, TRAINING AND REHABILITATION, EMPLOYMENT SECURITY DIVISION,<br><br>Defendants/Respondents. | No. 62493 |



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

# PETITION FOR REVIEW OF COURT OF APPEALS DECISION

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

Attorney for Appellant

TABLE OF CONTENTS

TABLE OF AUTHORITIES

RULES

**Reasons for Review**

This Supreme Court should review the Nevada Court of Appeals Decision for the following reasons:

1. This case presents a question of first impression as stated in the Appellate Court's Decision.
2. This case involves an issue of statewide public importance as it affects all Nevada employees that may need to apply for unemployment benefits.
3. This case has the likelihood of repeating itself.

**Questions for Review**

Whether the Appellate Court applied the incorrect standard in a judicial review petition including the burden each party bears?

Whether the uncontroverted facts require a different outcome including whether Respondent did not meet its burden and/or whether Appellant met any burden required of her?

**Introduction**

This case centers around a denial of a petition for judicial review where Appellant Nadine Goodwin sought judicial review from her denial of unemployment benefits from the Nevada Department of Employment, Training & Rehabilitation ("DETR") after being terminated for failing to obtain a Bachelor's

Degree within a specified time limit. Her failure was held to be off-duty conduct misconduct connected with work.

While there are several issues in Goodwin's appeal to this Court, this Petition is limiting itself to the analysis and decision of the Appellate Court given the length limitation of a Petition for Review. (NRAP 40B(d)).

It should be noted that the many of the cases relied upon by the Appellate Court were never presented by any party.

**1. This case presents a question of first impression and is contrary to analogous Nevada law.**

The Appellate Court stated "[t]he Nevada Supreme Court has never addressed whether an employee's failure to maintain a certification in accordance with an employer policy constitutes disqualifying misconduct . . .." (Decision, p. 11). Therefore it is important for this Supreme Court to address an undecided question of Nevada law. Additionally, the analysis was contrary to analogous Nevada law.

**2. This case involves an issue of statewide public importance as it affects all Nevada employees that may need to apply for unemployment benefits.**

The purpose of Nevada's unemployment system is to provide temporary benefits to those that have involuntarily lost their employment. *Clark County Sch. Dist. v. Bundley*, 148 P.3d 750, 754, 122 Nev. 1440 (2006). To be denied unemployment benefits, an employee must either leave their employment without

good cause (N.R.S. § 612.380(1)), or be fired for misconduct (N.R.S. § 612.385). "[T]he unemployment compensation law, NRS Chapter 612, presumes that an employee is covered by the system." *Clark County Sch. Dist. v. Bundley*, 148 P.3d 750, 754, 122 Nev. 1440 (2006) (employer did not meet its burden showing excessive absences constituted willful misconduct).

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

To be denied unemployment benefits based on misconduct, the misconduct must be specifically connected with the person's work. Off-duty conduct not actually connected with work is not a reason for denying unemployment benefits.

The legal issue in this matter is whether failing to obtain a college degree rises to the legal definition of misconduct. Many employers in Nevada place policies in effect that affect off-duty conduct and Nevada applying an employer's off-duty conduct policy to unemployment cases in determining whether unemployment should be denied has a large and sweeping effect on Nevada's employees and is of substantial public interest and importance. This case and similar type issues have the likelihood of repetition.

## LEGAL ISSUES

### I. The Appellate Court improperly shifted the burden of production.

The presumption that an employee is covered by the unemployment system found in *Bundley* can only be overcome by proof of willful misconduct. It is the burden of the employer to show misconduct in fact occurred by a preponderance of the evidence. See *Clark County Sch. Dist. v. Bundley*, 148 P.3d at 756. Misconduct must also involve an "element of wrongfulness." Id. (citation omitted). Misconduct warranting termination and misconduct warranting a denial of unemployment benefits are two separate issues. Id. (footnote 13) (citation omitted). Disqualifying misconduct requires an employee to "deliberately and unjustifiably violate(s)" a policy. Id. at 754. Only after "the employer makes an initial showing of willful misconduct" does the burden shift to the employee. (emphasis added). Id. at 756. When the record is absent of showing that an employee acted intentionally, misconduct is not shown. *Kolnik v. Nevada Employment Sec. Dept*., 908 P.2d 726, 729, 112 Nev. 11 (1996). In this matter the record is devoid of any showing that Goodwin was intentionally not pursuing her Bachelor's degree.

While *Bundley* states that the employer has the burden of showing willful misconduct and only then does the burden shift to the employee and *Kolnik* states that absent such a showing misconduct is not shown, the Appellate Court's analysis

skipped the step of showing the conduct at issue was in fact willful and simply looked at the degree not being obtained without the employer meeting the additional burden of showing of willfulness, etc. The Appellate Court simply made a presumption that the failure to obtain a degree itself was willful misconduct and that Goodwin had the burden to show that this presumption was incorrect. It is here that the Appellate Court recognized Nevada has never addressed this issue and stated:

> While the Nevada Supreme Court has never addressed whether an employee's failure to maintain a certification in accordance with an employer policy constitutes disqualifying misconduct, other jurisdictions have. *See*, *e.g.*, *Holt v. Iowa Dep't of Job Serv.*, 318 N.W.2d 28 (Iowa Ct. App. 1982); *Chacko v. Commonwealth*, *Unemployment Comp. Bd. of Review*, 410 A.2d 418 (Pa. Commw. Ct. 1980); *Hicks v. Commonwealth*, *Unemployment Comp. Bd. of Review*, 383 A.2d 577 (Pa. Commw. Ct. 1978). As a Pennsylvania court stated, "academic failure after a good-faith effort would not be willful misconduct," but where the employee accepted a position knowing doctoral studies were required, refusing to pursue those studies without good reason constituted, among other things, an "intentional and substantial disregard" inimical to the employer's interest and was deemed willful misconduct. *Millersville State Coll., Pa. Dep't of Educ. v. Commonwealth*, *Unemployment Comp. Bd. of Review*, 335 A.2d 857, 860 (Pa. Commw. Ct. 1975)
>
> The burden of demonstrating a good-faith effort is on the employee; the employee does not meet this burden unless the employee supports a good-faith claim with evidence. *See Chacko*, 410 A.2d at 419; *see also Bundley*, 122 Nev. at 1447-48, 148 P.3d at 755-56. (Decision p. 11-12)

While the analysis used by the Appellate Court states that an employee carries the burden of showing they acted reasonably, a close reading of the cases

cited by the Appellate Court shows they are not on point and that they are contrary to Nevada's *Bundley* findings as well as the facts of this case.[1]

In *Holt*, unemployment benefits were granted to a teacher that did not complete coursework by a deadline due to his wife being injured. *Holt v. Iowa Dep't of Job Serv.*, 318 N.W.2d 28 (Iowa Ct. App. 1982). In *Holt* the finding of needing to care for one's wife showed an absence of misconduct is highly similar to Goodwin's situation of not being able to devote herself solely to school due to her being a single mother and her necessary responsibilities.

In *Chacko*, a nursing school graduate was informed: 1) that she would need to obtain a permission letter from the state allowing her to work for a year prior to taking her licensing test, and 2) that she would need to pass her licensing test. *Chacko v. Commonwealth, Unemployment Comp. Bd. of Review*, 410 A.2d 418, 49 Pa. Commonwealth Ct. 148 (Pa. Commw. Ct. 1980). However, the graduate neither bothered to apply for the letter of permission nor did she even attempt to take the licensing test. While refusing to do either one of these single acts can be seen to be willful misconduct, Goodwin's continued course of taking years of college classes and obtaining her Associate's degree and only being four (4) classes

[1] The Iowa and multiple Pennsylvania cases were never cited by any party and were raised for the first time by the Appellate Court. When the undersigned was questioned about the cases by the Appellate Court, he stated he was not prepared to address them and when pressed the undersigned did his best to address possible distinctions.

shy of obtaining her Bachelor's degree shows the opposite of willfully violating an employer's policy. (Opening Brief, p. 3, facts no. 20 and 21).

In *Hicks*, a nursing graduate needed to take her licensing exam within one (1) year of her graduation. *Hicks v. Commonwealth, Unemployment Comp. Bd. of Review*, 383 A.2d 577, 34 Pa. Commonwealth Ct. 352 (Pa. Commw. Ct. 1978). As the Court stated:

> This is not a case where claimant took the examination and failed it. Here she did not even take it. As we said in *Millersville State College v. Unemployment Compensation Board of Review,* 18 Pa. Commonwealth Ct. 238, 242, 335 A.2d 857, 859-60 (1975), "[t]his is an important distinction, for we believe that the claimant's failure to make such an attempt constituted willful misconduct, whereas the failure to . . . [pass the examination] in itself would not have done so." 34 Pa. Commonwealth Ct. at 355

As shown in *Hicks*, the Court made an important distinction between refusing to make an attempt versus not sucessfully completing the task. In this matter Goodwin spent years working on her degree and had almost completed it. Again, the *Hicks* case is opposite to this matter as Goodwin spent years working on her degree and was just a few classes short of obtaining her Bachelor's - testimony that is not contested.

In *Millersville*, the claimant was hired as an assistant professer with the conditions that he pursue a doctorate degree. *Millersville State Coll., Pa. Dep't of Educ. v. Commonwealth, Unemployment Comp. Bd. of Review*, 335 A.2d 857, 860,

18 Pa. Commonwealth Ct. 238 (Pa. Commw. Ct. 1975). However he failed to make sucn an attempt. The Court stated:

> It is abundantly clear to us that the decision of the College not to reappoint the claimant was based entirely on his failure even to attempt the pursuit of a doctorate. 18 Pa. Commonwealth Ct. at 241
>
> [W]e believe that the claimant's failure to make such an attempt constituted willful misconduct, whereas the failure to obtain a Ph.D. in itself would not have done so. Id. at 241 (emphasis added).

The theme being shown so far is that the unemployment applicants were refusing to make any attempt at complying - which establishes the willfulness requirement of misconduct. But as noted in *Millersville* it was the refusal to try to obtain a degree that constituted wilfull misconduct and not the failure to obtain it. Again, this is the complete opposite of the facts in Goodwin's case at bar.

The Appellate Court then re-cites to *Chacko* and *Bundley* for the proposition that an employee has the burden of showing good faith efforts at compliance. As previously stated, misconduct was clearly shown in *Chacko* when there was no attempt made to comply with her obligations. In such a case there was a requirement to show some sort of good faith effort was made by the employee to comply. 49 Pa. Commonwealth Ct. at 151. The holding in *Bundley* makes it clear that the burden only shifts to the employee once willful misconduct is actually shown. 148 P.3d at 756. In *Bundley* it was found that "[m]ere absence without leave is not disqualifying misconduct". Id.

> [D]isqualifying misconduct must involve an "element of wrongfulness . . .. Id. at 755.
>
> Bundley, however, did not bear the burden to demonstrate that she had not committed disqualifying misconduct. Instead, the school district carried the burden to show that Bundley had engaged in conduct disqualifying her from receiving unemployment benefits . . .. Id.
>
> [E]ven if Bundley's absences were in violation of school policy, the school district submitted no evidence to contradict Bundley's testimony as to the reasons for the three absences . . .. Id. at 757.
>
> [T]he school district failed to show that Bundley, whom the law presumes is an employee covered by the system, deliberately and unjustifiably violated any school absence policy . . .. Id. at 757.

The law in Nevada is clear that the employee does not bear any burden of proof unless actual willful misconduct has been shown, and the out of state cases the Appellate Court cited to are highly distinguishable from Goodwin pursuing her degree (which was ultimately obtained) but not completing it within the given time frame. However the Appellate Court found that Goodwin did not present proper evidence as to why she did not complete her Bachelor's degree - thus improperly shifting the burden of production to Goodwin. The Appellate Court referenced the criminal case of *Wright* and stated that not presenting evidence is a reason to uphold an administrative agency's decision. *Wright v. State, Dep't of Motor Vehicles*, 121 Nev. 122, 125, 110 P.3d 1066, 1068 (2005). *Wright* was a case where he was arrested after he caused a car accident, smelled of alcohol, failed all of the field sobriety tests, and a subsequent blood test showed substantial alcohol

in his system.[2] Wright simply failed to show that he was not under the influence when driving when confronted with the overwhelming evidence of wrongful criminal conduct. Therefore this lack of evidence presentation did not overcome the evidence of criminal conduct that was presented. In contrast to the wrongful criminal conduct Wright was arrested for, there was no evidence that Goodwin engaged in any knowing and willful conduct that comprised an element of wrongfulness. As such, the burden shifting to her was improper especially considering that the Referee decides what they consider relevant and inquire into those subjects and not other subjects (discussed later) such as those the Appellate Court decided would have been appropriate to have investigated and presented. In this case, the employer simply did not carry its burden of proof that Goodwin met the definition of willful unemployment "misconduct" such as intentionally refusing to take courses. The record does not support that Goodwin was being defiant or refusing to work towards her Bachelor's degree. Instead the record only contains evidence that Goodwin was in fact working towards her degree and was just shy of completing it. In sum, the lack of evidence of misconduct is imputed to the employer and not to Goodwin.

---

[2] *Wright* referenced *City of Reno v. Estate of Wells,* 110 Nev. 1218, 1222, 885 P.2d 545, 548 (1994) for the proposition that a lack of evidence to show that the City's decision to abandon real property based on the City's findings that the abandonment would not injure the public was not sufficient to overcome the City's findings and thus there was "substantial evidence" for the City's decision.

## II. The Appellate Court applied the incorrect review standard.

The Appellate Court applied a "deferential standard" where none was allowed. While deference is to be given to the lower tribunal when weighing evidence and testimony, there was no contradiction in the evidence in this matter that allowed for any weighing of the evidence.

The Appellate Court found that "there was a lack of evidence on which the appeals referee could have found that Goodwin made a reasonable, good-faith effort to graduate on time." (Decision, p. 14). Goodwin presented undisputed evidence of her good faith effort to graduate on time. The Appellate Court did not disagree, but instead it believed that Goodwin should have presented more that it as a court would have desired had it been sitting. This is an improper weighing of the undisputed evidence. Specifically the Appellate Court stated:

> Goodwin's primary explanation for not completing the coursework was due to her work and family responsibilities. Goodwin, however, did not assert, and the record does not contain evidence showing, that she did not understand her family responsibilities at the time she applied for her intern certification or when she accepted her position with Bristlecone, such that she would not have known that she would need to balance those responsibilities in order to ensure her timely graduation. *Cf. Holt*, 318 N.W.2d at 30. Nor did she provide sufficient evidence to demonstrate that her progress towards her degree constituted a reasonable, although ultimately unsuccessful, attempt to obtain her degree in time to ensure her continuous compliance with the certification requirement. (Decision, p. 13-14).[3]

[3] Goodwin's argument that she should not be denied unemployment benefits was not just that she had work and other responsibilities, but it was also that she took

> Goodwin provided no evidence showing how many credits she earned while attending TMCC or how many credits Walden accepted to apply towards her bachelor's degree. Id. at p. 14-15.
>
> [T]his effort does not show that Goodwin took timely and reasonable steps to try to comply with the certification requirement. Id. at p. 15.

An unemployment hearing is designed to by nature for those desiring unemployment benefits to represent themselves.[4] The Referee conducts the hearing by initially asking the questions and then giving the parties the opportunity to ask questions of each other. (see JA 43 to 44 and JA 54 that shows the Referee placing the employer under oath initially and then asking the questions and then placing Goodwin under Oath and then asking her questions). In this matter the Referee asked Goodwin about the classes she took. However the Referee never asked Goodwin any of the questions the Appellate Court stated it would have liked to have seen presented, such as mitigating circumstances in why Goodwin did not

---

all classes that were offered that fit into her work schedule and family responsibilities. (Opening Brief, p. 3, facts 17 and 18).

> "17. Goodwin was not able to go to school full time as well as work and take care of her children. (JA 61:25-27).
> 18. Goodwin has always taken the maximum classes possible and only two classes were offered every 6 weeks. (JA 63-64).
> 19. Goodwin was not given any warnings prior to her termination. (JA 87).
> 20. Goodwin obtained her Associate's Degree. (JA 68 - 69).
> 21. Goodwin was only four (4) classes shy of obtaining her Bachelors Degree when she was terminated. (JA 26)." (Opening Brief, p. 3).

[4] The only hearing before the Unemployment Referee is actually called an appeal as it is where either the employer or employee can appeal the initial determination of unemployment benefits, but it is the only time both sides present their story in a hearing like setting along with testimony.

obtain her Bachelor's Degree within the specified time frame. While the Appellate Court found in essence that there was a void in the evidence it would have desired, the record still states that Goodwin has always taken the maximum classes possible and was pursuing her degree. (Opening Brief, p. 3, fact 18). The employer never disputed this claim by Goodwin and therefore it is the only evidence in the record.

Since the only evidence in the record is that Goodwin took all of the classes possible, it was impermissible for the Appellate Court to defer to the unemployment Referee's finding as this pivotal fact was not in dispute. There was no argument by the employer that Goodwin was incorrect or even misrepresenting herself. This must be taken as the employer that she worked intimately with was aware of the class offerings and that Goodwin was correct. At a minimum the employer waived this argument. Therefore the finding of misconduct is not supported by substantial evidence as the only "facts" presented were that Goodwin was hired to work full time, was a single mother that had to take care of her family, and took all the online classes that she could. Deference to a decision cannot stand when the relevant facts are not in dispute and do not support such a finding of misconduct.

## CONCLUSION

While Goodwin did not complete her Bachelor's degree within the time specified, she was only a few classes shy and completed it the following semester.

This failure without more (which was not presented by the employer pursuant to its burden or inquired into by the Referee) does not rise to intentional and willful misconduct.

Dated this 31st day of May, 2016.

/s/ Brian Morris
Brian Morris, Esq.

**Affirmation**

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

Dated this 31st day of May, 2016.

/s/ Brian Morris
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) as this brief has been prepared in a proportionally spaced typeface using a 14 point Times New Romans font that is double spaced.

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 4,667 words pursuant to NRAP 40B(d) as it contains 3,402 words.

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 31st day of May, 2016.

/s/ Brian Morris
Brian Morris, Esq.
Nevada Bar No. 5431

## CERTIFICATE OF SERVICE

I certify that on the 31st day of May, 2016, I filed the foregoing with the Clerk of the Court, which sent notification of such filing using the electronic filing/notification system to:

Neil A. Rombardo, Esq.

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

**NADINE GOODWIN, Appellant,**
**v.**
**CYNTHIA A. JONES AND RENEE OLSON, AS FORMER AND PRESENT ADMINISTRATORS;**
**AND STATE OF NEVADA, DEPARTMENT OF EMPLOYMENT, TRAINING & REHABILITATION,**
**EMPLOYMENT SECURITY DIVISION, Respondents.**

**132 Nev., Advance Opinion 12**
**No. 62493**

**COURT OF APPEALS OF THE STATE OF NEVADA**

**March 3, 2016**

Header ends here.

Appeal from a district court order denying a petition for judicial review of an unemployment benefits decision. Second Judicial District Court, Washoe County; Jerome Polaha, Judge.

*Affirmed.*

Brian R. Morris, Reno, for Appellant.

Neil A. Rombardo and J. Thomas Susich, Carson City, for Respondents.

BEFORE GIBBONS, C.J., TAO and SILVER, JJ.

Page 2

*OPINION*

By the Court, GIBBONS, C.J.:

The Nevada Legislature enacted unemployment compensation laws "to provide temporary assistance and economic security to individuals who become involuntarily unemployed." *Clark Cty. Sch. Dist. v. Bundley*, 122 Nev. 1440, 1445, 148 P.3d 750, 754 (2006) (internal quotation marks omitted). Pursuant to NRS 612.385, a terminated employee is ineligible to receive unemployment compensation benefits if the employer terminated the employee for misconduct connected with the employee's work. In this appeal, we consider whether an employee's failure to maintain a certification required by the employer constituted misconduct within the meaning of NRS 612.385. Here, because the employee did not provide sufficient evidence to demonstrate that she made a reasonable, good-faith attempt to maintain her certification, we conclude the employee's conduct amounted to disqualifying misconduct. Therefore, under the particular circumstances of this

case, we affirm the district court's decision denying judicial review of the administrative agency's denial of appellant's application for unemployment benefits.

*BACKGROUND*

Appellant Nadine Goodwin first enrolled at Truckee Meadows Community College (TMCC) in 1999. In January 2001, Goodwin received a certification as an alcohol and drug abuse counselor intern, but the record does not reveal when she initially applied for her certification. Under state regulations applicable to alcohol and drug abuse counselor interns, a certified intern must complete the education requirements to become a certified counselor within ten years of the date on which the person applied for intern certification. Nevada Administrative Code

Page 3

(NAC) 641C.290(5). Among other requirements, the intern must have a bachelor's degree to become a certified counselor. NRS 641C.390(1)(c).

In September 2003, Bristlecone Family Resources,[1] an agency that provides treatment programs for drug, alcohol, and gambling abuse or addiction, as well as family counseling services, hired Goodwin as a counselor intern. At some later but unknown date, Goodwin transitioned into an adult drug court administrator role, where she remained until Bristlecone terminated her employment.

In 2006, Goodwin signed Bristlecone's job description for her position acknowledging that, as a drug court administrator, she was "[r]esponsible to follow all necessary protocol to secure and maintain . . . Intern . . . Counselor status when appropriate." Goodwin also acknowledged that her job description included "[p]rovid[ing] direct client services, which [could] include individual counseling [and] group counseling." Additionally, Bristlecone circulated a letter informing all staff that, effective March 1, 2008, "[t]he Counselor Intern is responsible for maintaining proper licensure." The scope of the letter was "[a]ll staff" and specifically listed as responsible for compliance the "Clinical Director, Clinical Supervisors, [and] Human Resources." The letter warned that failure to maintain proper licensure may result in termination.

Goodwin received an associate's degree from TMCC in 2010, eleven years after she first enrolled. She then transferred her TMCC credits to Walden University to apply toward a bachelor's degree. Nothing in the record establishes how many credits Goodwin accumulated at TMCC or how many credits she transferred to Walden.

Page 4

On May 6, 2011, Wendy Lay, Executive Director of the State of Nevada Board of Examiners for Alcohol, Drug & Gambling Counselors (the Board), informed Goodwin by letter that Goodwin's intern certification would expire and she would be unable to renew it unless she completed her bachelor's degree by June 30, 2011. This letter was the first

communication from the Board regarding Goodwin's certification expiration, and it occurred at least five months after the ten-year time period in NAC 641C.290(5) had already expired.

Goodwin responded to Lay in an email and stated, among other things: "I understand I cannot do any substance abuse counseling and I won't." Goodwin then sought an extension of her certification from the Board at its July 8, 2011, meeting; however, the Board denied her request. As a result, the Board confirmed the expiration of Goodwin's intern certification. Bristlecone terminated Goodwin the same day, citing her failure to maintain an intern certification or obtain a counselor certification as required by Bristlecone's employment policy.

Goodwin applied to respondent State of Nevada, Department of Employment, Training & Rehabilitation, Employment Security Division (ESD) for unemployment benefits.[2] ESD denied Goodwin's claim on the ground that she was terminated for misconduct connected with her work. Goodwin appealed ESD's decision to an appeals referee who conducted a hearing to determine whether Goodwin's conduct disqualified her from receiving unemployment benefits.



Goodwin testified at the hearing that she was five classes shy of attaining her bachelor's degree when Bristlecone terminated her. Goodwin asserted that she took the maximum number of classes offered by Walden (two classes every six weeks) but took at most three classes per semester at TMCC over the 11-year period of enrollment. She did not submit any documentary evidence to the appeals referee supporting her progress or the number of courses she took at any given time at TMCC. Goodwin explained to the appeals referee that she did not take more classes at TMCC because she worked full time and bore substantial responsibilities as a single mother of three children, ages 26, 24, and 19, at the time she was terminated.

Goodwin also stated she had relied on her conversations with Lay in believing the Board would grant her an extension. She testified that Lay advised her to provide transcripts to the Board to demonstrate her scholastic progress because of how close she was to completion. The record does not contain evidence that Goodwin submitted the transcripts to the Board. Additionally, Goodwin testified that she completed over 21,000 hours of work as a counselor intern.

The appeals referee found that Goodwin used nine years of the designated ten-year period to earn her associate's degree, leaving only one year to complete her bachelor's degree. The appeals referee also found that Goodwin's failure to maintain her intern certification violated Bristlecone's employment policy. Further, the appeals referee summarily found that Goodwin's conduct included an element of wrongfulness.

ESD's Board of Review denied Goodwin's appeal of the appeals referee's decision without comment. Goodwin then sought judicial review in the district court. The district court reviewed the prior proceedings and

Page 6

concluded Goodwin's failure to attain her bachelor's degree within ten years constituted misconduct connected with her work. The district court therefore denied Goodwin's petition for judicial review. This appeal followed.

*ANALYSIS*

Goodwin argues that degree completion constitutes off-duty conduct. As such, she contends the appeals referee could only find it to be disqualifying misconduct if ESD established that the conduct violated a Bristlecone policy, which reasonably related to her job, and that she intentionally or willfully violated the policy. With regard to the last consideration, Goodwin argues that her failure to obtain her degree, and thus to maintain her certification, was not willful or intentional because she continuously pursued her education and maintained contact with the Board to try to obtain an extension when she failed to complete the education requirements in time.

ESD does not dispute that the behavior at issue constituted off-duty conduct, but argues that the policy regulating such behavior had a reasonable relationship to Goodwin's work. Moreover, ESD contends that Goodwin deliberately ignored the approaching deadline for obtaining her degree, and thus, that her failure to maintain her certification constituted a willful or intentional violation of Bristlecone's policy.

We review an administrative agency's decision to determine whether it was arbitrary or capricious or an abuse of discretion. NRS 233B.135(3)(f). The analysis of whether misconduct disqualifies an employee from receiving unemployment benefits is separate from the analysis of whether misconduct warrants termination and requires the

Page 7

trier of fact to apply the legal definition of misconduct to the factual circumstances of the case. *Bundley*, 122 Nev. at 1446, 148 P.3d at 755.

When off-duty conduct violates an employer policy, the issue is whether "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." *Clevenger v. Nev. Emp't Sec. Dep't*, 105 Nev. 145, 150, 770 P.2d 866, 868 (1989). The intentional violation or willful disregard requirement is consistent with the general definition of misconduct in the unemployment benefits context, which provides that misconduct is "a deliberate violation or disregard on the part of the employee of standards of behavior which his employer has the right to expect." *Barnum v. Williams*, 84 Nev. 37, 41, 436 P.2d 219, 222 (1968) (internal quotation marks omitted).

Thus, the threshold questions we must address are whether Bristlecone had a policy requiring Goodwin to maintain certification as an adult drug court administrator, and if so, whether that policy had a reasonable relationship to the work performed. We answer both questions in the affirmative.

*Goodwin was required to maintain her certification*

Goodwin initially argues that ESD failed to show that Bristlecone's policy required her to be certified in order to perform her job as a drug Court administrator. ESD counters that Bristlecone required Goodwin to be certified, both by Bristlecone's policy and by law. In addition, ESD argues Bristlecone hired Goodwin as a drug counselor and, accordingly, she was subject to Bristlecone's employment policy requiring all drug counselors to maintain certification.

Page 8

This court reviews a decision denying unemployment benefits to determine whether the administrative agency acted arbitrarily or capriciously. *See McCracken v. Fancy*, 98 Nev. 30, 31, 639 P.2d 552, 553 (1982). Generally, this court looks to whether substantial evidence supports the agency's decision. *Bundley*, 122 Nev. at 1445, 148 P.3d at 754. More particularly, we review questions of law de novo, but fact-based legal conclusions are entitled to deference. *Id.* "Substantial evidence is that which a reasonable mind might accept as adequate to support a conclusion."[3] *United Exposition Serv. Co. v. State Indus. Ins. Sys.*, 109 Nev. 421, 424, 851 P.2d 423, 424-25 (1993).

NRS Chapter 641C governs intern certification for alcohol and drug counseling. Under that chapter, it is a misdemeanor offense for a person to "engage in the practice of counseling alcohol and drug abusers" without a proper certification. NRS 641C.900; NRS 641C.950. Thus, if Goodwin's job duties required her to practice counseling, and she engaged in any counseling whatsoever, then the law required her to maintain her intern certification or to obtain counselor certification. *See* NRS 641C.900; NRS 641C.950.

The appeals referee concluded that Bristlecone's employment policy required Goodwin to maintain her certification. At the hearing, ESD submitted into evidence Bristlecone's written employment policy, which stated that adult and family drug court administrators are required to provide direct client services, including individual or group counseling.

Page 9

Additionally, the policy stated that Bristlecone's drug court administrators must maintain certified intern status where appropriate. Moreover, Goodwin testified that she engaged in 21,000 hours of counseling while employed at Bristlecone.

Therefore, we conclude Goodwin's job description and her testimony provide substantial evidence to support the appeals referee's findings that Bristlecone's certification requirement applied to Goodwin, who worked as a drug court administrator, and that this requirement

was reasonably related to Goodwin's employment. Thus, the issue of whether Goodwin's behavior constituted an intentional violation or willful disregard of that policy must now be addressed. *See Clevenger*, 105 Nev. at 150, 770 P.2d at 868.

*Failure to maintain required certification constituted disqualifying misconduct*

Initially, the employer bears the burden of showing by a preponderance of the evidence that the employee engaged in disqualifying misconduct under NRS 612.385. *Bundley*, 122 Nev. at 1447-48, 148 P.3d at 755-56. If the employer meets this burden, the burden then "shifts to the former employee to demonstrate that the conduct cannot be characterized as misconduct within the meaning of NRS 612.385, for example, by explaining the conduct and showing that it was reasonable and justified under the circumstances." *Id.* at 1448, 148 P.3d at 756. Findings of misconduct present mixed questions of law and fact, which are generally given deference unless they are not supported by substantial evidence. *Garman v. State, Emp't Sec. Dep't*, 102 Nev. 563, 565, 729 P.2d 1335, 1336 (1986). (my note: no evidence showing the opposite)

Page 10

The Nevada Supreme Court has generally determined that an employee's violation of an employment policy is an intentional violation or willful disregard when the employee knows of the policy yet deliberately chooses not to follow the policy. *See, e.g., Fremont Hotel & Casino v. Esposito*, 104 Nev. 394, 398, 760 P.2d 122, 124 (1988) (concluding that a cocktail server's refusal to take a drug and alcohol test after being reminded that the union-employer contract required testing was an intentional violation of that policy); *Barnum*, 84 Nev. at 42, 436 P.2d at 222 (concluding that an employee driver intentionally violated a company policy when he deliberately removed a mandated safety tracking device from a company truck despite knowing the device was required on all trips).

The Nevada Supreme Court has also determined that a substantial disregard of the employer's interest may be demonstrated when the violation of an employment policy is the result of a lack of action. For example, in *Kraft v. Nevada Employment Security Department*, 102 Nev. 191, 194-95, 717 P.2d 583, 585 (1986), the court concluded that an employee's failure to notify his employer of his absence in accordance with the employer's notice policy constituted disqualifying misconduct. There, the employee failed to notify his employer that he would not be at work when his car broke down on the way to work. *Id.* at 192-93, 717 P.2d at 584. The employee in *Kraft* explained that he did not notify his employer of his absence because there were not any telephones in the immediate vicinity. *Id.* The court, however, concluded that substantial evidence supported the agency's finding that a telephone was probably nearby and that the employee's failure to make any effort to locate a telephone for

Page 11

over three hours constituted misconduct. *Id.* at 194-95, 717 P.2d at 584-85.

In analyzing the employee's circumstances in *Kraft*, the court stated that "there must be a point when inaction can only be viewed as the product of indifference." *Id.* at 194, 717 P.2d at 585. The court declared that "it is the duty of the employee to have regard for the interests of his employer and for his own job security . . . . Although circumstances may vary this duty, good faith on the part of the employee must always appear." *Id.* (internal quotations omitted). The court concluded the employee failed to act reasonably and in good faith under the circumstances; therefore, his inaction constituted disqualifying misconduct. *Id.* at 194-95, 717 P.2d at 585.

While the Nevada Supreme Court has never addressed whether an employee's failure to maintain a certification in accordance with an employer policy constitutes disqualifying misconduct, other jurisdictions have. *See, e.g.*, *Holt v. Iowa Dep't of Job Serv.*, 318 N.W.2d 28 (Iowa Ct. App. 1982); *Chacko v. Commonwealth, Unemployment Comp. Bd. of Review*, 410 A.2d 418 (Pa. Commw. Ct. 1980); *Hicks v. Commonwealth, Unemployment Comp. Bd. of Review*, 383 A.2d 577 (Pa. Commw. Ct. 1978). As a Pennsylvania court stated, "academic failure after a good-faith effort would not be willful misconduct," but where the employee accepted a position knowing doctoral studies were required, refusing to pursue those studies without good reason constituted, among other things, an "intentional and substantial disregard" inimical to the employer's interest and was deemed willful misconduct. *Millersville State*

Page 12

*Coll., Pa. Dep't of Educ. v. Commonwealth, Unemployment Comp. Bd. of Review*, 335 A.2d 857, 860 (Pa. Commw. Ct. 1975).[4]

The burden of demonstrating a good-faith effort is on the employee; the employee does not meet this burden unless the employee supports a good-faith claim with evidence. *See Chacko*, 410 A.2d at 419; *see also Bundley*, 122 Nev. at 1447-48, 148 P.3d at 755-56. The employee may, however, meet this burden by providing evidence that an unforeseen circumstance thwarted a good-faith attempt to satisfy a license requirement. *See Holt*, 318 N.W.2d at 30 (concluding that failure to comply with an employer's license requirement was not a willful disregard or intentional violation of the requirement because the employee's spouse became unexpectedly ill requiring the employee to take care of the couple's four children).

We find the rationale behind these decisions instructive when considered in light of existing Nevada law regarding misconduct in the unemployment benefits context. In this case, substantial evidence supports the conclusion that Goodwin had ample notice of the law pertaining to certification and of Bristlecone's certification requirement,

Page 13

but failed to take steps to ensure that she fulfilled this requirement on time, despite having ten years in which to obtain her degree. Given the clear requirement and the length of time

available to comply, we conclude that ESD met its initial burden of showing that Goodwin's failure to maintain her certification constituted misconduct. *See Bundley*, 122 Nev. at 1447-48, 148 P.3d at 755-56. Thus, the burden shifted to Goodwin to provide evidence demonstrating that she made a reasonable, good-faith attempt to comply with the certification requirement and that her failure to comply was justified under the circumstances of this case.

Implicit in the appeals referee's decision concluding that Goodwin's actions constituted misconduct is the finding that the failure to take sufficient courses to ensure that she graduated on time was neither reasonable nor in good faith under the circumstances. We are generally bound by the fact-based legal conclusions made by the administrative agency, such that, "[e]ven if we disagreed with [the agency's] finding, we would be powerless to set it aside" if it is supported by substantial evidence. *See Kraft*, 102 Nev. at 194, 717 P.2d at 585 (citing *McCracken*, 98 Nev. at 31, 639 P.2d at 553). Further, we cannot pass on the credibility of a witness. *Lellis v. Archie*, 89 Nev. 550, 554, 516 P.2d 469, 471 (1973). Thus, we must examine the record that was before the administrative agency to ascertain whether the agency acted arbitrarily or capriciously. *Bundley*, 122 Nev. at 1444, 148 P.3d at 754.

Here, Goodwin's primary explanation for not completing the coursework was due to her work and family responsibilities. Goodwin, however, did not assert, and the record does not contain evidence showing, that she did not understand her family responsibilities at the time she applied for her intern certification or when she accepted her position with



Bristlecone, such that she would not have known that she would need to balance those responsibilities in order to ensure her timely graduation. *Cf. Holt*, 318 N.W.2d at 30. Nor did she provide sufficient evidence to demonstrate that her progress towards her degree constituted a reasonable, although ultimately unsuccessful, attempt to obtain her degree in time to ensure her continuous compliance with the certification requirement.

In particular, Goodwin testified that she was only able to take, at most, three courses per semester at TMCC and could not work part time to allow her to take more courses. Goodwin, however, failed to provide any evidence demonstrating the number of courses she took at any given time throughout her tenure at TMCC; indeed, the record is devoid of any documentary evidence of her progress as she worked toward her degree. Therefore, there was a lack of evidence on which the appeals referee could have found that Goodwin made a reasonable, good-faith effort to graduate on time. *See Wright v. State, Dep't of Motor Vehicles*, 121 Nev. 122, 125, 110 P.3d 1066, 1068 (2005) (explaining that a lack of evidence may provide a basis for upholding an administrative agency's decision under the substantial evidence standard).

Moreover, Goodwin testified that she finally received her associate's degree 11 years after initially enrolling at TMCC (which was also 9 years after receiving her counselor intern certification). The appeals referee determined that Goodwin should have been focusing her efforts on her bachelor's degree. When she finally transferred to Walden University, only one

year remained before her certification expired. Goodwin provided no evidence showing how many credits she earned

Page 15

while attending TMCC or how many credits Walden accepted to apply towards her bachelor's degree.

Further, although Goodwin asserts that she maintained contact with the Board and thought she would receive an extension, nothing in the record demonstrates that Goodwin sought such an extension until after the ten-year period had already expired. Thus, this effort does not show that Goodwin took timely and reasonable steps to try to comply with the certification requirement.

We cannot substitute our judgment for that of the appeals referee regarding the weight of evidence. *See Bundley*, 122 Nev. at 1445, 148 P.3d at 754. In this case, Goodwin presented insufficient evidence on which the appeals referee could conclude she made a reasonable, good-faith attempt at meeting the certification requirement. *See Wright*, 121 Nev. at 125, 110 P.3d at 1068. Thus, we are bound by law to uphold the appeals referee's determination. *See Kraft*, 102 Nev. at 194, 717 P.2d at 585.

*CONCLUSION*

On this record, we conclude that substantial evidence supports the appeals referee's finding that Goodwin's failure to comply with Bristlecone's certification policy amounted to a substantial disregard of a reasonable employer policy—an action that amounted to disqualifying misconduct. *See Garman*, 102 Nev. at 566, 729 P.2d at 1337. Further, because Goodwin failed to provide sufficient evidence regarding the progress she made in attempting to timely graduate, we conclude she did not satisfy her burden of proving she made a reasonable and good-faith attempt to meet the employer's requirements. Accordingly, because we conclude the administrative agency's decision was not arbitrary,

Page 16

capricious, or an abuse of discretion, NRS 233B.135(3)(f), we affirm the district court's order denying judicial review.

/s/_____, C.J.
Gibbons

We concur:

/s/_____, J.
Tao

/s/ _____, J.
Silver

---

Footnotes:

[1.] Bristlecone Family Resources is not a party to this appeal.

[2.] Cynthia Jones and Renee Olson are also named as respondents in this appeal as former and present administrators, but their role in the underlying matter is unclear from the record, and neither has participated in the proceedings below or on appeal.

[3.] The Nevada Revised Statutes similarly define substantial evidence as "evidence which a reasonable mind might accept as adequate to support a conclusion." NRS 233B.135(4), *amended by* 2015 Nev. Stat., ch. 160, § 11, at 711.

[4.] Goodwin argues, unconvincingly, that Pennsylvania applies its misconduct statute differently than Nevada because Pennsylvania denies unemployment benefits to employees terminated due to incarceration, whereas Nevada does not. We reject this argument because Pennsylvania does not apply a bright-line rule; rather, the misconduct determination is based on the circumstances of each case. *See Wertman v. Commonwealth, Unemployment Comp. Bd. of Review*, 520 A.2d 900, 903 (Pa. Commw. Ct. 1987) (distinguishing cases where an employee incarcerated due to an inability to post bail cannot be said to have engaged in willful misconduct, whereas an employee incarcerated as a result of a conviction could yield a finding of willful misconduct).

---