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EMPLOYMENT SECURITY  
DIVISION  
  
Unemployment Insurance  
Support Services



JIM GIBBONS  
Governor  
  
LARRY J. MOSLEY  
Director  
  
CYNTHIA JONES  
Division Administrator

May 22, 2009

Cheryl Atkinson, Administrator  
U.S. Department of Labor  
Office of Workforce Security  
200 Constitution Avenue NW, Room S-4231  
Washington, DC 20210

Dear Ms. Atkinson:

Please consider this correspondence the State of Nevada's application for the distribution of the two-third's portion, \$51,291,608.00, of the American Recovery and Reinvestment Act, Unemployment Modernization Incentive Payments in accordance with Section 2003(a) of Public Law 111-5.

This request is based on the provisions of Section 2003(a) of Public Law 111-5 that provides incentive payments to states. Nevada's Unemployment Insurance program allows for the payment of benefits under two of the four provisions delineated in the Assistance for Unemployed Workers and Struggling Families Act included in Title II of Division B of Public Law No. 111-5.

I hereby certify that Nevada's Unemployment Insurance Compensation law, policy and procedures allow for the payment of Unemployment Insurance benefits under the following conditions, if otherwise eligible:

- 1) Unemployment Insurance benefits is payable to certain individuals seeking only part-time work.
- 2) An individual is not disqualified from Unemployment Insurance benefits for separations due to certain compelling family reasons.

Enclosed please find documentation which demonstrates that Nevada's Unemployment Insurance Program allows for the payment of benefits under these two circumstances through the flexibility provided in the state's governing statutes and the program's administrative policies and procedures.

Cheryl Atkinson, Administrator  
May 22, 2009  
Page 2

Furthermore, with this letter, I certify that these provisions within Nevada's Unemployment Insurance program and the administrative practices are not subject to automatic discontinuation (sunset provisions). Nevada's application is submitted in good faith with the intention of providing benefits to unemployed workers who meet the eligibility provisions on which the application is based.

The State of Nevada's Department of Employment, Training and Rehabilitation intends to use these incentive funds provided for in this incentive to pay Unemployment Insurance benefits.

If you have any questions regarding this application, please feel free to contact me at (775) 684-3909.

Sincerely,



Cynthia Jones  
Deputy Director, DETR/Administrator, ESD  
Department of Employment, Training and Rehabilitation

CAJ:bt

Enclosures

cc: Larry J. Mosley, Director

EMPLOYMENT SECURITY  
DIVISION  
  
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- 2) An individual is not disqualified from Unemployment Insurance benefits for separations due to certain compelling family reasons.

Enclosed please find documentation which demonstrates that Nevada's Unemployment Insurance Program allows for the payment of benefits under these two circumstances through the flexibility provided in the state's governing statutes and the program's administrative policies and procedures.

Cheryl Atkinson, Administrator  
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Sincerely,



Cynthia Jones  
Deputy Director, DETR/Administrator, ESD  
Department of Employment, Training and Rehabilitation

CAJ:bt  
Enclosures  
cc: Larry J. Mosley, Director

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**Requirement Number 1 - Unemployment compensation is payable to certain individuals seeking only part-time work.**

Section 612.375 of the Nevada Revised Statutes states in part, "... (c) He is able to work, and is available for work, ..." This statute does not define whether the claimant must seek full-time work, only that the claimant must be available for work.

Since 1997, the State of Nevada allowed for those seeking part-time employment in certain circumstances to be considered meeting the availability provisions. Because recent economic conditions have created an increase in part-time employment, Nevada has expanded the Agency's interpretation of its availability provisions.

- a. A high school student has a legal duty to attend school. This attendance may limit the student's availability for some shifts of work or prohibit working full-time. In these cases, the individual would be allowed to seek and accept part-time work.
- b. Individuals with medical problems may be restricted to part-time work, and an individual may be found eligible to seek and accept part-time work while receiving benefits. In certain circumstances, which would be similar to an individual seeking full-time work, individuals may need to provide medical documentation supporting a doctor's advice to work only part-time or that they can perform the type of work seeking within their limitations.
- c. An individual has an established history of part-time employment (majority of weeks worked in the base period are part-time), will be allowed to conduct a work search that is for part-time employment. Benefits will not be denied if an individual refuses full time employment.

References:

1. UI Memo 97-5,
2. UI Memo 2009-07, Amendment to UI Memo 2009-04,
3. NRS 612.375,
4. Manual of Operations, Section 4724.22,

State of Nevada  
DEPARTMENT OF EMPLOYMENT, TRAINING & REHABILITATION

EMPLOYMENT SECURITY DIVISION

MEMORANDUM

TO: ALL LOCAL OFFICE MANAGERS  
FROM: Harry Bradley, Chief of Benefits *HB*  
DATE: April 8, 1997  
SUBJECT: UI MEMO 97-5 - AVAILABILITY ISSUES

Background: In the early implementation of unemployment benefits, the labor market for the unemployed was mostly full time employment. As a result, the precedent cases involving individuals' availability for work generally found that a person desirous of or restricted to working part time would not meet the availability requirements.

Department policy currently reflects these precedent cases with a few exceptions.

While the majority of work remains full-time, the economic changes occurring within the country is slowly altering the labor market and the prevalence of part time employment is increasing. *This UI Memo addresses Division policy regarding availability of individuals attending high school and individuals with medical restrictions.*

1. A high school student has a legal duty to attend school. This attendance may limit the student's availability for some shifts of work or prohibit working a full shift.
2. Individuals with medical problems may out of necessity restrict the hours they are available for work due to a lack of ability to work full time. Medical documents are required to verify the person has been advised by a doctor to work only part time.

To determine whether the above claimants meet the availability requirements, fact finding must include the labor market conditions for the type of work being sought. The prevalence of part time work within the occupation and the fact the claimant is qualified to perform the type of work being sought is required. The efforts to seek work, at the time of the interview, will also be documented.

When the facts indicate that the occupation being sought is plentiful in the labor market and an adequate search for work is being made, the individuals may meet the availability requirements. In each case, the claimant must be advised of the active seek work requirements in the specific occupation; keeping a record of the contacts made for work; and, that their work search will be verified by local office personnel.

The need for work search verification will be determined by the adjudicator or by personnel in the local office and conducted in the local office. The scheduled verification of the work search interview will be documented on the BC99 and any pertinent documents in the adjudication center will be returned to the local offices. An in-person (IP) date will be input into the computer records. When the individual reports to the local office, work search verification must be performed. Any issues discovered during the verification process will be scheduled for adjudication in the usual manner. When local office personnel determine the claimant is complying with Division requirements, further follow-up need not occur. The local office personnel may schedule further follow-up action as required.

In the event that full time suitable work is offered and refused by these claimants, good cause may exist for the refusal when the reason for the refusal is due to the restrictions mentioned above.

This policy is effective immediately.

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## MEMORANDUM

**TO:** UI Centers/Integrity Managers and Supervisors

**FROM:** Theresa Nicks, ESD Program Chief/UISS

**DATE:** May 22, 2009

**SUBJECT:** UI Memo – 2009-07, Amended UI Memo 2009-04  
Availability for Seeking Part Time Work Decisions  
NRS.612.375,  
Manual of Operations, Section 4724.22

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Please share the following information with the appropriate staff.

This memorandum is intended to clarify the questions about current law and policy concerning a claimant seeking part-time work. This will also address the requirement that the division provide a quality determination for such cases.

Background: In earlier implementation of Unemployment Insurance benefits, the labor market for the unemployed was mostly full time employment. As a result, the precedent cases involving individuals' availability for work generally found that a person desirous of or restricted to working part-time would not meet the availability requirements. Currently, policy allows high school students and those claimants that are restricted to part time work due to medical limitations to seek only part time work. In the case of an individual medically restricted to part-time work, medical documentation will only be required if: (1) there is a question that the claimant's base period wages are part-time; or (2) if there is question that the work being sought was suitable based on the claimant's medical limitations; or (3) if there is a question that the claimant was able to work.

While the majority of work remains full-time, it has become apparent that part time employment is increasing. NRS 612.375 applies to the eligibility and a claimant's right to appeal that determination. There is nothing in the law that specifically states that an individual must seek full time work. In the past, adjudicators and appeal referees have found that claimants who have established a history of part time employment will be allowed to conduct a work search that is for part time employment.



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To determine whether a claimant meets the availability requirements, fact-finding must include the labor market conditions for the type of work being sought. Has the claimant performed part time work prior to the separation? How many hours each week had the claimant been working? The claimant would have had to establish a work history of part time employment to meet eligibility to seek only part time employment. The claimant's base period wages or past pay stubs may have to be examined to determine this. The labor market must support that there is part time work for the occupation the claimant is seeking, which is no different for an individual seeking full time work. In some instances, the claimant's last period of work may have been full-time due to an increase in hours, working a second job, or their last job was full-time. However, if the claimant is only seeking part-time work, and the majority of weeks worked in the base period include part-time work, benefits will be allowed. The claimant is required and must be willing to work the "same number of hours" he/she had in the past and be qualified to perform the type of work being sought. The efforts to seek work, at the time of the interview, must be documented whether the claimant is seeking part time or full time work. Any additional information necessary to resolve this issue will be obtained during the adjudication telephone interview.

Pursuant to NRS 612.375, the adjudication of a claimant's non-monetary eligibility or denial for conducting a work search that is limited to part-time work will be considered if the claimant is able and available to work the same amount of time that they worked before the separation. In the event that full time suitable work is offered and refused by a claimant, and the majority of weeks of work in the claimant's base period were part time work, then good cause will exist for the refusal. As when adjudicating any issue, each case must be scrutinized for eligibility. Section 4724.22, Manual of Operations, will be updated with this information.

The determination of a claimant's eligibility for Unemployment Insurance benefits is a critical UI program function. The adjudicator is responsible for determining the claimant's rights for those benefits. The decision will be written to demonstrate that the adjudicator acted with reasonable assurance that the determination of eligibility was consistent with the application of state law and policy.

Please direct any questions regarding this memorandum to UISS through a PPI on Sharepoint.

**NRS 612.375 General conditions; reductions in benefits.**

1. Except as otherwise provided in subsection 2 of NRS 612.3774, an unemployed person is eligible to receive benefits with respect to any week only if the Administrator finds that:

(a) He has registered for work at, and thereafter has continued to report at, an office of the Division in such a manner as the Administrator prescribes, except that the Administrator may by regulation waive or alter either or both of the requirements of this paragraph for persons attached to regular jobs and in other types of cases or situations with respect to which he finds that compliance with those requirements would be oppressive or inconsistent with the purposes of this chapter.

(b) He has made a claim for benefits in accordance with the provisions of NRS 612.450 and 612.455.

(c) He is able to work, and is available for work, but no claimant may be considered ineligible with respect to any week of unemployment for failure to comply with the provisions of this paragraph if his failure is because of an illness or disability which occurs during an uninterrupted period of unemployment with respect to which benefits are claimed and no work has been offered the claimant which would have been suitable before the beginning of the illness and disability. No otherwise eligible person may be denied benefits for any week in which he is engaged in training approved pursuant to 19 U.S.C. § 2296 or by the Administrator by reason of any provisions of this chapter relating to availability for work or failure to apply for, or a refusal to accept, suitable work.

(d) He has within his base period been paid wages from employers:

(1) Equal to or exceeding 1 1/2 times his total wages for employment by employers during the quarter of his base period in which his total wages were highest; or

(2) In each of at least three of the four quarters in his base period.

↪ If a person fails to qualify for a weekly benefit amount of one twenty-fifth of his high-quarter wages but can qualify for a weekly benefit amount of \$1 less than one twenty-fifth of his high-quarter wages, his weekly benefit amount must be \$1 less than one twenty-fifth of his high-quarter wages. No person may receive benefits in a benefit year unless, after the beginning of the next preceding benefit year during which he received benefits, he performed service, whether or not in "employment" as defined in this chapter and earned remuneration for that service in an amount equal to not less than 3 times his basic weekly benefit amount as determined for the next preceding benefit year.

2. In addition to fulfilling the requirements set forth in subsection 1, an unemployed person who has been determined to be likely to exhaust his regular benefits and to need services to assist in his reemployment, pursuant to the system of profiling established by the Administrator pursuant to 42 U.S.C. § 503, is eligible to receive benefits with respect to any week only if he participates in those services to assist in his reemployment, unless the Administrator determines that:

(a) The unemployed person has completed his participation in those services; or

(b) There is a justifiable cause for the person's failure to participate in those services.

3. For any week in which a claimant receives any pension or other payment for retirement, including a governmental or private pension, annuity or other, similar periodic payment, except as otherwise provided in subsection 4, the amount payable to the claimant under a plan maintained by a base-period employer or an employer whose account is chargeable with benefit payments must:

(a) Not be reduced by the amount of the pension or other payment if the claimant made any contribution to the pension or retirement plan; or

(b) Be reduced by the entire proportionate weekly amount of the pension or other payment if the employer contributed the entire amount to the pension or retirement plan.

4. The amount of the weekly benefit payable to a claimant must not be reduced by the pension offset in subsection 3 if the services performed by the claimant during the base period, or the compensation he received for those services, from that employer did not affect the claimant's eligibility for, or increase the amount of, the pension or other payment, except for a pension paid pursuant to the Social Security Act or Railroad Retirement Act of 1974, or the corresponding provisions of prior law, which is not eligible for the exclusion provided in this subsection and is subject to the offset provisions of subsection 3.

5. As used in this section, "regular benefits" has the meaning ascribed to it in NRS 612.377.

[4:129:1937; A 1939, 115; 1941, 412; 1945, 299; 1947, 413; 1949, 277; 1951, 339; 1955, 698]—(NRS A 1965, 107; 1971, 751, 1359; 1973, 1358; 1975, 999; 1977, 898; 1981, 688; 1985, 160; 1989, 1245, 2126; 1991, 145; 1993, 536, 1819; 1995, 62, 579)

**State of Nevada Unemployment Insurance  
Manual of Operations Section 4700 - Policy**

**4724.22 AVAILABILITY OF CLAIMANTS SEEKING PART-TIME  
WORK**

While the majority of work remains full-time, there are economic changes occurring within the country and the frequency of part-time employment is increasing.

There are several situations that may arise which may allow an individual to seek only part-time work as part of their work search program.

1. A high school student has a legal duty to attend school. This attendance may limit the student's availability for some shifts of work or prohibit working a full shift. A high school student must seek work and their work search will not be waived.

2. Individuals with medical problems may be restricted to part-time work. Medical documents may be required to verify the person has been advised by a doctor to work only part-time. The circumstances that may require medical documentation would be the following: (1) If there is a question that the claimant's base period wages are part-time; or (2) if the work being sought was suitable based on the claimant's medical limitations; or (3) if there was a question that the claimant was able to work.

3. It will be necessary to review all claimants that are on a limited work search solely for part-time employment. Part-time employment is on an increase and where previously there would be an availability issue, we will allow claimants to seek part-time work. To determine whether a claimant meets the availability requirements, fact-finding must include the labor market conditions for the type of work being sought. Has the claimant performed part time work prior to the separation? How many hours each week had the claimant been working? The claimant would have had to establish a work history of part time employment to meet eligibility to seek only part time employment. The claimant's base period wages or past pay stubs may have to be examined to determine this. The labor market must support that there is part time work for the occupation the claimant is seeking, which is no different for an individual seeking full time work. In some instances, the claimant's last period of work may have been full-time due to an increase in hours, working a second job, or their last job was full-time. However, if the claimant is only seeking part-time work, and the majority of weeks worked in the base period include part-time work, benefits will be allowed. The claimant is required and must be willing to work the same number of hours he/she had in the past and be qualified to perform the type of work being sought. The efforts to seek work, at the time of the interview, must be documented whether the claimant is seeking part time or full time work.

To determine whether claimants seeking part-time work meet the availability requirements, fact-finding must include the labor market conditions for the type of

**State of Nevada Unemployment Insurance  
Manual of Operations Section 4700 - Policy**

work being sought. Since part-time work is becoming common within the labor market, the occupation and the fact the claimant is qualified to perform the type of work being sought is required. The efforts to seek work, at the time of the interview, will also be documented. The adjudicator must keep in mind that the work search requirements for an individual seeking part-time work will be the same for someone seeking full-time work.

When the facts indicate that the occupation being sought is plentiful in the labor market and an adequate search for work is being made, the individuals will meet the availability requirements. In each case, the claimant must be advised of the active seek work requirements in the specific occupation; keeping a record of the contacts made for work; and, that their work search may be verified by department personnel.

In the event that full time suitable work is offered and refused by a claimant, and the majority of weeks of work in the claimant's base period were part time work, then good cause will exist for the refusal.

The decision will be written to demonstrate that the adjudicator acted with reasonable assurance that the determination of eligibility was consistent with the application of the state law and policy.

**Requirement Number 2 - An individual is not disqualified from unemployment compensation for separations due to certain compelling family reasons.**

Section 612.380 of the Nevada Revised Statutes states in part, “1. Except as otherwise provided in subsection 2, a person is ineligible for benefits for the week in which he has voluntarily left his last or next to last employer: (a) Without good cause, if so found by the Administrator, ...” Good cause is not defined in Nevada law, but is generally held to mean that an individual had reasons so urgent and compelling that they had no other alternative but to quit and that they exhausted all reasonable recourse prior to quitting.

In 1981, Section NRS 612.415, commonly known as the “domestic quit” provision, was repealed. Prior to this action, most individuals who left employment to marry or to accompany a spouse to another area were denied benefits. However, the Division’s policy has been expanded to include a finding of good cause when an individual quits for the following “compelling family” (domestic) reasons even if there were other alternatives available:

- a. An individual, who quits employment to accompany their spouse to a new location because it would be impractical to commute, has been a valid reason to find in favor of the claimant. The area and the distance that the claimant is willing to commute for work is determined by labor market conditions for that particular area. Most adjudicators are familiar with labor market information within Nevada. However, Local Office staff can also provide this information when the adjudicator is not familiar with the area. On March 9, 2006, the Division’s attorney provided further interpretation of NRS 612.380 to allow a finding of good cause to include an individual who quits and relocates to accompany a “partner” when a child is involved in the relationship. Since the claimant and the partner are legally obligated to care for the child and to maintain the family unit, good cause or a compelling reason to quit was found.
- b. An individual who quits to take care of a family member who is ill or disabled is also considered a personal compelling reason to quit. An immediate family member is defined as spouses, parents, domestic partners, grandparents, sisters, brothers, adult children, foster children, and minor children under the age of 18. A signed physician’s statement can be requested which documents the illness or disability of a family member. However, if the claimant does not have a statement from a physician, other methods of verification will be acceptable, such as a home health care provider, nurse practitioner or a sworn statement from the individual who is ill or another family member. If the ill person is receiving Social Security Disability, any documentation establishing that the family member is ill or disabled is acceptable. Illness and disability means a verified illness or disability which necessitates the care of the ill person for a period of time longer than the employer is willing to grant leave (paid or otherwise).

Even if the ill or disabled family member could have moved in with the claimant or into an assisted care facility, if the family or the family member chooses neither of these options, the claimant will not be denied benefits for leaving their job to provide the care.

When the family member's illness or disability clearly establishes that they required care by another individual and the employer does not accommodate the claimant's request for time-off, a compelling reason will be established for quitting.

- c. In some cases, an individual may quit because of a domestic violence situation. The adjudicator must investigate the adverse effect of the situation on the claimant, and attempt to contact the agency that was aware of the situation. The domestic violence situation may also expand to include immediate family members such as spouses, parents, domestic partners, grandparents, sisters, brothers, adult children, foster children, and minor children under the age of 18, as the domestic violence situation may be directed at a minor child and not the claimant. As in all voluntary quit situations, the burden of proof will rest with the claimant to establish that they had good cause to quit. If the claimant had reasonable belief that they were protecting themselves or an immediate family member, and that their continued employment would jeopardize the safety of themselves or a member of their immediate family, then good cause to quit will be established.
- d. Section 612.385 of the Nevada Revised Statutes states in part, "A person is ineligible for benefits ..., if he was discharged from his last or next to last employment for misconduct connected with his work ...". Misconduct is not defined in Nevada law, only that an individual who is discharged for misconduct in connection with the work will be found ineligible for benefits. Nevada Supreme Court decisions have provided further definitions of misconduct, which are used by adjudicators and appeals referees when rendering decisions on an individual's eligibility to receive benefits.

In *Barnum vs. Williams*, 84 NV 37, 436 P 2d 219 (1968), the Nevada Supreme Court reasoned that "misconduct," within the meaning of the unemployment compensation law, means a deliberate violation or disregard of reasonable standards. Carelessness or negligence showing substantial disregard of duties is misconduct, while failure of performance because of inability, ordinary negligence in isolated instances, and good faith errors in judgment and discretion are excluded. In a later case, the Nevada Supreme Court further refined the definition by holding that misconduct required an "element of wrongfulness." *Lellis v Archie* 89 Nev. 550, at 553, 516 P.2d 469 (1973). *Garman v State, Employment Security Department*, 102 Nev. 563, at 565 729 P.2d 1335 (1986). Most recently, the Nevada State Supreme Court has held that: "Disqualifying misconduct occurs when an employee deliberately and unjustifiably violates or disregards (his) 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 (his) employer." *Clark County School District v Bundley*, 122 Nev. Adv. Rep. 119, 148 P. 3d 750, 754-755 (2006).

Nevada has, for a number of years, provided unemployment benefits to individuals who have been discharged due to absences or tardiness because of compelling family reasons. Nevada's policy concerning individuals who are absent or tardy because of an illness or compelling family reason is not misconduct, when proper notice is given, even when the absence is repeated and works hardship on the employer.

State of Nevada, Department of Employment, Training and Rehabilitation  
Two-Thirds Application for Modernization Incentive Payments

References:

1. UI Memo 2009-08, Amendment to UI Memo 2009-03,
2. UI Memo 2009-09,
3. NRS 612.380,
4. NRS 612.385,
5. Manual of Operations, Section 4740, Section 4740.14, and Section 4754,
6. Letter from Division's Attorney dated March 9, 2006, legal opinion, Pg 2, #4,
7. Clark County School District v Bundley, 122 Nev. Adv. Rep. 119, 148 P. 3d 750, 754-755 (2006),
8. Garman v State, Employment Security Department, 102 Nev. 563, at 565 729 P.2d 1335 (1986).



## MEMORANDUM

**TO:** UI Centers/Integrity Managers and Supervisors

**FROM:** Theresa Nicks, ESD Program Chief/UISS

**DATE:** May 22, 2009

**SUBJECT:** UI Memo – 2009-08, Amendment to UI Memo 2009-03  
Voluntary Quit for Domestic Violence  
Reference: NRS 612.380,  
Manual of Operations, Section 4740.14, Domestic Quits

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Please share the following information with the appropriate staff.

This memorandum is intended to clarify questions about current law and policy concerning voluntary quitting for “compelling family reasons”. This will also address the requirement that the division must provide a quality determination for such cases.

The adjudication of a claimant’s non-monetary eligibility or denial for a voluntary quit due to “compelling family reasons” will be written under NRS 612.380. The decision will also provide rights to a written determination of eligibility and the claimant’s right to appeal that determination. The appeal information can be provided during a telephone interview, faxed or mailed.

Currently, NRS 612.380 states that an individual will be denied benefits for, “Leaving last or next to last employment without good cause ...” However, there are several reasons why an individual may quit their job for “compelling family reasons”. Although the reason for quitting was personal, the adjudicator must investigate the situation and good cause for quitting may be established.



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In some cases, the claimant quits because of a domestic violence situation. To establish that the claimant quit with good cause, the adjudicator will need to examine the adverse effect of the situation on the claimant. Was the reason for leaving compelling? Would a reasonably prudent person in a similar situation have left work? How severe or immediate were the harmful circumstances to the claimant and/or the family member?

To establish the severity of the situation or the abusive incidents brought forward by the claimant, the agency that was involved in the situation should be contacted. If it is necessary that a message be left with the agency, the message should request specific information about the incidents and any advice that was given to the claimant. If the agency (police, shelters) fails to provide the information, the claimant can also provide written statements from others. For instance, there may be a co-worker, a family member, or a clergy member that witnessed an abusive incident.

It is not always necessary to have documentation from the agency that was involved with the situation in order for an eligible determination to be issued. As in all voluntary quit situations, the burden of proof will rest with the claimant to establish that they had good cause to quit and that their continued employment would jeopardize the safety of themselves or a member of their immediate family. The Manual of Operations, Section 4740.14 will be updated with this information.

There are other circumstances where an individual may have to leave their employment for a "compelling family reason". Section 4740.14, Manual of Operations regarding domestic quits explains other situations that may require the claimant to quit. For instance, the illness or disability of a member of the individual's immediate family or quitting to accompany a spouse that has accepted another position. As in all domestic quits, the adjudicator must investigate and gather all the facts before a non-monetary decision can be issued.

The determination of a claimant's eligibility for unemployment insurance benefits is a critical unemployment insurance program function. The decision will be written to demonstrate that the adjudicator acted with reasonable assurance that the determination of eligibility was consistent with the application of state law and policy through interpretation of NRS 612.380.

Please direct any questions regarding this memorandum to UISS through a PPI on Sharepoint.



## MEMORANDUM

**TO:** UI Centers Managers and Supervisors

**FROM:** Theresa Nicks, Chief of UISS

**DATE:** May 22, 2009

**SUBJECT:** UI Memo – 2009-09  
**Discharge for Compelling Family Reasons**  
**Reference: NRS 612.385,**  
**Manual of Operations, Section 4754, Discharge for Compelling Family**  
**Reasons**

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Please share the following information with the appropriate staff.

This memorandum is intended to inform staff about current law and policy concerning discharges for “compelling family reasons”.

The adjudication of a claimant’s non-monetary eligibility for a discharge due to “compelling family reasons” will be written under NRS 612.385. The decision will also provide rights to a written determination of eligibility and the claimant’s right to appeal that determination. The appeal information can be provided during a telephone interview, faxed or mailed.

Currently, NRS 612.385 states in part that an individual will be denied benefits, “... if he was discharged from the last or next to last employment for misconduct connected with the work ...” When an individual’s separation from work is due to a “compelling family reason” that prevents them from reporting to work, as long as reasonable notification was provided to the employer (in most cases), misconduct will not be established and benefits will be allowed.

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A compelling family reason may be defined as an absence due to illness or disability of an immediate family member requiring care, a domestic violence situation, or an illness or disability to the claimant that prevents them from reporting to work. Immediate family members include spouses, minors under the age of 18, and parents. In most cases, proper notification to the employer is required; however, there may be some circumstances when the claimant is unable to contact the employer as outlined in the employer's attendance policy. Individuals who are absent or tardy because of an illness or a compelling family reason is not misconduct, when proper notice is given, even when the absence is repeated and works hardship on the employer.

**For example:** A claimant's six month old baby is ill and cannot be left at a child care center. The individual notifies the employer prior to the start of each shift that they will not be at work that day. The claimant is unable to report to work for six consecutive days. The claimant reports to work on her next scheduled day of work and is discharged. Although the claimant's absence from work created a hardship for the employer, the claimant's reasons for missing work were compelling and misconduct has not been shown.

**For example:** The claimant was severely beaten by her abusive spouse, and hospitalized for three days. The claimant was not able to notify her employer until the second day that she missed work, due to the severity of her injuries. The claimant advised the employer that she would not be able to report to work for several more days, and continued to contact her employer every day afterwards regarding her status. For her safety, the police advised her to stay away from her work place and home, until her spouse was located and arrested. Because of the claimant's time away from work, the employer had to replace her after she missed work for two weeks. Similar to the above situation, although the claimant's absence from work created a hardship for the employer, the claimant's reasons for missing work were compelling and misconduct has not been shown.

In order for an individual to be disqualified under the misconduct provisions of the law, a deliberate violation or a disregard of a reasonable standard must be established. When the separation involves a compelling family reason, the behavior and the actions of the claimant must be carefully reviewed. If the behavior and actions of the claimant do not constitute misconduct, then benefits will be allowed.

Section 4754, Discharge for Compelling Family Reasons has been added to the Manual of Operations to provide guidance when adjudicating these types of separations.

The determination of a claimant's eligibility for unemployment insurance benefits is a critical unemployment insurance program function. The decision will be written to demonstrate that the adjudicator acted with reasonable assurance that the determination of eligibility was consistent with the application of state law and policy through interpretation of NRS 612.385.

Please direct any questions regarding this memorandum to UISS through a PPI on SharePoint.

**NRS 612.380 Leaving last or next to last employment without good cause or to seek other employment.**

1. Except as otherwise provided in subsection 2, a person is ineligible for benefits for the week in which he has voluntarily left his last or next to last employment:

(a) Without good cause, if so found by the Administrator, and until he earns remuneration in covered employment equal to or exceeding his weekly benefit amount in each of 10 weeks.

(b) To seek other employment and for all subsequent weeks until he secures other employment or until he earns remuneration in covered employment equal to or exceeding his weekly benefit amount in each of 10 weeks, if so found by the Administrator.

2. A person is not ineligible for benefits solely because he left employment which was not suitable to enter training approved pursuant to 19 U.S.C. § 2296.

3. As used in subsection 2, employment is "suitable" if the work is of a substantially equal or higher level of skill than the person's past adversely affected employment, and the wages are not less than 80 percent of his average weekly wage at his past adversely affected employment.

[Part 5:129:1937; A 1939, 115; 1941, 412; 1943, 239; 1947, 413; 1949, 277; 1951, 339; 1955, 698]—(NRS A 1973, 1782; 1975, 1000; 1977, 872; 1981, 690; 1985, 163; 1993, 1823; 1997, 2393)

**NRS 612.385 Discharge for misconduct.** A person is ineligible for benefits for the week in which he has filed a claim for benefits, if he was discharged from his last or next to last employment for misconduct connected with his work, and remains ineligible until he earns remuneration in covered employment equal to or exceeding his weekly benefit amount in each of not more than 15 weeks thereafter as determined by the Administrator in each case according to the seriousness of the misconduct.

[Part 5:129:1937; A 1939, 115; 1941, 412; 1943, 239; 1947, 413; 1949, 277; 1951, 339; 1955, 698]—(NRS A 1973, 1782; 1975, 1001; 1979, 1071; 1993, 1823)

**State of Nevada Unemployment Insurance  
Manual of Operations Section 4700 - Policy**

**4740 VOLUNTARY QUIT**

Section 612.380 states that a person is ineligible for benefits for the week in which he voluntarily left his last or next-to-last employer without good cause, and until he earns wages in covered employment equal to or exceeding his weekly benefit amount in each of 10 weeks.

A claimant may be determined eligible for quitting employment if it can be established that he/she quit for good cause.

- Good cause is established if the claimant quit for a personal reason that is “compelling” in nature.
- Good cause may also be established if the claimant quit due to sub-standard working conditions, i.e. not receiving proper payment, unsafe working conditions, harassment, and change of work schedule.

Note: If the claimant quit due to working conditions, the employer MUST be contacted by the adjudicator.

In most cases, good cause cannot be established if the claimant failed to exhaust all available and reasonable alternatives prior to quitting.

**4740.14 DOMESTIC QUILTS (Compelling Family Reasons)**

Domestic quit issues will be adjudicated under NRS 612.380. A domestic quit is a quit due to family circumstances or for “compelling family reasons”.

The following guidelines based on precedents and legal opinions will be used in the adjudication of these cases.

If a person leaves employment because of the reasons of the spouse or partner, the case must be decided on the basis of whether the decision made by the couple, for the couple, is good cause. To maintain the family unit, the couple must be treated as an indivisible unit. The family unit can consist of married couples, couples (natural parents) who establish a home with their natural child, or same-sex partners who are both legally responsible for a child.

Therefore, if the spouse or partner (with children involved) accepts a new job in another location, and the claimant’s decision to quit to follow, good cause may be established. The adjudicator will consider whether it was impractical for the claimant to commute from the new location to the work place. Another consideration would be the date that the claimant quit to relocate in relation to when the spouse or partner moved to start the new work. If there is a considerable gap of time, then the claimant should be

## **State of Nevada Unemployment Insurance Manual of Operations Section 4700 - Policy**

questioned about the delay. This questioning is necessary to pinpoint the final reason that caused the claimant to quit. Each separation will be examined to determine if leaving was a compelling reason to quit. In deciding unemployment compensation cases, a couple must be considered as a unit, and an important consideration is maintaining the family unit.

Other factors must be considered, such as any separation of the family unit and what compelled the quit at the given time. Separations that occur due to a desire as opposed to a compelling need may not lend themselves to a finding of eligibility. For example, if the claimant remained behind in order to be able to sell the family home that may in fact be a compelling need.

**For example:** A couple mutually decided to relocate so the spouse could enroll in law school out of state. There was no law school in their area. Claimant quit without good cause, because the record shows no urgent or compelling need for the spouse to attend school.

**For example:** A wife who quits and relocates with a husband who has been permanently transferred by his company to maintain the family unit. In this case, good cause for leaving would be found. However, a wife who is employed but quits to move with an unemployed husband who is looking for work would usually be a quit without good cause.

**For example:** Another situation would be a couple who is not married but has a child together and each of these persons is legally obligated to care for the child. The company transfers one partner and the other partner quits to maintain the family unit. This will be determined as good cause for quitting one's employment.

Individuals who quit to relocate with a spouse or partner must establish, by preponderance of the evidence that the following situations apply:

1. There is a legal marriage in place at the time of the quit to relocate or;
2. Couples who are not married, but have a biological or adopted child, where both parties are parents;
3. The claimant had to quit to maintain the family unit as commuting from the new location was not practical.

Preponderance of the evidence does not require hard documentation. Preponderance of the evidence can be established by gathering sufficient facts to issue a reasonable and prudent determination. Information such as name of the new employer and date of employment can be used to develop the fact-finding required to pay benefits.

If the claimant makes consistent statements throughout the fact finding interview that would normally lead to a conclusion that that the claimant quit to relocate

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with a spouse or partner that accepted another job, then generally a conclusion can be made that the claimant quit with good cause.

Documentation may be required when any of the following situations arises (these are examples only, guidelines as to scenarios which may dictate that obtaining documentation of statements is prudent and protects the integrity of the determination):

1. Claimant's statements are inconsistent, changing the story in the middle of the interview, such as stating a spouse or partner relocated to take a job as opposed to look for a job.
2. Improper time frame, such as claimant waiting a year before quitting and relocating to join her spouse or partner, or claimant lacks sufficient knowledge about spouse's or partner's employment, such as name of employer, date employment began, etc.
3. In the case of an unmarried couple with no children involved, further questioning of the claimant will be necessary to determine if this was the claimant's best option and that all alternatives were exhausted prior to quitting (i.e. Could the claimant have continued working until another job was secured at the new location prior to quitting? Why did the claimant's partner choose to accept work in another location, if both were employed where they were currently living? Could the claimant have continued to support them self without the support of the partner? If the claimant could not have continued to live on their own, could they have found another roommate or move in with a family member?)
  - a. Another circumstance where an individual may have to leave their employment for a "compelling family reason" could be to provide care for an ill or disabled family member of their immediate family. An immediate family member is defined as spouses, parents, domestic partners, grandparents, sisters, brothers, adult children, foster children, and minor children under the age of 18. A signed physician's statement can be requested which documents the illness or disability of a family member. However, if the claimant does not have a statement from a physician, other methods of verification will be acceptable, such as a home health care provider, nurse practitioner or a sworn statement from the individual who is ill or another family member. If the ill person is receiving Social Security Disability, any documentation establishing that the family member is ill or disabled is acceptable. Illness and disability means a verified illness or disability which necessitates the care of the ill person for a period of time longer than the employer is willing to grant leave (paid or otherwise).

Even if the ill or disabled family member could have moved in with the claimant or into an assisted care facility, if the family or the family member chooses neither of these options, the claimant will not be denied benefits for leaving their job to provide the care. In many cases, when the family member's illness or disability clearly establishes that they required care by another individual and the employer does not accommodate the claimant's request for time-off, a compelling reason will be established for quitting.

The adjudicator must question the claimant's availability to seek or accept work, whether the claimant had to relocate or not to take care of the family member.



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The above does not apply to a voluntary quit due to domestic violence. To establish that the claimant quit with good cause, the adjudicator will need to examine the adverse effect of the situation on the claimant. Was the reason for leaving compelling? Would a reasonably prudent person in a similar situation have left work? How severe or immediate were the harmful circumstances to the claimant? The domestic violence situation can also include a family member, such as a spouse, parents, domestic partners, grandparents, sisters, brothers, adult children, foster children, or a minor child under the age of 18.

To establish the severity of the abusive incidents brought forward by the claimant, the agency that was aware of the situation should be contacted. If it is necessary that a message be left with the agency, the message should request specific information about the incidents and any advice that was given. If the agency (police, shelters) fails to provide the information, the claimant can also provide written statements from others. For instance, there may be a co-worker, a family member, or a clergy member that witnessed an abusive incident.

It is not always necessary to have documentation from the agency that was aware of the situation in order for an eligible determination to be issued. As in all voluntary quit situations, the burden of proof will rest with the claimant to establish that they had good cause to quit. If the claimant had reasonable belief that their continued employment would jeopardize the safety of themselves or a member of their immediate family, then good cause to quit will be established.

As in all domestic quits, the adjudicator must investigate and gather all the facts before a non-monetary decision can be issued. See section 4754 if an individual was discharged for a "compelling family reason."

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Manual of Operations Section 4700 - Policy**

**4754 DISCHARGE FOR COMPELLING FAMILY REASONS**

When an individual's separation from work is due to a "compelling family reason" that prevents them from reporting to work, as long as reasonable notification was provided to the employer (in most cases), misconduct will not be established and benefits will be allowed.

A compelling family reason may be defined as an absence due to illness or disability of an immediate family member requiring care, a domestic violence situation, or an illness or disability to themselves that prevents them from reporting to work. Immediate family members include spouses, minors under the age of 18, domestic partners, grandparents, sisters, brothers, adult children, foster children, and parents. In most cases, proper notification to the employer is required; however, there may be some circumstances when the claimant is unable to contact the employer as outlined in the employer's attendance policy. Individuals who are absent or tardy because of an illness or a compelling family reason is not misconduct, when proper notice is given, even when the absence is repeated and works hardship on the employer.

**For example:** A claimant's six month old baby is ill and cannot be left at a child care center. The individual notifies the employer prior to the start of each shift that they will not be at work that day. The claimant is unable to report to work for six consecutive days. The claimant reports to work on her next scheduled day of work and is discharged. Although the claimant's absence from work created a hardship for the employer, the claimant's reasons for missing work were compelling and misconduct has not been shown.

**For example:** The claimant was severely beaten by her abusive spouse, and hospitalized for three days. The claimant was not able to notify her employer until the second day that she missed work, due to the severity of her injuries. The claimant advised the employer that she would not be able to report to work for several more days, and continued to contact her employer every day afterwards regarding her status. For her safety, the police advised her to stay away from her work place and home, until her spouse was located and arrested. Because of the claimant's time away from work, the employer had to replace her after she missed work for two weeks. Similar to the above situation, although the claimant's absence from work created a hardship for the employer, the claimant's reasons for missing work were compelling and misconduct has not been shown.

In order for an individual to be disqualified under the misconduct provisions of the law, a deliberate violation or a disregard of a reasonable standard must be established. When the separation involves a compelling family reason, the behavior and the actions of the claimant must be carefully reviewed. If the behavior and actions of the claimant do not constitute misconduct, then benefits will be allowed.

Legal Opinion provided to show interpretation of Nevada's provision for separation due to compelling family reasons.

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U. I. SUPPORT SERVICES

CROWELL, SUSICH, OWEN & TACKES, LTD.

P.O. Box 1000  
Carson City, Nevada 89702  
(775) 882-1311  
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J. Thomas Susich, Esq.  
Crowell, Susich, Owen & Tackes, Ltd.  
P.O. Box 1000  
Carson City, Nevada 89702

March 9, 2006

Denise Miller  
Acting Chief of Benefits  
Employment Security Division  
1923 North Carson Street  
Second Floor  
Carson City, NV 89701

RE: Letter of February 13, 2006

Dear Denise:

I received a letter from you on February 13, 2006, asking me to provide you with a legal opinion regarding various issues. We met on March 8, 2006, to discuss the issues in more detail. Please find my responses below:

1. NRS 612.375(1)(c) provides that a claimant may not be disqualified for benefits if he is unable to search for work due to illness or disability. The words "illness" and "disability" indicate a specific malady which renders the person involuntarily unable to work. Thus if the claimant provides a doctor's note stating that he suffers from an illness or disability which has rendered him unable to work then he should not be disqualified. However, if the doctor provides a note which indicates that the claimant voluntarily underwent some sort of medical treatment which was not necessary to protect his health, then he would be ineligible to receive benefits.

2. NRS 612.445 provides that when a claimant deliberately makes a false or misleading statement in order to obtain or increase his benefits he must be disqualified. The language of the statute is clear. It doesn't matter if the claimant is otherwise eligible, he must be disqualified if he made deliberate misrepresentations in order to obtain or increase his benefits and further must be order to repay any benefits he received.

3. NRS 612.344 allows a claimant who is temporarily disabled or is receiving money for rehabilitation services to elect a base period for unemployment insurance purposes. The claimant may elect his base period if he files a claim within four weeks after the disability or rehabilitation ends. It is my opinion that the claimant must be given four weeks after the final decision releasing him from rehabilitation or disability status. Intervening periods where he was released and then reinstated in a disability status may not be counted.

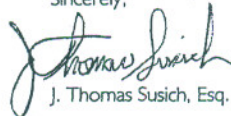
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4. NRS 612.380 has been interpreted to allow a finding of good cause where a spouse quits his employment to follow his mate to another place. I believe that where a legal obligation exists, such as in a marriage, good cause can be found in the right circumstances to justify the awarding of benefits. This would also apply to couples who are not married, but who have a biological or adopted child, where both parties are parents. Each of these persons are legally obligated to care for the child and thus keeping the family unit together may be determined to be good cause for quitting one's employment.

5. NRS 612.475 and other statutes within Chapter 612 provide for the filing of appeals or protests within eleven days. Under the decision of *Hardin v. Jones* the Nevada Supreme Court held that where a notice is mailed the recipient must be given an additional three days to account for the time necessary for the notice to be delivered by the United States Postal Service. The time does not commence until the day after the notice is mailed. The three days apply to the beginning of the time, not the end. Thus you don't start counting the eleven days until three days have elapsed after the notice was mailed. It doesn't matter whether the third day of the three day period falls on a non judicial day. You then count the eleven days, and if the eleventh day falls on a non judicial day then you must give the person until the next judicial day to file his appeal, etc. Non judicial days include any days when ESD offices are closed. While it isn't required, I believe that federal holidays which don't match up with state holidays, when mail is not delivered, should not be counted either. I only know of one federal holiday that is not a state holiday, that would be Columbus Day. Simply put, count fourteen days from the day after the item was mailed. If the fourteenth day is a non judicial day, go to the next judicial day. This is consistent with the way the court's apply the rule. Please remember that the three day period only applies to items that are mailed. If an item is personally served on a person the eleven days commence on the day after service is affected.

Please let me know if you have any additional questions or comments.

Sincerely,



J. Thomas Susich, Esq.

JTS/ms  
Endosure

cc: Cindy Jones, Administrator  
Jim Page, Chief Referee  
Donna Clark, Chief of Contributions

This Nevada Supreme Court Decision is being provided to show the state's application of misconduct provisions regarding separations due to compelling family reasons.

**122 Nev., Advance Opinion 119**  
IN THE SUPREME COURT OF THE STATE OF NEVADA

CLARK COUNTY SCHOOL DISTRICT,  
Appellant,  
vs.  
HARRIET BUNDLEY AND  
EMPLOYMENT SECURITY DIVISION,  
DEPARTMENT OF EMPLOYMENT,  
TRAINING AND REHABILITATION,  
Respondents.

No. 46725

**FILED**

DEC 28 2006

JANETTE M. BLOOM  
CLERK OF SUPREME COURT  
BY: *[Signature]*  
CHIEF DEPUTY CLERK

Appeal from a district court order denying judicial review in an unemployment compensation matter. Eighth Judicial District Court, Clark County; Kenneth C. Cory, Judge.

Reversed and remanded with instructions.

L. Steven Demaree, Assistant General Counsel, Las Vegas,  
for Appellant.

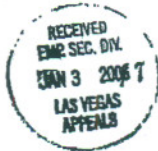
Kummer Kaempfer Bonner Renshaw & Ferrario and J. Thomas Susich,  
Carson City,  
for Respondents.

BEFORE BECKER, HARDESTY and PARRAGUIRRE, JJ.

OPINION

PER CURIAM:

In this appeal, we clarify that when an employer asserts that a former employee's misconduct disqualifies her from receiving unemployment benefits, the employer bears the burden of demonstrating that the employee's discharge was due to disqualifying misconduct. The employer may do this by making an initial showing of willful misconduct



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related to the employment. To avoid being disqualified from receiving benefits, the former employee must then demonstrate that the nature of the misconduct was not of the type for which disqualification is warranted.

In this case, the administrative agency failed to appropriately determine whether the employer had met its burden to show that its former employee was discharged for willful misconduct with regard to her unauthorized absences. Accordingly, we reverse the district court's order denying judicial review of the administrative decision awarding unemployment compensation, and we remand this matter to the district court with instructions that it, in turn, remand the matter to the administrative agency for further proceedings with regard to this issue.

#### FACTS AND PROCEDURAL HISTORY

Respondent Harriet Bundley was discharged from her position with appellant Clark County School District as an "in-house suspension" teacher. According to the termination notice, Bundley was discharged for several general reasons and, specifically, for being "absent without leave" on eight occasions—January 18, 19, and 20, 2005, and February 9, 10, 17, 18, and 24, 2005—for a total of seven full days, despite having previously received relevant admonishments.

Thereafter, Bundley filed for unemployment benefits, which she was granted by respondent Employment Security Division of the Nevada Department of Employment, Training, and Rehabilitation. The school district challenged Bundley's right to receive those benefits, however, alleging that Bundley was discharged for misconduct in connection with her work. Specifically, the school district indicated that Bundley had "excessive attendance" problems, of which she had been warned could lead to job loss.

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BY EDITH

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Before and at the subsequent administrative hearing, the school district submitted as evidence four written admonishments that Bundley had received in the fall of 2004, reminding her that she (1) had been absent five days since the beginning of the school year, and late once; (2) had in some instances notified the wrong person of her absences, and was instead required to report any absences to, and obtain approval therefor from, the principal or assistant principal; and (3) had, apparently before May 26, 2004, experienced some problems with excessive absences and/or absences taken before a sufficient amount of leave had accrued. While the school's principal stated, during the hearing, that Bundley had been discharged for attendance problems, her testimony focused on one precipitating factor: Bundley's alleged failure to report her absences on February 17, 18, and 24, 2005. With regard to this issue, the principal relayed that neither herself, nor the assistant principal or school secretaries, recalled Bundley having called in on those three days.

Bundley, on the other hand, testified that she had called in to report those absences and had spoken once to the assistant principal and twice to the principal. She also testified that she was absent because she had to see a doctor about her broken foot and, on February 24th, to take care of her ill daughter, whose illness was apparently the result of a continuing medical condition of which the school was aware. Bundley averred that she had applied, or had planned to apply, for additional sick leave from the school's sick leave bank. Finally, she indicated that she was willing to submit documentation to support her claims as to having called the school on the days in question, broken her foot, and applied for leave from the sick leave bank.

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FLORIDA

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After the hearing concluded, an appeals referee determined that the school principal's assertions that Bundley had not phoned to report her absences were more credible. The appeals referee thus concluded that Bundley was discharged because of attendance problems and her failure to notify her employer that she would be absent on February 17, 18, and 24, in contravention of the school's policy. According to the appeals referee, Bundley's failure to notify her employer of her inability to report to work on those three days constituted misconduct disqualifying her from receiving benefits under NRS 612.385, which provides that an employee who is discharged for work-related misconduct may not receive benefits. Bundley administratively appealed.

After reviewing the evidence that had been presented to the appeals referee, the Board of Review reversed the appeals referee's decision, determining that Bundley had credibly testified that her absence on the days in question was due to her and her daughter's illnesses and that she had timely notified her supervisor of those absences. Noting that Bundley was admittedly absent without leave but that nothing appeared in the record to show that Bundley had failed to report her absences, the Board concluded that, for unemployment benefits purposes, mere absence resulting from illness is not disqualifying misconduct.

The school district's subsequent petition for judicial review was denied, and consequently, it appeals.

#### DISCUSSION

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

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acted arbitrarily or capriciously, thereby abusing its discretion.<sup>1</sup> With regard to the Board's factual determinations, we note that the Board conducts de novo review of appeals referee decisions.<sup>2</sup> 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.<sup>3</sup>

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.<sup>4</sup> In no case may we substitute our judgment for that of the Board as to the weight of the evidence.<sup>5</sup> Thus, even though we review de novo any questions purely of law,<sup>6</sup> the Board's fact-based legal conclusions

<sup>1</sup>State Emp. Sec. Dep't v. Holmes, 112 Nev. 275, 279, 914 P.2d 611, 614 (1996); see also NRS 233B.135(3).

<sup>2</sup>Kraft v. Nev. Emp. Sec. Dep't, 102 Nev. 191, 193-94, 717 P.2d 583, 585 (1986).

<sup>3</sup>State Emp. Security v. Hilton Hotels, 102 Nev. 606, 609, 729 P.2d 497, 499 (1986); see also NRS 612.530(4) (providing that, "[i]n any judicial proceedings . . . , the finding of the Board of Review as to the facts, if supported by evidence and in the absence of fraud, is conclusive"); Black's Law Dictionary 105-06 (8th ed. 2004) (defining "appeal de novo," generally, as a procedure in which the reviewing body considers the lower tribunal's record but reviews the evidence and law without deference to the lower tribunal's rulings).

<sup>4</sup>Kolnik v. State Emp. Sec. Dep't, 112 Nev. 11, 16, 908 P.2d 726, 729 (1996).

<sup>5</sup>Holmes, 112 Nev. at 279, 914 P.2d at 614.

<sup>6</sup>Kolnik, 112 Nev. at 16, 908 P.2d at 729.

with regard to whether a person is entitled to unemployment compensation are entitled to deference.<sup>7</sup>

Disqualifying misconduct carries an element of wrongfulness

We have recognized that the protective purpose behind Nevada's unemployment compensation system is to provide "temporary assistance and economic security to individuals who become involuntarily unemployed."<sup>8</sup> To further this purpose, the unemployment compensation law, NRS Chapter 612, presumes that an employee is covered by the system and does not allow the employee to waive his or her rights under the system.<sup>9</sup> Because the system is not designed to provide assistance to those persons who are deemed to have become voluntarily unemployed, however, NRS 612.385 disqualifies a person from receiving unemployment benefits "if [she] was discharged from . . . employment for misconduct connected with [her] work."

Disqualifying misconduct occurs when an employee deliberately and unjustifiably violates or disregards her employer's reasonable policy or standard,<sup>10</sup> or otherwise acts in such a careless or

<sup>7</sup>Id.

<sup>8</sup>State Emp. Sec. v. Reliable Health Care, 115 Nev. 253, 257, 983 P.2d 414, 417 (1999).

<sup>9</sup>See id.; NRS 612.700.

<sup>10</sup>Holmes, 112 Nev. at 282, 914 P.2d at 616 (recognizing that an employee's deliberate violation of "a company rule reasonably designed to protect the legitimate business interests of his employer" may constitute disqualifying misconduct (internal quotations omitted)); Kolnik, 112 Nev. at 15-16, 908 P.2d at 728-29 (noting that, essentially, before unemployment benefits may be denied for misconduct, it must be shown that the act or acts leading to termination involved "an element of wrongfulness" (internal quotations omitted)).

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negligent manner as to "show a substantial disregard of the employer's interests or the employee's duties and obligations to [her] employer."<sup>11</sup> As we have previously suggested, because disqualifying misconduct must involve an "element of wrongfulness,"<sup>12</sup> an employee's termination, even if based on misconduct, does not necessarily require disqualification under the unemployment compensation law.<sup>13</sup> Instead, determining whether misconduct disqualifies a person from receiving unemployment benefits "requires a separate and distinct analysis":<sup>14</sup> "[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."<sup>15</sup> Generally, then, an employee's absence will constitute misconduct for unemployment compensation

<sup>11</sup>Kolnik, 112 Nev. at 15, 908 P.2d at 729 (quoting Bargum v. Williams, 84 Nev. 37, 41, 436 P.2d 219, 222 (1968)); see also Holmes, 112 Nev. at 282, 914 P.2d at 616 (recognizing that the repetition of acts may show willfulness) (citing Clevenger v. Employment Security Dep't, 105 Nev. 145, 150, 770 P.2d 866, 868 (1989)).

<sup>12</sup>Kolnik, 112 Nev. at 15-16, 908 P.2d at 729 (quoting Garman v. State Employment Security Dep't, 102 Nev. 563, 565, 729 P.2d 1335, 1336 (1986)).

<sup>13</sup>Id. at 15, 908 P.2d at 728 (recognizing that misconduct warranting termination and misconduct warranting a denial of unemployment benefits are two separate issues).

<sup>14</sup>Div. Emp. Sec. v. Gardner-Denver Mach., 941 S.W.2d 13, 15 (Mo. Ct. App. 1997).

<sup>15</sup>Kolnik, 112 Nev. at 15, 908 P.2d at 729; see also Gardner-Denver Mach., 941 S.W.2d at 15.

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purposes only if the circumstances indicate that the absence was taken in willful violation or disregard of a reasonable employment policy (i.e., was unjustified and, if appropriate, unapproved),<sup>16</sup> or lacked the appropriate accompanying notice.<sup>17</sup>

As the determination of whether Bundley's acts constituted misconduct is, thus, a fact-based question of law, the Board's decision is entitled to deference.<sup>18</sup> Nevertheless, the school district essentially argues that the Board overlooked two ways in which Bundley engaged in disqualifying misconduct: (1) she was admittedly absent eight times without available leave, and she failed to submit evidence documenting that her absences were justified or approved, or that she had even applied for additional leave; and (2) she failed to demonstrate that she had timely notified the school that she would be absent on February 17, 18, and 24, despite being aware of the school's policy that she do so.

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<sup>16</sup>See, e.g., Hilton Hotels, 102 Nev. at 608, 729 P.2d at 499; Kraft, 102 Nev. at 194, 717 P.2d at 585; State Emp. Sec. Dep't v. Evans, 111 Nev. 1118, 1119, 901 P.2d 156, 156-57 (1995) (recognizing that work absences will disqualify a person from receiving unemployment benefits only if the absences fall within the description of misconduct); Gardner-Denver Mach., 941 S.W.2d at 16 ("Violation of an employer's absence policy, which may be adequate cause for dismissal, is not, standing alone, necessarily a finding of misconduct connected with the work, so as to deny unemployment benefits.").

<sup>17</sup>Kraft, 102 Nev. at 194, 717 P.2d at 585.

<sup>18</sup>Id.

The employer bears the burden of demonstrating disqualifying misconduct

Preliminarily, we note that both of the school district's arguments arise from the same flawed premise—that Bundley was responsible for demonstrating that her absences did not constitute misconduct. 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 under NRS 612.385.

As several other jurisdictions have noted in similar contexts, the discharged employee is not always aware of the circumstances surrounding her dismissal, but rather, the employer is in the "unique position to know the reasons for [the] employee's discharge."<sup>19</sup> Further, "access to the facts relating to that discharge will be more readily obtained by the employer than the employee."<sup>20</sup> The practical result is

<sup>19</sup>Bean v. Montana Bd. of Labor Appeals, 965 P.2d 256, 260-61 (Mont. 1998) (quoting Parker v. St. Maries Plywood, 614 P.2d 955, 959 (Idaho 1980), and noting that "a majority of states require an employer to bear this burden" of proving misconduct); see also Kivalu v. Life Care Centers of America, 127 P.3d 165, 167 (Idaho 2005) ("The burden of proving the alleged misconduct is on the employer."); Business Ctrs. v. Labor & Ind. Rel. Com'n, 743 S.W.2d 588, 589 (Mo. Ct. App. 1988) ("[T]he employer has the burden of proving misconduct . . ." (citing Clemons v. Blache, 501 So. 2d 1020, 1022 (La. Ct. App. 1987); Santos v. Director of Div. of Employment Sec. 498 N.E.2d 118, 120 (Mass. 1986); Engler v. Marshall Turkey Plant, 409 N.W.2d 570, 572-73 (Minn. Ct. App. 1987); Looney v. Unemp. Comp. Bd. of Review, 529 A.2d 612, 613-14 (Pa. Commw. Ct. 1987)); Shiazza v. Com., Unemploy. Comp. Bd. of R., 420 A.2d 83, 84 (Pa. Commw. Ct. 1980).

<sup>20</sup>Bean, 965 P.2d at 261 (quoting Parker, 614 P.2d at 959). For example, in the underlying matter, Bundley's termination notice indicated  
*continued on next page . . .*

that the employer can usually more easily prove employee misconduct than the employee can disprove the employer's assertion that she engaged in such misconduct.<sup>21</sup>

For these reasons, and in light of the unemployment compensation system's protective purposes, as described above, we conclude that in Nevada, if an employer asserts that a former employee is disqualified from receiving unemployment benefits because that employee was discharged due to misconduct, the employer bears the burden of so proving by a preponderance of the evidence.<sup>22</sup> Once the employer makes an initial showing of willful misconduct, however, the burden shifts to the

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that she was discharged for being absent without leave. The hearing notice stated merely that the issue to be decided was whether Bundley was discharged for misconduct. Accordingly, Bundley was not fully aware that the school district would assert that her alleged failures to notify the school of her absences on February 17, 18, and 24 were causes for her discharge. We note, too, that NRS 233B.121(2)(d) requires the hearing notice to include "[a] short and plain statement of the matters asserted" and provides that, if the notice merely states the relevant issues, a party may obtain by request "a more definite and detailed statement." See also NAC 612.225(3) (limiting the hearing's scope "to issues identified in the notice of hearing, unless the parties are provided with proper notice and the opportunity to request a continuance with respect to other issues").

<sup>21</sup>Bean, 965 P.2d at 261.

<sup>22</sup>See Dalton Brick & Tile Company v. Huiet, 115 S.E.2d 748, 750 (Ga. Ct. App. 1960) (stating that an employer seeking to deny unemployment benefits to an otherwise eligible employee under an excepting clause must prove that the excepting clause applies "by a preponderance of the evidence"); Charbonnet v. Gerace, 457 So. 2d 676, 679 (La. 1984) (same); Lumpkin v. North Central Airlines, Inc., 209 N.W.2d 397, 400 (Minn. 1973) (providing that the employer must establish disqualifying misconduct for unemployment benefits purposes by the "greater weight of the evidence").

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.<sup>23</sup>

Mere absence without leave is not disqualifying misconduct, but an employer may meet its initial burden by demonstrating excessive unauthorized absences

The school district asserts that, because the Board recognized that absence without leave is misconduct leading to termination, it necessarily erred when it determined that no disqualifying misconduct occurred. But, as noted above, whether Bundley's absences disqualified her from receiving unemployment benefits requires a separate analysis in light of the definition of misconduct pertaining to the unemployment compensation law—Bundley's conduct must have been in willful violation or disregard of the school's standards.

In this vein, the school district argues that Bundley's seven days of absences were unauthorized and in direct contravention of school policy and prior school directives. With respect to the latter assertion, that Bundley's absences violated school policy and directives, the record does not contain the school district's absence policy, and the directives merely order Bundley to "[c]ome to work as assigned," indicating that, in the past, she had improperly used leave that had not yet accrued and had

<sup>23</sup>See, e.g., Mason v. Load King Mfg. Co., 758 So. 2d 649, 654 (Fla. 2000); Cargal v. Review Bd. of Ind. Empl. Sec. Div., 428 N.E.2d 85, 87 (Ind. Ct. App. 1981); Kelly v. Unemploy. Comp. Bd. of Review, 747 A.2d 436, 438-39 (Pa. Commw. Ct. 2000); Virginia Employment Com'n v. Gantt, 376 S.E.2d 808, 811 (Va. Ct. App. 1989), opinion adopted on en banc rehearing, 385 S.E.2d 247 (Va. Ct. App. 1989).

not contacted the right person to report her absences.<sup>24</sup> Accordingly, it is not clear that Bundley's 2005 absences violated any policy or directive.

Moreover, even 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 discussed during the hearing, which the Board concluded showed that the absences were justified. The school district failed to contradict this testimony even though it acknowledged that, at the time she was discharged, Bundley had informed the school authorities that at least some of the absences were the result of her daughter's illness.<sup>25</sup> Accordingly, the 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,

<sup>24</sup>Bundley, when testifying before the appeals referee, indicated that the school's policy was to allow up to five consecutive days' absence before any action to discharge the employee was taken, which did not occur here.

<sup>25</sup>See Croy v. Division of Employment Security, 187 S.W.3d 888, 893 (Mo. Ct. App. 2006) (recognizing that absences due to illness or emergency are generally not considered willful misconduct, especially when reported, and that when the employer fails to provide evidence of its relevant policies and the alleged misconduct, including whether any claimed illness existed, no disqualification is warranted); Randolph M. James, P.C. v. Lemmons, 629 S.E.2d 324, 332 (N.C. Ct. App. 2006) (noting that an employee has little control over absences caused by illness, so that disqualification may not be warranted therefor). We note that the record contains no indication that the school district even requested documentation as to Bundley's or her daughter's illnesses and doctor's appointments. See generally NAC 612.225(2) (providing that, upon showing necessity, a party may obtain a subpoena).



and the Board's decision with regard to the alleged policy violations is based on substantial evidence.<sup>26</sup>

With respect to the school district's former assertion, that Bundley was absent without authorization eight times within approximately one month, however, it is unclear whether the school district met its initial burden. As recognized by the Supreme Court of Florida, when an employee is absent without authorization, that conduct is inherently detrimental to the employer's interests in efficiently operating its business.<sup>27</sup> And if the unauthorized absences are many, their excessiveness tends to show a willful disregard of such interests. Accordingly, if an employer shows a clear pattern of unauthorized absenteeism, a presumption of willful misconduct arises, which can be rebutted only if the former employee shows that the absences did not constitute misconduct within the meaning of NRS 612.385.<sup>28</sup>

Here, the Board failed to consider whether Bundley's admitted-to unauthorized absences were excessive, and thus whether the school district met its initial burden to prove willful misconduct.<sup>29</sup>

<sup>26</sup>See Wright v. State, Dep't of Motor Vehicles, 121 Nev. 122, 125, 110 P.3d 1066, 1068 (2005) (recognizing that substantial evidence can be "inferentially shown by [a] lack of [certain] evidence" (quoting City of Reno v. Estate of Wells, 110 Nev. 1218, 1222, 885 P.2d 545, 548 (1994))).

<sup>27</sup>Mason, 758 So. 2d at 653.

<sup>28</sup>Id. at 654 (noting that, before the burden will be shifted to the former employee, the employer must present "satisfactory proof . . . of a serious and identifiable pattern of excessive absenteeism"); id. at 656 (pointing out that the employer's burden of proving excessive unauthorized absenteeism is a "heavy" one).

<sup>29</sup>We note that Bundley submitted evidence showing that she joined the sick leave bank the following school year, and she indicated that she  
*continued on next page . . .*

Further, although Bundley then testified that as to the nonvoluntary nature of the three absences on which the school district based its arguments during the administrative hearing, it is unclear whether the other five absences in 2005 were justifiable, as they were not discussed during the administrative hearing. Since neither the appeals referee nor the Board adequately considered this issue, we reverse the district court's decision and remand this matter with instructions that the court remand the matter to the Board for further proceedings with respect to this issue.<sup>30</sup>

When conflicting testimony exists, misconduct is not necessarily demonstrated by an alleged failure to report absences

Regarding the allegation that Bundley failed to notify the school district of her last three absences, we recognize that even if

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thought that she would be able to obtain additional leave therefrom to cover her January and February 2005 absences. In reviewing this issue on remand, these assertions should also be considered in determining whether the school district met its burden.

<sup>30</sup>See, e.g., *id.* at 655-56 (concluding that the employer's proof that the former employee had four absences, four late arrivals, and one early quitting time was sufficient to show willful misconduct, but discussing, with approval, the trial court's conclusion in Blumetti v. Unemployment Appeals Com'n, 675 So. 2d 689, 691 (Fla. Dist. Ct. App. 1998), that the employer failed to meet its initial burden of showing excessive absenteeism when some of the absences relied upon were not shown to be the former employee's fault); see also Tallahassee Primary Care v. Florida UAC, 930 So. 2d 824 (Fla. Dist. Ct. App. 2006) (concluding that the employer presented competent evidence of excessive and unauthorized absences, but that the former employee had rebutted the presumption of misconduct arising therefrom by showing that her absences were due, among other things, to her sick child).

Bundley's absences themselves do not constitute misconduct, any unreasonable failure on her part to notify the school that she was going to be absent could show a substantial disregard of her employer's interests so as to disqualify her from receiving unemployment benefits under NRS 612.385.<sup>31</sup> The school district, however, did not show that Bundley failed to timely report her absences. Although the school's principal initially testified that Bundley had not called in on February 17, 18, and 24, she later testified that she could not recall whether Bundley had called, and that neither the assistant principal nor the school secretaries could remember any calls from Bundley on those days, either. Bundley, on the other hand, insisted that she had telephoned on each of the three days in question and had spoken once with the assistant principal and twice with the principal. Accordingly, as the Board was free to rely on Bundley's testimony,<sup>32</sup> its determination that Bundley is not disqualified due to any failure to notify her employer is entitled to deference.

<sup>31</sup>Kraft, 102 Nev. at 194, 717 P.2d at 585.

<sup>32</sup>The school district also argues that the Board's decision was arbitrary and capricious because, even though it considered no additional evidence, it came to the opposite credibility determinations as did the appeals referee, without any grounds on which to do so. See Reno v. Estate of Wells, 110 Nev. 1218, 1222, 885 P.2d 545, 548 (1994) (recognizing that "arbitrary" and "capricious" have been defined, in the governmental action context, as "an apparent absence of any grounds or reasons for the decision" (quoting Tighe v. Von Goerken, 108 Nev. 440, 442-43, 833 P.2d 1135, 1136 (1992))). As noted above, however, the Board is free, during its de novo review, to review the evidence without deferring to the appeals referee's conclusions. Further, the Board's decision to afford the school's principal's testimony less weight was not unreasonable; although Bundley asserted that she had phoned the school to report her absences, the principal merely could not recall whether she had received any calls, and the school district did not provide any additional evidence

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CONCLUSION

As the employer challenging its former employee's right to receive unemployment benefits, under NRS 612.385's disqualification for misconduct provision, the school district bore the burden of demonstrating, by a preponderance of the evidence, that Bundley committed the alleged misconduct. As the school district did not show that Bundley engaged in misconduct disqualifying her from receiving unemployment benefits with regard to school policy and directive violations or with respect to non-notification, the Board's determination that Bundley was not disqualified from receiving benefits on these grounds is based on substantial evidence and is thus entitled to deference. Because the appeals referee and the Board failed to adequately consider the school district's assertion that disqualification was warranted based on Bundley's excessive unauthorized absences, however, we reverse the district court's order denying judicial review, and we remand this matter to the district court so that it may remand the matter to the Board for further proceedings consistent with this opinion.

Becker J.  
Becker

Hardesty J.  
Hardesty

Parraguirre J.  
Parraguirre

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demonstrating that Bundley did not call. See, e.g., Hilton Hotels, 102 Nev. at 609, 729 P.2d at 499 (noting that the Board was free to assign probative values to testimony adduced during a hearing).

This Nevada Supreme Court Decision is being provided to show the state's application of misconduct provisions regarding separations due to compelling family reasons.

IN THE SUPREME COURT OF THE STATE OF NEVADA

LINDA GARMAN,	)	No. 16829
	)	
Appellant,	)	
	)	
vs.	)	
	)	
STATE OF NEVADA, EMPLOYMENT	)	
SECURITY DEPARTMENT; STANLEY	)	
JONES, Executive Director;	)	
LAS VEGAS AREA CAMP FIRE	)	
COUNCIL, INC.,	)	
	)	
Respondents.	)	

**FILED**

DEC 15 1986

*Levitt*  
CLERK OF SUPREME COURT

Appeal from order denying judicial review for the denial of unemployment benefits. Eighth Judicial District Court, Clark County; Stephen L. Huffaker, Judge.

Reversed.

Graves, Leavitt, Cawley & Koch,  
Las Vegas,  
for Appellant.

Jeff Eskin, Las Vegas,  
for Respondent State of  
Nevada, Employment Security  
Department.

Crowell, Crowell, Crowell &  
Susich and Daniel O'Brien,  
Carson City; and Steven Marzullo  
and William Phillips, Las Vegas,  
for Respondent Camp Fire  
Council.

O P I N I O N

PER CURIAM:

This action was originally brought when Garman filed a request for a hearing before the Appeals Referee of the Nevada Employment Security Department ("ESD") after receiving notice from ESD that her claim for unemployment benefits was denied. The referee entered a decision affirming the action of ESD denying Garman benefits. The Referee's decision was

appealed to the Board of Review. The Board of Review adopted the findings of fact of the Referee and affirmed his decision.

The Board of Review decision was appealed to the district court by a petition for judicial review. On July 17, 1985, the trial court entered its order affirming the decision of the Board of Review and dismissing the petition.

Linda Garman was employed by Las Vegas Area Camp Fire Council, Inc. as a Program Director on January 23, 1984. Prior to being hired for the position, Garman told the Executive Director of Camp Fire that she could not work from 8:30 a.m. to 4:30 p.m. and that she could only work from 6:00 a.m. to 2:00 p.m. The Board of Directors of Camp Fire voiced their support for Garman and approved the individualized schedule.

Garman was employed 4 1/2 months with the Camp Fire Council. During that time she experienced four changes in her immediate supervisor. During the tenure of each supervisor, Garman worked from 6:00 a.m. to 2:00 p.m.

On June 4, 1984, Garman received a memorandum from her new supervisor, Judith Dobson, stating that her new hours would be from 8:30 a.m. to 4:30 p.m. Garman reported to work the next day at 8:30 a.m. and had her performance evaluated by Judith Dobson. During this meeting, Dobson told Garman she would be required to work the newly assigned schedule. Garman told Dobson that she could not do this because of school and family commitments. Immediately after this meeting, Dobson suspended Garman without pay pending termination. The grounds for the suspension were insubordination and unprofessional conduct.

Subsequently, on June 8, 1984, Dobson officially terminated Garman for a long list of infractions. The sole justification for denial of employment benefits, as determined by the Appeals Referee, was that Garman had committed misconduct by refusing to work the newly assigned schedule. The

Appeals Referee deemed this to be the proximate cause of her termination. After unsuccessfully exercising her appellate rights at the Board of Review and at the district court, Garman filed the instant appeal.

The issue in this appeal is whether Garman's refusal to work reassigned hours constituted misconduct, as a matter of law, under the facts of the instant case.

The Appeals Referee's decision, which was upheld by the Board of Review, held that misconduct is defined as "a deliberate violation or a disregard of reasonable standards, carelessness or negligence showing substantial disregard of duties." *Barnum v. Williams*, 84 Nev. 37, 436 P.2d 219 (1968). In reviewing the decision of an administrative board, this court, like the district court, "is limited to the record below and to the determination of whether the board acted arbitrarily or capriciously." *McCracken v. Fancy*, 98 Nev. 30, 31, 639 P.2d 552, 553 (1982). If the agency determination is based on substantial evidence, the inquiry ends, for neither this court nor the district court is at liberty to substitute its judgment for that of the agency. *Id.*

When analyzing the concept of misconduct, the trier of fact must consider the legal definition, *Barnum*, in context with the factual circumstances surrounding the conduct at issue. Misconduct then becomes a mixed question of law and fact. *Jones v. Rosner*, 102 Nev. \_\_\_, \_\_\_ P.2d \_\_\_ (Adv. Opn. No. 49, May 28, 1986). Findings of misconduct must be given deference similar to findings of fact, when supported by substantial evidence in the lower court. *Id.* For example, the violation of a work rule, not accumulating excessive numbers of tardies/early leaves, was deemed not to be misconduct when viewed in light of the reasons for the early tardies/early leaves (illness, taking care of a terminally ill mother and

appearing in court). *Tynes v. Uniroyal Tire Company*, 679 P.2d 1310 (Okla. Ct. App. 1984).

Nevada decisions have stated that the employee's conduct which prompted the termination must have an element of wrongfulness in order to constitute misconduct so as to prevent the terminated employee from receiving unemployment benefits. In *Lellis v. Archie*, 89 Nev. 550, 516 P.2d 469 (1973), this court held that a casino changemaker did not commit an act of misconduct by refusing to work at a less favorable work station when in the past the casino had used a rotation system to allow all changemakers to rotate from the worst to best stations. This court held that "an objection to the change of stations by *Lellis* lacked any element of wrongfulness." *Id.* at 553, 516 P.2d at 471.

The activities of Garman and the circumstances of her employment must be analyzed to see if there is an element of wrongfulness, sufficient to support a determination of misconduct.

When Garman accepted employment with Las Vegas Area Camp Fire Council, Inc., she conditioned her employment on being able to work from 6:00 a.m. to 2:00 p.m. This was specifically approved by the Camp Fire Board over the objections of the existing Executive Director.

Many cases can be cited which indicate that refusing to work new hours other than those initially agreed upon under an employment relationship by contract or at will, does not constitute misconduct. See *Wade v. Hurley*, 515 P.2d 491 (Colo. Ct. App. 1973) (no misconduct found when an employee refuses to work a newly assigned Sunday shift); *Trunkline Gas Co. v. Administrator, Dep't Employment Security*, 364 So.2d 1365 (Va. Ct. App. 1978) (refusal to work a different shift was not misconduct when employer had allowed employee to work on a specific shift so that she could take care of her small child):



St. Germain v. Adams, 377 A.2d 620 (N.H. 1977) (employee's refusal to work new Sunday shift was not misconduct, even absent an employment contract); Hulse v. Levine, 393 N.Y.S.2d 386 (N.Y. 1977) (refusal to work unexpected overtime is not misconduct); In re Watson, 161 S.E.2d 1 (N.C. 1968) (refusal to work another shift, absent an agreement to do so, is not misconduct when an employee has a small child to care for); Neff v. Com. Unemployment Compensation Bd., 407 A.2d 936 (Pa. Comm. Ct. 1979) (refusal to work a new shift or on Saturdays was not wilfull misconduct).

While no express contract for employment existed between the parties in the instant case, nor was an employment contract mentioned in the findings of fact or argued to the court until Garman's final reply brief, her case is similar to the aforecited cases in which courts have found that a refusal to work newly assigned hours was not misconduct, even absent an agreement for specific working hours as a condition of employment. Garman's case is even stronger because she specifically conditioned her employment upon working an individualized schedule.

This court has ruled that when an employee receives a shift change and then responds by eventually not showing up for work, such evidence in the record substantiated the ruling of no entitlement to benefits. State Employment Sec. Dept. v. Weber, 100 Nev. 121, 676 P.2d 1318 (1984). Weber upheld the Board of Review's determination that the employee voluntarily left his job without good cause.

Garman's case, however, provides no basis for a determination of misconduct in refusing to work under a rearranged time schedule. Her original time schedule was specifically approved by the Camp Fire board of directors pursuant to employment negotiations. Garman was attending university classes which would have conflicted with the new

schedule. She was contemplating taking more classes in the future. On the day she was directed to begin working from 8:30 a.m. to 4:30 p.m., she came to work at 8:30 a.m. and thereafter explained her problem in maintaining the new schedule.

When viewing the facts of this case with other similar decisions, it is certain that Garman's refusal to work new hours did not constitute misconduct. There was no substantial evidence of wrongfulness in Garman's actions. Therefore, the judgment of the lower court must be reversed.

ESD alleges that the refusal to work assigned hours is universally recognized as misconduct. Garman did not refuse to work assigned hours, she refused to acquiesce to a change in her condition of employment. Our holding is thus confined to the narrow facts and circumstances of this case and does not provide condonation for an employee's wrongful refusal to work according to time schedules fashioned by employers.

Since Garman's refusal to accept and work the revised time schedule invoked by her new supervisor did not constitute misconduct under the facts of record, we reverse the judgment of the district court and remand with instructions to order ESD to provide Garman her appropriate unemployment benefits.

Mowbray, C. J.  
Mowbray

Springer, J.  
Springer

Gunderson, J.  
Gunderson

Steffen, J.  
Steffen

Young, J.  
Young

Attest: A full, true and Correct Copy.  
Judith Fountain, Clerk of the Supreme Court

By Sharon E. Papp Deputy