

IN THE COURT OF APPEALS OF THE STATE OF NEVADA

MARVEL DWAIN HENRY,  
Appellant,

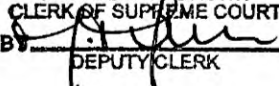
vs.

THE STATE OF NEVADA  
EMPLOYMENT SECURITY DIVISION;  
RENEE OLSON (NOW, KIMBERLY  
GAA), IN HER OFFICIAL CAPACITY  
AS ADMINISTRATOR OF THE  
EMPLOYMENT SECURITY DIVISION;  
AND J. THOMAS SUSICH, IN HIS  
CAPACITY AS CHAIRPERSON OF THE  
EMPLOYMENT SECURITY DIVISION  
BOARD OF REVIEW,  
Respondents.

No. 82285-COA

**FILED**

OCT 20 2022

ELIZABETH A. BROWN  
CLERK OF SUPREME COURT  
BY   
DEPUTY CLERK

*ORDER OF REVERSAL AND REMAND*

Marvel Dwain Henry appeals from a district court order denying a petition for judicial review in an unemployment benefits matter. Eighth Judicial District Court, Clark County; Trevor L. Atkin, Judge.

Henry, an employee of South Side Pizza, LLC (South Side Pizza), was scheduled for a shift on April 29, 2019.<sup>1</sup> On that day, Henry did not show up for his scheduled shift because he had been stopped by an officer with the Las Vegas Metropolitan Police Department for walking in a crosswalk against the signage. Although he was only given a warning for the violation, the officer determined during the stop that Henry had an outstanding bench warrant issued by the Las Vegas Justice Court for an underlying charge of driving with an expired license plate and arrested

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<sup>1</sup>We do not recount the facts except as necessary to our disposition.

him.<sup>2</sup> In this appeal, the Las Vegas Justice Court case is the only case relevant to the issue of Henry's alleged misconduct.<sup>3</sup> While in custody, Henry asked his family to call his employer to notify it of his absences.<sup>4</sup> Henry was eventually released on May 4, 2019, after spending seven nights in custody.<sup>5</sup> Upon his release, he contacted South Side Pizza and was informed that he had been terminated for missing three consecutive shifts: April 29, April 30, and May 1, 2019.

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<sup>2</sup>The parties agreed at oral argument that the bench warrant issued by the Las Vegas Justice Court is what led to Henry's arrest during the pedestrian stop.

<sup>3</sup>Henry has two other criminal cases. Both the parties and the appeals referee were imprecise in referencing his other cases, neither of which were the cause of Henry missing work, often conflating the Las Vegas Justice Court case with the Las Vegas Municipal Court case. The municipal court case concerns suspended registration/plates. In that case, Henry is making payments pursuant to a payment plan, which did not prevent him from working and, therefore, this case is not relevant to the legal issues presented in this appeal, notwithstanding the misplaced references to this case by the appeals referee. Henry also has a case in Lincoln County concerning a ticket for speeding in rural areas. At oral argument, respondents conceded that Henry's case in Lincoln County was not the basis for the denial of his unemployment benefits. Thus, this case also has no bearing on his termination and denial of benefits.

<sup>4</sup>There is conflicting testimony as to whether Henry's family notified South Side Pizza of his expected absences. The record supports that Henry's family called at least once, and potentially more since South Side Pizza reported to the ESD adjudicator that it had been notified of Henry's "absences" from his family.

<sup>5</sup>Following Henry's arrest for the bench warrant issued by the Las Vegas Justice Court, he was required to post bail for his case in Lincoln County. He posted bail on May 3, 2019, and was released from the Clark County Detention Center the following day.

Henry timely filed for unemployment benefits with the Employment Security Division (ESD) of the Nevada Department of Employment, Training and Rehabilitation. South Side Pizza initially reported to ESD that Henry had quit for being a “no call no show” for three consecutive shifts. The ESD adjudicator’s notes documented that South Side Pizza confirmed that Henry’s “family notified them of [Henry’s] absences” due to his incarceration. The ESD adjudicator determined that the “employer is considered the separating party and this separation is considered a discharge.” However, the ESD adjudicator denied Henry’s unemployment claim, concluding that “failure to report to work because you were incarcerated due to your off-duty behavior, is considered to be misconduct in connection with the work.” The ESD adjudicator reasoned that “[a]cting in a manner which results in incarceration so that it is impossible to report for work is misconduct connected with the work, even though the claimant had no intent to act in disregard of the employer’s interest.”

Henry filed an appeal of the denial of unemployment benefits to the next level of review and a hearing was conducted before an appeals referee. Henry explained that he missed work due to being detained, but that he had his family “call” his employer and notify them of his incarceration on his behalf. Further, Henry testified that the underlying charge for which he was detained was dismissed and, therefore, his incarceration did not constitute disqualifying misconduct. During the hearing, the appeals referee and the parties conflated Henry’s Las Vegas Municipal Court case, wherein Henry was on a fines and fees payment plan that was later reinstated, with his case in the Las Vegas Justice Court. The appeals referee did not specifically reference to Henry’s dismissed charge in

the Las Vegas Justice Court. Instead, the appeals referee stated that “[i]n order for me to reverse this decision, I need to have something from the courts that states they made an error.”<sup>6</sup> Additionally, the record supports that the appeals referee did not consider whether South Side Pizza met its burden of demonstrating that Henry’s termination was attributed to disqualifying misconduct because of his incarceration versus incarceration due to Henry’s potential indigency or unsupported charge. The appeals referee thus denied Henry’s appeal, concluding that Henry committed disqualifying misconduct within the meaning of NRS 612.385 given his failure to appear for work due to his incarceration. Henry appealed the appeals referee’s decision to the Board of Review (Board).

The Board summarily declined further review of Henry’s appeal, thereby adopting and affirming the appeals referee’s decision. Henry then filed a petition for judicial review with the Eighth Judicial District Court. The district court denied the petition, relying on *State, Employment Security Division v. Murphy*, 132 Nev. 202, 208, 371 P.3d 991, 995 (2016), to conclude that Henry’s criminal behavior led to his arrest, which caused his absenteeism. The district court determined that there was a presumption of disqualifying misconduct because Henry showed a clear pattern of absenteeism by missing three consecutive shifts as a result

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<sup>6</sup>At oral argument there appeared to be confusion and uncertainty as to whether the appeals referee considered Henry’s case in the Las Vegas Justice Court and whether additional documents were supplemented in the record following the hearing. Upon further review, the appeals referee listed the Las Vegas Justice Court docket, showing dismissal of the charge, as one of the exhibits admitted into evidence during the hearing. Further, at oral argument, respondents conceded that they do not dispute that the charge on which Henry was arrested was dismissed by the justice court.



of his incarceration.<sup>7</sup> Additionally, the district court relied on *Murphy* to conclude that Henry's family contacting his employer to notify it of Henry's absences was irrelevant. *Id.* at 208, 371 P.3d at 995. Accordingly, the district court determined that ESD's decision to deny Henry unemployment benefits was not arbitrary or capricious because it was supported by substantial evidence. This appeal followed.

On appeal, Henry argues that his conduct did not rise to the level of disqualifying misconduct under *Murphy* because the charge for which he was arrested was subsequently dismissed. Therefore, the charge against him was unsupported. Henry also argues that the district court erred in determining that the dutiful notification requirement was irrelevant for determination of unemployment benefits under NRS 612.385. And because his family notified South Side Pizza of his absences due to his incarceration, ESD could not demonstrate a pattern of excessive unauthorized absences. Respondents argue that Henry engaged in disqualifying misconduct because his incarceration led to his unauthorized absences. Additionally, respondents argue that while the first bench warrant's charge was dismissed, Henry still engaged in disqualifying misconduct because he had another warrant for a case in Lincoln County where the charges were not dismissed.<sup>8</sup> Since Henry's absenteeism was not

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<sup>7</sup>We note that respondents did not argue below that Henry engaged in a pattern of absenteeism, only that he missed three shifts due to his incarceration.

<sup>8</sup>We decline to address respondents' argument that Henry committed misconduct because of the charges in the Lincoln County case to which he posted bail for while in custody in Clark County. This is because the issue was raised for the first time on appeal. *See Old Aztec Mine, Inc. v. Brown*, 97 Nev. 49, 52, 623 P.2d 981, 983 (1981) (explaining that issues not argued

attributed to indigence or an unsupported charge, respondents argue it was irrelevant that Henry's family advised his employer of his absences. We primarily agree with Henry.<sup>9</sup>

The appellate court "review[s] an administrative agency's decision in the same manner as the district court." *Clark County v. Bean*, 136 Nev. 579, 581, 482 P.3d 1207, 1209 (2020), *as amended*, (Dec. 30, 2020). Like the district court, the appellate court reviews an unemployment compensation decision "to ascertain whether the board acted arbitrarily or capriciously, thereby abusing its discretion." *Clark Cty. Sch. Dist. v. Bundley*, 122 Nev. 1440, 1444, 148 P.3d 750, 754 (2006). The Board's "fact-based legal conclusions with regard to whether a person is entitled to unemployment compensation are entitled to deference." *Id.* at 1445, 148 P.3d at 754. This court must uphold the administrative decision if it is supported by substantial evidence. *Leeson v. Basic Refractories*, 101 Nev. 384, 385-86, 705 P.2d 137, 138 (1985); *see also* NRS 612.530(4). Substantial

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below are "deemed to have been waived and will not be considered on appeal"). Further, respondents conceded at oral argument that the Lincoln County case was not the basis for the denial of Henry's unemployment benefits.

<sup>9</sup>We agree that we need not address the dutiful notification requirement because respondents never raised the issue of excessive absences as a reason for Henry's termination. *See Bundley*, 122 Nev. at 1446, 148 P.3d at 755 ("Generally, then, an employee's absence will constitute misconduct for unemployment compensation 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), or lacked the appropriate accompanying notice." (footnotes omitted)). Further, respondents acknowledge that Henry missed his three shifts because of his incarceration, which respondents' claim constituted the disqualifying misconduct.

evidence is evidence that a reasonable mind might accept as adequate to support a conclusion. *Bundley*, 122 Nev. at 1445, 148 P.3d at 754.

*Henry's conduct did not constitute disqualifying misconduct under Murphy*

The purpose behind unemployment compensation in Nevada is to “ease the economic burden” on those who are involuntarily unemployed. *Murphy*, 132 Nev. at 205, 371 P.3d at 993. But a former employee can be disqualified from receiving unemployment benefits if “he or she was discharged . . . for misconduct connected with the person’s work.” *Id.* (quoting NRS 612.385). Disqualifying misconduct occurs when “an employee deliberately and unjustifiably violates or disregards h[is] 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.” *Id.* at 205, 371 P.3d at 992 (alterations in original) (quoting *Bundley*, 122 Nev. at 1445-46, 148 P.3d at 754-55). Merely being terminated is not an automatic disqualification from receiving unemployment benefits, but rather, the disqualifying misconduct must involve an “element of wrongfulness.” *Id.*

When the alleged misconduct is absenteeism caused by incarceration, “the employee can only rebut the presumption by demonstrating the incarceration is not caused by criminal conduct, but rather by indigence or unsupported charges.” *Murphy*, 132 Nev. at 208, 371 P.3d at 995. If it is the employee’s criminal behavior that prevents him from returning to work when later convicted of a crime, the employee is disqualified from receiving unemployment benefits. *Id.* An employee is not disqualified from receiving unemployment benefits when he shows his criminal charges were subsequently dropped. *Id.* at 207-08, 371 P.3d at 994

(citing, inter alia, *Holmes v. Review Bd. of Ind. Emp't Sec. Div.*, 451 N.E.2d 83, 88 (Ind. Ct. App. 1983) (holding that a claimant was not disqualified from unemployment benefits because of pretrial incarceration where charges were later dismissed)).

Here, ESD contends that the disqualifying misconduct was Henry's absenteeism caused by incarceration due to being arrested on an outstanding warrant. However, in this case, the charge that led to the warrant that ultimately resulted in Henry's incarceration was subsequently dismissed. Las Vegas Justice Court records contained in the record on appeal support that Henry's case for driving with an expired license plate was dismissed on May 2, 2019. Thus, Henry's absenteeism was not due to criminal conduct, but rather an unsupported charge that was dropped. *Cf. Murphy*, 132 Nev. at 204, 371 P.3d at 992 (holding that "an employee who is terminated as a result of missing work due to incarceration, and who is subsequently convicted of a crime, is not eligible for unemployment benefits."); *see also id.* at 209, 371 P.3d at 995 (concluding that an employee was disqualified from receiving benefits where the employee's "absence from work was directly caused by his criminal conduct—he pleaded guilty to the charges against him"). Accordingly, Henry's absenteeism due to his incarceration based on a subsequently dismissed charge does not constitute disqualifying misconduct.

The appeals referee also did not consider that the Las Vegas Justice Court case was dismissed, and reasoned that she needed evidence from the courts that they made an error even though she had the justice



court document before her.<sup>10</sup> The appeals referee, however, did not need a special document from the courts stating it made an error because the dismissed charge in the record before her was sufficient under *Murphy* to determine that Henry's incarceration was not the result of disqualifying misconduct.

Accordingly, a "reasonable mind" could not have concluded that Henry was not eligible for unemployment benefits due to his absenteeism due to incarceration in light of *Murphy*. See *Bundley*, 122 Nev. at 1445, 148 P.3d at 754. Thus, ESD's decision to deny Henry unemployment benefits based on his incarceration is not supported by substantial evidence, and on this ground alone, we reverse.

*South Side Pizza failed to meet its initial burden of establishing Henry's disqualifying misconduct*

When an employer discharges an employee for alleged misconduct, the employer bears the initial burden of proving the misconduct. *Bundley*, 122 Nev. at 1448, 148 P.3d at 756. An employer can establish misconduct based upon the employee's absences 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), or lacked the appropriate accompanying notice." *Id.* at 1446, 148 P.3d at 755 (footnote omitted). In this case, the appeals referee concluded that incarceration was the disqualifying misconduct based on the case presented. There were no other reasons argued below or on appeal. Therefore, in light of the charge against Henry being dismissed,

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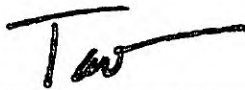
<sup>10</sup>At oral argument, respondents made the same representation that the appeals referee wanted a document that stated the courts made an error. Respondents conceded at oral argument that there is no clearer proof than the dismissed charge in the Las Vegas Justice Court.

the employer failed to meet its burden of proof to show that Henry engaged in disqualifying misconduct.

Therefore, we

ORDER the judgment of the district court REVERSED AND REMAND this matter to the district court with instructions that the district court, in turn, remand the matter to the Board to determine Henry's unemployment benefits.<sup>11</sup>

  
\_\_\_\_\_, C.J.  
Gibbons

  
\_\_\_\_\_, J.  
Tao

  
\_\_\_\_\_, J.  
Bulla

cc: Chief Judge, Eighth Judicial District Court  
Eighth Judicial District Court, Department 8  
Hanks Law Group  
State of Nevada/DETR  
Eighth District Court Clerk

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<sup>11</sup>Insofar as the parties raise arguments that are not specifically addressed in this order, we have considered the same and conclude that they either do not present a basis for relief or need not be reached given our disposition of this appeal.