

**PETITIONS FOR JUDICIAL REVIEW OF DECISIONS DENYING
UNEMPLOYMENT INSURANCE
FOR MISCONDUCT**

This document should be used in conjunction with the model Petition for Judicial Review prepared by Nevada Legal Services which is available at the Self Help Center. Use these instructions if you were disqualified for unemployment compensation on the ground that you were fired for committing misconduct at work.

The court will not hear new evidence or re-evaluate the evidence which was submitted to the Employment Security Division (ESD). It will reverse ESD's decision only if the court determines that either there is no substantial evidence in the record supporting a finding that you were fired for misconduct or that as a matter of law you are behavior did not constitute misconduct.

You write out your arguments as to why the record does not show that you are guilty of misconduct in the blank spaces at Section III ARGUMENT in the model PETITIONER'S OPENING BRIEF IN SUPPORT OF PETITION FOR JUDICIAL REVIEW

To help you understand what behavior qualifies as misconduct which would disqualify you from receiving benefits the below information is provided. You can use it to help frame your arguments. Disclaimer: these examples do not have the force of law, however, they generally reflect a common understanding of what misconduct at work means.

You are using these instructions if you have been disqualified for misconduct connected to your work. The controlling statute is NRS 612.385 which is:

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 that 15 weeks thereafter as determined by the administrator in each case according to the seriousness of the misconduct.

This statute has been interpreted by the Nevada Supreme Court in several cases. Summaries of those cases are at the end of this document.

Generally speaking, the decisions defined misconduct as an act that is in disregard of the employer's interests, a deliberate violation of a known reasonable rule of the employer, a disregard of standards of behavior

which the employer has a right to expect, or negligence to such a degree as to show an element of wrongfulness or demonstrate a substantial disregard of the employer's interests. It is not misconduct when the failure of performance is due to inability, or if the action is ordinary negligence in isolated instances or a good faith error in judgment or discretion.

Read the general definition above to see if there is a way that your conduct does not fit it. For example, is there evidence to show your conduct was intentional? If not, was it negligent to such a degree as to show an element of wrongfulness or a substantial disregard of the employer's interests?

The Nevada Supreme Court cases provide several arguments which you may make. Some examples include:

- Even if your behavior constitutes misconduct you may argue that it is not "connected to your work". Note, however, that some off-duty conduct may constitute misconduct if it shows a "willful disregard for the rules of the employer. Off-duty drug use and failure to take a drug test have been found to be connected to the work duties of some employees in Clevenger v. Employment Security Dept., 105 Nev. 145 770 P.2d 866 (1989), Fremont Hotel v. Esposito, 104 Nev. 394, 760 P.2d 122 (1988) and Nevada Employment Sec. Dept. v. Holmes, 112 Nev. 275, 914 P.2d 611 (1996).
- You may argue that your behavior did not contain an element of wrongfulness as required by Lellis v. Archie, 89 Nev. 550, 516 P.2d 469, 471 (1973).
- Even if you are at fault he may argue that your conduct was neither intentional or reckless but was merely negligent in the ordinary sense as in Kolnik v. Employment Security Dept., 112 Nev. 11, 908 P.2d 726 (1996).

Use your analysis to write out your argument in the blank space in the brief.

- If ESD disqualified you for conduct which does not meet the definition of misconduct make your argument in the spaces following *A. Respondent's decision was clearly erroneous as a matter of law in so far as...*
- If ESD disqualified you without providing any reason as to why you are guilty of misconduct or conducted the hearing in some unfair/arbitrary fashion make your argument in the spaces following *B. Respondent's decision was arbitrary and capricious and an abuse of discretion...*

- If ESD disqualified you for conduct which does meet the definition of misconduct but the record does not contain any "substantial evidence" (something beyond mere hearsay) that you actually engaged in the conduct make your argument in the spaces following *C. Respondent's decision was not based on substantial evidence....*

Nevada Supreme Court Cases Defining Misconduct

Barnum v. Williams, 84 Nev. 37, 436 P.2d 219 (1968)); Misconduct may be established by 'a deliberate violation or disregard on the part of the employee of standards of behavior which his employer has the right to expect. Carelessness or negligence on the part of the employee to such a degree as to show a substantial disregard of the employer's interest or the employee's duties or obligations to his employer are misconduct. However, "ordinary negligence in isolated instances, or good faith errors in judgment or discretion" are not misconduct. Held: guilty of misconduct.

Lellis v. Archie, 89 Nev. 550, 516 P.2d 469, 471 (1973). Misconduct requires "an element of wrongfulness". Casino "change girl" objected to assignment to less desirable work station than she was entitled to under labor - management plan. Held: no misconduct.

Garman v. Employment Security Dept., 102 Nev. 563, 729 P.2d 1335, 1337 (1986). While misconduct requires "an element of wrongfulness", the claimant's conduct was found to be intentional. She threw away a form showing that she had made an error in what the Court concluded was a dishonest act. Held: guilty of misconduct

Kraft v. Nevada Employment Sec. Dept., 102 Nev. 191, 717 P.2d 583, 585 (1986), An employee has a duty to act as a reasonably prudent person in keeping in contact with his employer. The claimant stayed by a broken car on a highway for three hours without calling his employer in violation of his duty to give the employer notice of his anticipated tardiness. This Court concluded that his failure to leave his car and call for three hours at some point showed "indifference". Second, while Mr. Kraft testified there was no phone in the area, the Court concluded that his testimony on this point lacked credibility. Held: guilty of misconduct.

Nevada Employment Sec. Dept. v. Nacheff, 557 P.2d 787, 788 (1988). An employee has a duty to act as a reasonably prudent person in keeping in contact with his employer, i.e., duty to the employer to call in sick. Held: guilty of misconduct.

Employment Sec. Dept. v. Verrati, 104 Nev. 302, 756 P.2d 1196 (1988), Sleeping on the job in light of this claimant's duties appeared to constitute gross or wanton negligence. Held: guilty of misconduct

Fremont Hotel v. Esposito, 104 Nev. 394, 760 P.2d 122 (1988). Claimant intentionally refused to submit to a drug test. The court found her refusal to be "wrongful". Her subsequent change of mind did not cure her earlier refusal. Held: guilty of misconduct

Clevenger v. Employment Security Dept., 105 Nev. 145 770 P.2d 866 (1989). The Court concluded that the claimant had intentionally inhaled or ingested marijuana off duty and therefore had showed a "willful disregard for the rules of her employer". Held: guilty of misconduct

State, Employment Security Dept. v. Evans, 111 Nev. 1118, 901 P.2d 156 (1995). Employee forced to remain in jail pending trial for crime unrelated to work (cruelty to animals), who couldn't make bail, is not guilty of misconduct.

Nevada Employment Sec. Dept. v. Holmes, 112 Nev. 275, 914 P.2d 611 (1996). Casino gave Holmes ninety days notice that she would be given a hair analysis drug test and she voluntarily agreed to take the test. She tested positive for cocaine. The Court held that employee's ingestion of cocaine was intentional and willful violation of hotel's valid and reasonable drug free policy. The hotel's drug-free policy had a reasonable relation to the work performed by Holmes, i.e., she was entrusted with hotel's computer system, its Money Club and oftentimes handled large amounts cash. Job duties also included a substantial amount of personal interaction with hotel's guests. Court concluded that hotel had a justifiable reason for demanding that Holmes refrain from using cocaine. Held: guilty of misconduct

Kolnik v. Employment Security Dept., 112 Nev. 11, 908 P.2d 726 (1996). Cab driver was discharged after two "chargeable" accidents within three years pursuant to the union contract. Neither was intentional nor reckless and Supreme Court failed find a degree of wrongfulness; therefore no misconduct.