

2009

# Kenneth Bowdrey v. Workforce Appeals Board, Department of Workforce Services and Pacific Flyway Wholesale : Brief of Respondent

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

KENNETH BOWDREY,

Petitioner,

Case No. 20090503-CA

v.

WORKFORCE APPEALS BOARD  
OF THE UTAH DEPARTMENT OF  
WORKFORCE SERVICES, and  
PACIFIC FLYWAY WHOLESALE

Priority No. 7

Respondents.

BRIEF OF RESPONDENT

Petition for Review of a Decision of the  
Workforce Appeals Board of the  
Department of Workforce Services,  
State of Utah

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## **JURISDICTION OF THE COURT OF APPEALS**

This court has jurisdiction of this Petition for Review pursuant to Article 8, §3 of the Utah Constitution; Utah Code Ann., §§35A-4-508(8)(a), 78A-4-103, 63G-4-403; and Rule 14 of the Rules of Appellate Procedure.

## **ISSUES PRESENTED FOR REVIEW**

Is there substantial evidence to support the finding that the claimant voluntarily quit his employment without good cause or that a denial of benefits is not an affront to fairness under the equity and good conscience provisions of the rules?

## **STANDARD OF REVIEW**

This case involves a mixed question of law and fact. "Whether 'good cause' [to quit employment] exists is a mixed question of law and fact." *Denby v. Board of Review*, 567 P.2d 626, 630 (Utah 1977). This Court's review under the Utah Administrative Procedures Act is governed by Utah Code Ann. §63G-4-403 "which provides for appellate relief in the event an agency erroneously interprets or applies the law." *Adams v. Board of Review*, 776 P.2d 639, 641 (Utah 1989).

Resolution of the issues in this case requires the interpretation of two statutory provisions. The first, Utah Code Ann. §35A-4-405(1)(a) (2007) provides that a claimant is ineligible for benefits if he "left work voluntarily without good cause, if so found by the division, . . . ." The Utah Supreme Court held, in *Robinson v. Department of Employment Sec.*, that the statutory language in question



explicitly grants the [division] discretion to determine issues involving voluntariness and good cause. Accordingly, in reviewing these issues, we defer to the agency and we will not overturn its decisions regarding voluntariness and good cause unless we determine it has abused its discretion. *Robinson v. Department of Employment Sec.* 827 P.2d 250, 252 (Utah Ct. App. 1992).

The second statutory provision is Utah Code Ann. §35A-4-405(1)(b) (2007) which provides that

A claimant shall not be denied eligibility for benefits if the claimant leaves work under circumstances of such a nature that it would be contrary to equity and good conscience to impose a disqualification.

The equity and good conscience standard

requires the Board to consider factors such as 'the reasonableness of the claimant's actions' and 'continuing attachment to the labor market.' Because the statute does not further define these terms, and because the terms are broad and generalized, the statute implicitly grants the Board discretion to interpret the terms in determining equity and good conscience. . . . We therefore apply a reasonableness standard to this issue also. *Id.* at 254. [referring to what is now §35A-4-405(1)(c)]

See also *Morton Int'l v. Auditing Div. Of Utah State Tax Comm'n.*, 814 P.2d 581, 588 (Utah 1991).

Under the reasoning in *Robinson* and in *Morton*, this court should grant deference to the Workforce Appeals Board and not overturn its decision absent a finding of an abuse of discretion.

The question of whether the claimant voluntarily quit his employment is a question of fact. *Lanier v. Industrial Comm'n.*, 694 P. 2d 625 (Utah 1985). The Board should be upheld if there is substantial evidence to support its decision.

## **STATUTES AND REGULATORY PROVISIONS AT ISSUE**

The statutes and rules which are determinative in this matter are set forth verbatim in Addendum A, and include the following:

§35A-4-405(1), Utah Code Annotated  
§63-46b-16(4)(b), Utah Code Annotated, now §63G-4-403  
§78A-4-103, Utah Code Annotated  
R994-403-110c(2)(b), Utah Administrative Code  
R994-405-101, Utah Administrative Code  
R994-405-102, Utah Administrative Code  
R994-405-103, Utah Administrative Code  
R994-405-106, Utah Administrative Code  
R994-405-107(6), Utah Administrative Code  
R994-405-204, Utah Administrative Code  
R994-508-109(11), Utah Administrative Code

## **STATEMENT OF THE CASE**

### **A. Nature of the Case, Course of Proceedings, and Disposition Below.**

The claimant, Kenneth Bowdrey, filed a claim for unemployment insurance benefits on January 28, 2009, with an effective date of January 25, 2009. An initial decision by a Department of Workforce Services (Department) adjudicator denied benefits on the grounds the claimant voluntarily quit his employment without good cause and that a denial of benefits is not an affront to fairness under the equity and good conscience standard in Utah Code Ann. §35A-4-405(1). The Department's original decision was issued on February 11, 2009. (See Addendum B) The claimant appealed that decision to an Administrative Law Judge (ALJ) and an evidentiary hearing was held on March 30, 2009. On March 30, 2009, the ALJ issued a decision affirming the Department's original decision denying benefits. (See

Addendum C) The claimant appealed the decision of the ALJ to the Workforce Appeals Board (Board). In a decision issued May 18, 2009, the Board unanimously upheld the ALJ's decision denying unemployment benefits. The claimant's Petition for Review was filed June 17, 2009.

**B. Statement of the Facts.**

The claimant started working for the employer, Pacific Flyway Wholesale, on or about May 18, 2007, as a shipper. He worked the weekend shift which was Friday, Saturday, and Sunday, 12 hours per day. (Record, 30:4-7) The claimant had purchased an automobile with his girlfriend. Sometime prior to the job separation, the claimant moved out of the residence he shared with his girlfriend into a motel. He left the car with his girlfriend, (R, 26:7, R, 27:38-39) explaining that the girlfriend had children and needed the car more than he did. The claimant told the employer he no longer had a car and asked to be moved to a different shift so he could take the bus to work. At the claimant's request, the employer agreed to let the claimant work on "a shift that would accommodate his needs." (R, 30:6-7) The new shift was Monday through Thursday, 6 a.m. to 3:30 p.m. He started working that shift on Monday, August 18, 2008. (R, 30: 11-13, 21-22) His last day of work was August 20, 2008. (R, 29:43) He did not show up for his scheduled shift on August 21, 2008. (R, 30: 12-25) He also failed to call the employer to report that he would be absent. (R, 30: 23)

The employer's policy provides that if an employee is a no call, no show it is treated as a voluntary quit. The employer's no call, no show policy is contained in its policy and procedure packet which is provided to new employees when hired. (R, 31: 1-4)

The claimant testified he did not show up for work on April 21, 2008, because his feet were so sore he could not walk. (R, 27:5-6) He testified he was forced to take a bus to work but the last bus stop was over three miles from his employment. (R, 27: 10-15) He testified he was then living in a motel with no telephone in the room and that while there was a telephone in the front office of the motel, he was unable to walk to the front office to call the employer. (R, 26: 41-42, 27:3-6)

The claimant testified it took "a couple of days" for his feet to get better. His feet would have been better by his next scheduled work day, Monday, August 25, 2008, yet he failed to report for work that day and failed to call his employer but instead went to a Department office to apply for benefits. ( R, 34: 39-40) The claimant told the Department representative he had "transportation issues [and] he should have asked for time off, be was going thru a lot of hard times. [He] said he knows it's his fault not his employer's but he wasn't thinking straight." ( Exhibit 9, R, 9, R, 22: 28-33)

### **SUMMARY OF ARGUMENTS**

There is substantial evidence in the record to show the claimant voluntarily quit his employment without good cause making him ineligible for unemployment benefits. The denial of benefits is not an affront to fairness under the equity and good conscience provisions of the rules. The ALJ and the Board adjudicated all relevant issues, and none of the decisions issued was arbitrary or capricious.

## **ARGUMENT**

### **POINT I**

#### **THE EMPLOYER PROVIDED SUFFICIENT PROOF OF ITS ATTENDANCE POLICY.**

The General Manager of the employer company testified during the hearing that the employer's attendance policy provides if an employee misses a full day of work and fails to call in by the end of his or her shift, the employer will consider the employee to have quit. The same witness testified that the attendance policy is contained in the employer's manual which is provided to all employees at the time of hire. The claimant did not object to this testimony nor did he challenge the testimony during the hearing. While at one point the claimant alluded to an alleged three strikes rule, he did not argue that the employer had such a rule or that such a rule would apply to no call, no shows.

The claimant argues on appeal that because the employer did not provide a copy of its written attendance policy prior to or during the hearing, the testimony of the General Manager is insufficient to establish the policy existed. The claimant raises this objection for the first time in his brief to this court. Throughout these proceedings, the claimant has never alleged he did not know what the employer's policy was or that he did not know he might lose his job if he was a no call, no show. Because the claimant did not challenge the testimony of the General Manager during the hearing, it was not necessary for the employer to provide a copy of the policy. The claimant did say that another employee was allowed to keep her job after "three strikes," but the employer denied that. If the claimant had

provided testimony that he did not know he could be discharged for one occurrence, a copy of the employer's policy might have been required to resolve the conflict. Additionally, if the claimant had raised the issue during the hearing, the employer may have been given an opportunity to provide a copy of its policy.

Department rule R994-508-109(11) provides that a party must send documentary evidence to the ALJ in advance of the hearing. That same rule also states if a party has good cause for not providing those documents in advance of the hearing, "the documents will be admitted after provisions are made to insure due process is satisfied." By not objecting to the testimony of the General Manager at the time of the hearing, and waiting until now to raise this issue, the employer is deprived of an opportunity to show good cause.

This court has consistently held that "issues not raised in proceedings before administrative agencies are not subject to judicial review except in exceptional circumstances." *Brown & Root Indus. v. Industrial Comm'n* 947 P2d 671, 677 (Utah 1997) as cited in *Galley v. Dep't of Workforce Services*, 2003 UT App 277. The claimant has not shown any exceptional circumstances which would allow him to raise this issue now and the court should not consider it.

The ALJ found the testimony of the General Manager to be credible on the issue of the employer's policy regarding attendance. There was ample evidence to support that credibility determination. Without an objection raised by the claimant during the hearing, that testimony was sufficient to prove the employer's policy. While the claimant now seems

to argue that he did not know of the policy, or that the policy was not as it was described by the General Manager, that argument is not consistent with his actions at the time.

After missing work on Thursday, August 21, 2008, the claimant did not return to work for his next scheduled shift which was August 25, 2008. By that date his feet were healed but instead of reporting to work, the claimant went to the Department's office to apply for benefits. If the claimant believed he still had a job, or he believed the employer had a three strikes rule, he would have reported for work once his feet were healed instead of applying for benefits. Although the claimant testified he called the employer on August 25, 2008, the employer's witnesses denied that he called. If the claimant had called the employer that day, he would have learned of the job separation yet he testified that he learned he had been separated from his job when the Department representative called his employer while he was in the Department's office on August 25. (R, 34:39-40) Finally, the claimant told the Department representative that he knew that the job separation was "his fault and not his employer's" and that he "should have asked for time off. . . but he wasn't thinking straight." (Exhibit 9) The ALJ found the employer's witnesses more credible on the issue of whether the claimant knew of the policy and whether the claimant called the employer on August 25.

The employer proved that its attendance policy provided that if an employee failed to report for one shift without calling, the employer will treat it as a quit.

## **POINT II**

### **THE CLAIMANT QUIT HIS EMPLOYMENT, HE WAS NOT DISCHARGED.**

The claimant argues that he did not quit his employment nor did he intend to quit his employment. In support of his argument the claimant states in his brief that the employer made "the initial move to terminate the relationship" by telling the Department representative the claimant had quit. The Board disagrees. The claimant made "the initial move" by not reporting to work as scheduled, by not calling the employer as required, and by then applying for benefits. Department rules provide that it is not which party made "the initial move to terminate the relationship" that determines whether a job separation is a quit or a discharge but rather, which party was the moving party in ending the relationship. A separation is considered a quit under R994-405-101 if the claimant leaves existing work or refuses to follow instructions.

Department rule R994-405-106(1) provides that if "the claimant refused or failed to follow reasonable requests or instructions, and knew the loss of employment would result, the separation is a quit. . . ." The employer's policy provided that one no call, no show would be considered a quit. It is reasonable for an employer to require an employee call in when the employee is unable to report to work. When an employee fails to call in, the employer does not know if the employee will be absent all day or just late. Without knowing, the employer is unable to balance the workload in the employee's absence. Although he denies it now, the claimant's actions at the time show he knew his failure to call in on August 21 would result in him being separated from his job. Otherwise he would not have applied for



benefits the next work day without talking to the employer. The claimant admitted the separation was his fault and not the employer's and he should have asked for time off. Under Department rules, that is a quit because he failed to follow a reasonable request of calling in knowing it would result in the loss of employment.

In *Duong v. Department of Workforce Services*, 2001 UT App 390, the claimant failed to follow her supervisor's instructions. Duong contended that she should not have been "required to follow her supervisor's instructions if she did not agree with them." In upholding the Board's denial of benefits this court held:

Under the agency's rules, "if a worker refused to follow the reasonable requests or instructions knowing the loss of employment would result, the separation is a quit." *Utah Code Admin. P. R994-405-204(3)*. Accordingly, the Board determined that Duong voluntarily quit her job without good cause. "In reviewing these issues, we defer to the agency and we will not overturn its decisions regarding voluntariness and good cause unless we determine it has abused its discretion." *Robinson v. Dep't of Employment Sec.*, 827 P.2d 250, 252 (*Utah Ct. App.* 1992).

Department Rule R994-405-204 provides the Department determines whether a job separation is a quit or a discharge based on the circumstances of the separation as found by the Department. Here the claimant's actions show he was the moving party and that he intended to end his job with the employer. Not only did he fail to report to work on August 21 or call, but he went to the Department on the next work day, August 25, 2008, to apply for benefits. Additionally, he told the Department representative that he was at fault in the separation, not the employer, and he should have asked for time off. The Department, the ALJ, and a unanimous Board found that, by his actions, he voluntarily quit his job.

In the similar case of *Lanier v. Industrial Comm'n*, 694 P. 2d 625 (Utah 1985), the claimant failed to report for work four days in a row. On the first day, the claimant's daughter called the employer to report he would be absent. The claimant testified that his daughter called on the fourth day also but the claimant's supervisor testified she did not receive a call from the daughter on the fourth day. The employer in that case had a policy that provided employees must call in every day and if an employee fails to show up for work or call in for three consecutive days it would result in discharge. The Board in that case found that the daughter did not call on the fourth day and the facts supported a finding that the claimant voluntarily quit his job. The Board based that decision on the claimant's failure to contact the employer for three days as per that employer's policy. In upholding the Board's determination that the job separation was a quit and not a discharge, this court held:

The burden of proof in unemployment compensation proceedings is on the claimant to establish eligibility for benefits. In the context of this case, this burden required plaintiff to show he did not leave work voluntarily. In previously construing section 35-4-5(a), [35A-4-405(1)] we have stated that "'voluntarily' simply means at the volition of the employee, in contrast to a firing or other termination at the behest of the employer." Whether an employee left work at his own volition or at that of the employer is a question of fact. In reviewing decisions of the commission in unemployment compensation proceedings, we are to affirm factual determinations if they are supported by substantial evidence. There is substantial evidence on the record in this case to support the board's finding that plaintiff left work voluntarily, that is, at his own volition.

There is substantial evidence in this case to support finding the claimant quit his employment either by not following the employer's reasonable instructions to call in or by not reporting to work and applying for benefits instead.

### **POINT III**

#### **THE CLAIMANT DID NOT ESTABLISH GOOD CAUSE FOR VOLUNTARILY QUITTING HIS EMPLOYMENT, AND A DENIAL OF BENEFITS IS NOT AN AFFRONT TO FAIRNESS UNDER THE EQUITY AND GOOD CONSCIENCE STANDARD.**

To be eligible for benefits in a voluntary quit, the claimant bears the burden of proving he either had good cause for severing the employment relationship, or that it would be an affront to fairness to deny benefits under the equity and good conscience provisions of 35A-4-405(1)(a). (See Addendum A) The claimant failed to meet his burden of proof.

The good cause provision, Department rule R994-405-102, provides that a claimant must show that an immediate severance of the employment relationship was necessary to avoid a hardship the claimant could not control or prevent. (See Addendum A)

Hardship requires a showing that the job had an adverse effect causing "actual or potential physical, mental, economic, personal or professional harm . . . [as] measured against the actions of an average individual, not one who is unusually sensitive." The claimant testified that he was unable to show up for work because his feet were sore from walking from the bus stop to work and back, as well as being on his feet during the shift. There is no evidence that the claimant suffered actual or potential harm by calling the employer to inform it of his physical limitations. Additionally, the claimant's testimony was not entirely credible. He testified that he had to walk three plus miles from the bus stop to work, stand "for eight or nine hours," then "run" to catch the last bus home from work. ( R, 27:13-15) Prior to his last week of work, the claimant had been working 12 hour shifts doing the same work he was

doing when he quit. He failed to explain how walking to and from the bus stop and working shorter shifts was harder on his feet than working 12 hour shifts. The claimant also failed to explain why he had to "run" to catch the last bus after work. The claimant's shift ended at 3:30 p.m. It is presumed that the last bus would not have been before 5 p.m. Additionally, while the claimant did not have a telephone in his motel room, there was a telephone at the front office of the motel. The claimant's testimony that his feet were too sore to walk to the front office was not persuasive.

The Board is not unsympathetic to the claimant's problems but they do not rise to the level of hardship contemplated by the rule. Under the quit rule the hardship must be so adverse that the claimant had no reasonable alternative to quitting and that the situation was beyond the claimant's ability to control or prevent. The claimant failed to prove that quitting was his only option. The claimant could have asked if another employee could drive him to and from the bus stop or taken a taxi cab. While that might not seem financially practical, it was better than the claimant quitting his job and having no income at all. He might have also asked his girlfriend to take him to and from work since he was a half owner of the car.

In addition to showing hardship and the inability to control the situation, the good cause rule requires proof that the employer was given notice and an opportunity "to make changes that would eliminate the need to quit. An employee with grievances must have made a good faith effort to work out the differences with the employer before quitting unless those efforts would have been futile." R994-405-102(1)(b)(iii). The claimant failed to tell the employer of his problems and failed to show that those efforts would have been futile.

Employers are required to reimburse the Department for unemployment benefits paid to its former employees. For that reason, the employer must be given an opportunity to try and correct a problem and avoid the need for unemployment benefits if possible. The General Manager testified that the claimant was a good employee and had in fact been awarded the employee of the month award in the past. The employer had no intention of discharging the claimant. If the claimant had contacted the employer and explained that he was unable to walk to and from the bus stop in addition to working his shift, the employer might have been able to help the claimant find alternative transportation. Instead the claimant chose to simply not show up for work. There is no evidence the claimant believed the employer would not be willing to work with him on his transportation issues. In fact, the claimant admitted he should have asked for time off and the separation was his fault. His failure to discuss the problem with the employer was not reasonable. Finally, the claimant had asked the employer to change his schedule to accommodate his needs and the employer promptly complied. There is no evidence the employer would not have helped here.

This court has consistently held that "unemployment compensation is legislatively created to ameliorate the hardship of those who, through no fault of their own, find themselves unemployed." *Swiecicki v. Department of Employment Sec.*, 667 P.2d 28, 30 (Utah 1983) The court has also held "the termination is considered voluntary if it was 'at the volition of the employee, in contrast to a firing or other termination at the behest of the employer.'" *Adams v. Board of Review*, 776 P.2d 639, 641 (Utah Ct. App. 1989). The claimant is not unemployed through no fault of his own.

As this court stated in *Slane v. Department of Workforce Services, et. al.*, 2000 UT App 67, "having a 'good reason' to quit and having 'good cause' to quit are not the same thing." It is not at all clear the claimant even had a good reason to quit, let alone good cause. The claimant has failed to meet his burden to establish that any of the elements of good cause were met.

Department rule R994-405-107(6) provides:

If a claimant quits a job due to a lack of transportation, good cause may be established if the claimant has no other reasonable transportation options available. However, an availability issue may be raised in such a circumstance. If a move resulted in an increased distance to work beyond normal commuting patterns, the reason for the move, not the distance to the work, is the primary factor to consider when adjudicating the separation.

This rule is not controlling because the claimant did not prove he had no other reasonable transportation options. The claimant did not ever investigate other transportation options. A claimant is responsible for providing his or her own transportation to and from work. A claimant is not considered to be able and available for work if he or she does not have the means to become employed which includes transportation under Department rule R994-403-110c(2)(b). The claimant worked the new shift only three days before quitting and failed to look for other transportation options. His actions do not establish good cause under the rule cited above.

According to the Utah Administrative Code, if good cause is not established, the claimant's eligibility must be considered under the equity and good conscience standard under Department rule R994-405-103. (See Addendum A)

The equity and good conscience rule requires a showing that "there were mitigating circumstances, and a denial of benefits would be unreasonably harsh or an affront to fairness . . . ." The rule also requires that the claimant show the decision to quit was reasonable. Reasonable is defined as: "logical, sensible, or practical. There must be evidence of circumstances which . . . would have motivated a reasonable person to take similar action." Finally, the claimant must prove a continuing attachment to the labor market. The claimant testified he was performing a job search during the hearing. He is presumably attached to the labor market although his transportation problems might make him unavailable under R944-403-110c. The claimant's actions however, were not reasonable nor were there mitigating circumstances of the type contemplated by the rule.

As this court held in *Pritcher v. Department of Employment Sec.*, 752 P.2d 917 (Utah, 1988):

. . . the equity and good conscience provision is not an occasion for a free-wheeling judicial foray into the record and imposition of a decision consistent with this panel's collective sense of equity and fairness. On the contrary, that determination is one for the Department and ultimately the Board of Review, *see* Utah Code Ann. §35-4-5(a) (1987), [now §35A-4-405(1)(b)] with this court's role limited, as explained above, to deciding whether the findings support a decision that "equity and good conscience" do not require compensation and whether "evidence of any substance" supports the findings. We are obliged to give considerable deference to the Board's determination of whether equity requires compensation. Moreover, the concept is not as wide-open as it might seem, but rather has been defined and refined by statute, *id.*; by rule, Utah Administrative Code R475-5a-3 (1988); and by case law, *e.g.*, *Chapman v. Industrial Comm'n*, 700 P.2d 1099, 1101-02 (Utah 1985); *Salt Lake City Corp. v. Department of Employment Sec.*, 657 P.2d 1312, 1317 (Utah 1982).

*Chapman v. Industrial Comm'n*, 700 P.2d 1099 (1985), is the only case this author can find where Utah's appellate courts reversed a Board decision and allowed benefits under the equity and good conscience provision. In that case, the claimant was a 62-year-old woman who proved that her supervisor was erratic, swore at the claimant, accused the claimant of doing things she had not done, and "subjected the claimant to unreasonable fits of anger." The Board denied benefits finding the claimant had an obligation to notify someone in upper management about the problem with the supervisor. The claimant in *Chapman* testified that she did not report the supervisor to upper management because the supervisor was in ill health and the claimant did not want to be the cause of the supervisor losing her job. The Utah Supreme Court found that, given the claimant's age, the intolerable supervisor, and the claimant's explanation for not reporting the supervisor, a denial of benefits would be an affront to fairness.

The facts in the present case are substantially different. The claimant here was 48 years old and had worked at this job for over a year without any problems. Throughout most of that employment, he worked 12 hour shifts on his feet. In August 2008 he experienced some problems in his personal life which resulted in his loss of transportation. He asked the employer to move him to the day shift so he could ride the bus to work. He testified the walk from the bus stop to and from work was over three miles and after working eight to nine hours his feet were too sore to work. He admitted this was a temporary problem as his feet were fine a couple of days later. If the claimant had called his employer when his feet got better and investigated ways to keep his job, the result in this case would probably have been



different. Instead the claimant filed for benefits admitting the job loss was his fault and not the employer's. He admitted that he should have asked for time off implying that with some time off he might have solved his problems. His actions were not reasonable.

The claimant's problems are not the type of mitigating circumstances contemplated by the rule. Many workers experience physical problems from working. The reasonable response is to find a way to alleviate the pain by making adjustments or seeking medical attention. The claimant could have seen a doctor, talked to the employer, found alternative transportation or moved closer to work. A denial of benefits is not an affront to fairness.

#### **POINT IV**

#### **THE CLAIMANT HAS NOT MARSHALED THE EVIDENCE IN SUPPORT OF THE FACTUAL FINDINGS OF THE WORKFORCE APPEALS BOARD.**

The finding that the claimant did not have good cause for quitting was based on competent evidence in the record, primarily, the testimony of the claimant and the employer. In order to successfully challenge this finding, the claimant "must demonstrate that the findings are not supported by substantial evidence when viewed in light of the whole record before the court." The court should reject the claimant's appeal for her failure to marshal the evidence in support of her conclusion that the findings were without foundation. The Board recognizes that the claimant is proceeding pro se and might not be held to the strict procedural standards expected of claimants who are represented by counsel. However, the

burden when challenging a factual finding is an extremely heavy one and the claimant has presented no evidence or arguments sufficient to overcome this burden.

In *Crockett v. Crockett*, 836 P.2d 818 (Utah App. 1992), the court refused to entertain the appellant's factual challenges since the appellant failed to meet its marshaling burden:

[The Appellant] has neither marshaled the evidence in support of the finding nor demonstrated that the finding is clearly erroneous, but instead cites only evidence that supports the outcome she desires. *See Crookston v. Fire Ins. Exch.*, 817 P.2d 789, 800 (Utah 1991) (citing only evidence favorable to one's position "does not begin to meet the marshaling burden. . ."). **We therefore assume that the record supports the finding of the trial court.** *Id.* at 820. [Emphasis added]

This court expanded upon the appellant's burden to marshal the evidence in *Oneida/SLIC v. Oneida Cold Storage and Warehouse, Inc.*, 872 P.2d 1051 (Utah App. 1994):

Utah appellate courts do not take trial courts' factual findings lightly. We repeatedly have set forth the heavy burden appellants must bear when challenging factual findings. *Id.* at 1052.

The court reasoned that to successfully appeal a trial court's findings of fact, "appellate counsel must play the devil's advocate. '[Parties] must extricate [themselves] from the client's shoes and fully assume the adversary's position.'" *Id.* at 1053, citing *West Valley City v. Majestic Inv. Co.*, 818 P.2d 1311, 1315 (Utah Ct. App. 1991). The court further explained that proper marshaling requires the challenger to:

. . . present in comprehensive and fastidious order, every scrap of competent evidence introduced at trial which *supports* the very findings the appellant resists. *West Valley City v. Majestic Inv. Co.*, 818 P.2d 1311, 1315 (Utah App. 1991); accord *In re Estate of Bartell*, 776 P.2d 885, 886 (Utah 1989); *State v. Walker*, 743 P.2d 191, 193 (Utah 1987); *Commercial Union Assocs. v.*

*Clayton*, 863 P.2d 29, 36 (Utah App. 1993); *Ohline Corp. v. Granite Mill*, 849 P.2d 602, 604 (Utah App. 1993). *Oneida* at 1053.

Then, after an appellant has established:

. . . every pillar supporting their adversary's position, they then "must ferret out a fatal flaw in the evidence" and show why those pillars fail to support the trial court's findings. *West Valley City*, 818 P.2d at 1314. They must show the trial court's findings are "so lacking in support as to be 'against the clear weight of the evidence,' thus making them 'clearly erroneous.'" *Bartell*, 776 P.2d at 886 (quoting *Walker*, 743 P.2d at 193). *Oneida* at 1053.

The claimant here has made no attempt to meet his marshaling burden. He has pointed to no evidence in the record to show that the findings of the Board are so "against the clear weight of the evidence" that they are "clearly erroneous." The record below is supported by the evidence and entitled to a presumption of validity. See also *Grace Drilling Company v. Board of Review*, 776 P.2d 63, 67-68 (Utah Ct. App. 1989), where this court held that

. . . the 'whole record test' necessarily requires that a party challenging the Board's findings of fact must marshal all of the evidence supporting the findings and show that despite the . . . contradictory evidence, the findings are not supported by substantial evidence.

## CONCLUSION

The claimant has raised no competent argument in support of his appeal. This court should, therefore, affirm the decision of the Board disqualifying the claimant from the receipt of unemployment benefits, pursuant to §35A-4-405(1) of the Utah Employment Security Act.

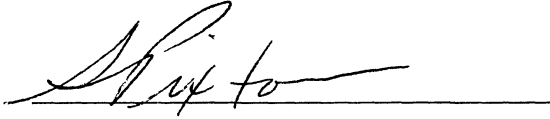
Respectfully submitted this 7<sup>th</sup> day of June, 2010.

  
A handwritten signature in black ink, appearing to read 'Suzan Pixton', is written over a horizontal line.

SUZAN PIXTON  
Attorney for Respondent  
Workforce Appeals Board  
Department of Workforce Services

## CERTIFICATE OF MAILING

I CERTIFY that I mailed two copies of the foregoing Respondent's Brief, postage prepaid, to the following this 7<sup>th</sup> day of June, 2010:

A handwritten signature in cursive script, appearing to read "Rip to", is written over a horizontal line.

### **35A-4-405. Ineligibility for benefits.**

Except as otherwise provided in Subsection (5), an individual is ineligible for benefits or for purposes of establishing a waiting period:

(1)(a) For the week in which the claimant left work voluntarily without good cause, if so found by the division, and for each week thereafter until the claimant has performed services in bona fide, covered employment and earned wages for those services equal to at least six times the claimant's weekly benefit amount.

(b) A claimant may not be denied eligibility for benefits if the claimant leaves work under circumstances where it would be contrary to equity and good conscience to impose a disqualification.

(c) Using available information from employers and the claimant, the division shall consider for the purposes of this chapter the reasonableness of the claimant's actions, and the extent to which the actions evidence a genuine continuing attachment to the labor market in reaching a determination of whether the ineligibility of a claimant is contrary to equity and good conscience.

(d) Notwithstanding any other subsection of this section, a claimant who has left work voluntarily to accompany, follow, or join the claimant's spouse to or in a new locality does so without good cause for purposes of Subsection (1).

### **63G-4-403. Judicial review -- Formal adjudicative proceedings.**

(1) As provided by statute, the Supreme Court or the Court of Appeals has jurisdiction to review all final agency action resulting from formal adjudicative proceedings.

(2) (a) To seek judicial review of final agency action resulting from formal adjudicative proceedings, the petitioner shall file a petition for review of agency action with the appropriate appellate court in the form required by the appellate rules of the appropriate appellate court.

(b) The appellate rules of the appropriate appellate court shall govern all additional filings and proceedings in the appellate court.

(3) The contents, transmittal, and filing of the agency's record for judicial review of formal adjudicative proceedings are governed by the Utah Rules of Appellate Procedure, except that:

(a) all parties to the review proceedings may stipulate to shorten, summarize, or organize the record;

(b) the appellate court may tax the cost of preparing transcripts and copies for the record:

(i) against a party who unreasonably refuses to stipulate to shorten, summarize, or organize the record; or

(ii) according to any other provision of law.

(4) The appellate court shall grant relief only if, on the basis of the agency's record, it determines that a person seeking judicial review has been substantially prejudiced by any of the following:

(a) the agency action, or the statute or rule on which the agency action is based, is unconstitutional on its face or as applied;

(b) the agency has acted beyond the jurisdiction conferred by any statute;

(c) the agency has not decided all of the issues requiring resolution;

(d) the agency has erroneously interpreted or applied the law;

(e) the agency has engaged in an unlawful procedure or decision-making process, or has failed to follow prescribed procedure;

(f) the persons taking the agency action were illegally constituted as a decision-making body or were subject to disqualification;

(g) the agency action is based upon a determination of fact, made or implied by the agency, that is not supported by substantial evidence when viewed in light of the whole record before the court;

(h) the agency action is:

(i) an abuse of the discretion delegated to the agency by statute;

(ii) contrary to a rule of the agency;

(iii) contrary to the agency's prior practice, unless the agency justifies the inconsistency by giving facts and reasons that demonstrate a fair and rational basis for the inconsistency; or

(iv) otherwise arbitrary or capricious.

**78A-4-103. Court of Appeals jurisdiction.**

(2) The Court of Appeals has appellate jurisdiction, including jurisdiction of interlocutory appeals, over:

(a) the final orders and decrees resulting from formal adjudicative proceedings of state agencies or appeals from the district court review of informal adjudicative proceedings of the agencies, except the Public Service Commission, State Tax Commission, School and Institutional Trust Lands Board of Trustees, Division of Forestry, Fire and State Lands actions reviewed by the executive director of the Department of Natural Resources, Board of Oil, Gas, and Mining, and the state engineer;



**R994-403-110c.     Able and Available - General Definition.**

(1)     The primary obligation of the claimant is to become reemployed. A claimant may meet all of the other eligibility criteria but, if the claimant cannot demonstrate ability, availability, and an active good faith effort to obtain work, benefits cannot be allowed.

(2)     A claimant must be attached to the labor force, which means the claimant can have no encumbrances to the immediate acceptance of full-time work. The claimant must:

(a)     be actively engaged in a good faith effort to obtain employment;  
and

(b)     have the necessary means to become employed including tools, transportation, licenses, and childcare if necessary.

**R994-405-101. Voluntary Leaving (Quit) - General Information.**

(1) A separation is considered voluntary if the claimant was the moving party in ending the employment relationship. A voluntary separation includes leaving existing work, or failing to return to work after:

(a) an employer attached layoff which meets the requirements for a deferral under R994-403-108b(1)(c),

(b) a suspension, or

(c) a period of absence initiated by the claimant.

(2) Failing to renew an employment contract may also constitute a voluntary separation.

(3) Two standards must be applied in voluntary separation cases: good cause and equity and good conscience. If good cause is not established, the claimant's eligibility must be considered under the equity and good conscience standard.

**R994-405-102. Good Cause.**

To establish good cause, a claimant must show that continuing the employment would have caused an adverse effect which the claimant could not control or prevent. The claimant must show that an immediate severance of the employment relationship was necessary. Good cause is also established if a claimant left work which is shown to have been illegal or to have been unsuitable new work.

(1) Adverse Effect on the Claimant.

(a) Hardship.

The separation must have been motivated by circumstances that made the continuance of the employment a hardship or matter of concern, sufficiently adverse to a reasonable person so as to outweigh the benefits of remaining employed. There must have been actual or potential physical, mental, economic, personal or professional harm caused or aggravated by the employment. The claimant's decision to quit must be measured against the actions of an average individual, not one who is unusually sensitive.

(b) Ability to Control or Prevent.

Even though there is evidence of an adverse effect on the claimant, good cause will not be found if the claimant:

(i) reasonably could have continued working while looking for other employment,

(ii) had reasonable alternatives that would have made it possible to preserve the job like using approved leave, transferring, or making adjustments to personal circumstances, or,

(iii) did not give the employer notice of the circumstances causing the hardship thereby depriving the employer of an opportunity to make changes that would eliminate the need to quit. An employee with grievances must have made a good faith effort to work out the differences with the employer before quitting unless those efforts would have been futile.

(2) Illegal.

Good cause is established if the claimant was required by the employer

to violate state or federal law or if the claimant's legal rights were violated, provided the employer was aware of the violation and refused to comply with the law.

(3) Unsuitable New Work.

Good cause may also be established if a claimant left new work which, after a short trial period, was unsuitable consistent with the requirements of the suitable work test in rule R994-405-306. The fact the claimant accepted a job does not necessarily make the job suitable. The longer a job is held, the more it tends to negate the argument that the job was unsuitable. After a reasonable period of time a contention the quit was motivated by unsuitability of the job is generally no longer persuasive. The Department has an affirmative duty to determine whether the employment was suitable, even if the claimant does not raise suitability as an issue.

**R994-405-103. Equity and Good Conscience.**

(1) If the good cause standard has not been met, the equity and good conscience standard must be considered in all cases except those involving a quit to accompany, follow, or join a spouse as provided in R994-405-104. If there are mitigating circumstances, and a denial of benefits would be unreasonably harsh or an affront to fairness, benefits may be allowed under the provisions of the equity and good conscience standard if the claimant:

(a) acted reasonably.

The claimant acted reasonably if the decision to quit was logical, sensible, or practical. There must be evidence of circumstances which, although not sufficiently compelling to establish good cause, would have motivated a reasonable person to take similar action, and,

(b) demonstrated a continuing attachment to the labor market.

A continuing attachment to the labor market is established if the claimant took positive actions which could have resulted in employment during the first week subsequent to the separation and each week thereafter. An active work search, as provided in R994-403-113c, should have commenced immediately after the separation whether or not the claimant received specific work search instructions from the Department. Failure to show an immediate attachment to the labor market may not be disqualifying if it was not practical for the claimant to seek work. Some circumstances that may interfere with an immediate work search include illness, hospitalization, incarceration, or other circumstances beyond the control of the claimant provided a work search commenced as soon as practical.

**R994-405-106.      Quit or Discharge.**

(1)      Refusal to Follow Instructions.

If the claimant refused or failed to follow reasonable requests or instructions, and knew the loss of employment would result, the separation is a quit.

(2)      Leaving Prior to Effective Date of Termination.

(a)      If a claimant leaves work prior to the date of an impending reduction of force, the separation is a quit. Notice of an impending layoff does not establish good cause for leaving work. However, the duration of available work may be a factor in considering whether a denial of benefits would be contrary to equity and good conscience. If the claimant is not disqualified for quitting, benefits will be denied for the limited period of time the claimant could have continued working, as there was a failure to accept all available work as required under Subsection 35A-4-403(1)(c).

(b)      If the claimant quit to avoid a disqualifying discharge the separation will be adjudicated as a discharge.

(3)      Leaving Work Because of a Disciplinary Action.

If the disciplinary action or suspension was reasonable, leaving work rather than submitting to the discipline, or failing to return to work at the end of the suspension period, is considered a quit unless the claimant was previously disqualified as a result of the suspension.

(4)      Leave of Absence.

If a claimant takes a leave of absence for any reason and files a claim while on such leave from the employer, the claimant will be considered unemployed and the separation is adjudicated as a quit, even though there still may be an attachment to the employer. If a claimant fails to return to work at the end of the leave of absence, the separation is a quit.

(5)      Leaving Due to a Remark or Action of the Employer or a Coworker.

If a claimant hears rumors or other information suggesting he or she is to be laid off or discharged, the claimant has the responsibility to confirm,

prior to leaving, that the employer intended to end the employment relationship. The claimant also has a responsibility to continue working until the date of an announced discharge. If the claimant failed to do so and if the employer did not intend to discharge or lay off the claimant, the separation is a quit.

(6) Resignation Intended.

(a) Quit.

If a claimant gives notice of his or her intent to leave at a future date and is paid regular wages through the announced resignation date, the separation is a quit even if the claimant was relieved of work responsibilities prior to the effective date of the resignation. A separation is also a quit if a claimant announces an intent to quit but agrees to continue working for an indefinite period as determined by the employer, even though the date of separation was determined by the employer. If a claimant resigns but later decides to stay and attempts to remain employed, the reasonableness of the employer's refusal to continue the employment is the primary factor in determining if the claimant quit or was discharged. For example, if the employer had already hired a replacement, or taken other action because of the claimant's impending quit, it may not be practical for the employer to allow the claimant to rescind the resignation, and the separation is a quit.

(b) Discharge.

If a claimant submitted a resignation to be effective at a definite future date, but was relieved of work responsibilities and was not paid regular wages through the balance of the notice period, the separation is considered a discharge as the employer was the moving party in determining the final date of employment. Merely assigning vacation pay not previously assigned to the notice period does not make the separation a quit.

(7) If an employer tells a claimant it intends to discharge the claimant but allows the claimant to stay at work until he or she finds another job and the claimant decides to leave before finding another job, the separation is a quit. Good cause may be established if it would be unreasonable to require a claimant to remain employed after the employer has expressed its intent to discharge him or her.

**R994-405-107.      Examples of Reasons for Quitting.**

**(1)      Prospects of Other Work.**

Good cause is established if, at the time of separation, the claimant had a definite and immediate assurance of another job or self-employment that was reasonably expected to be suitable, full-time, and permanent. However, if the new work is later determined to have been unsuitable and it is apparent the claimant knew, or should have known, about the unsuitability of the new work, but quit the first job and subsequently quit the new job, a disqualification will be assessed from the time the claimant quit the first job unless the claimant has purged the disqualification through earnings received while on the new job.

If, after giving notice but prior to leaving the first job, the claimant learns the new job will not be available when promised, permanent, full-time, or suitable, good cause may be established if the claimant immediately attempted to rescind the notice, unless such an attempt would have been futile.

(a)      A definite assurance of another job means the claimant has been in contact with someone with the authority to hire, has been given a definite date to begin working and has been informed of the employment conditions.

(b)      An immediate assurance of work generally means the prospective job will begin within two weeks from the last day the claimant was scheduled to work on the former job. Benefits will be denied for failure to accept all available work from the prior employer under the provisions of Subsection 35A-4-403(1)(c) if the claimant files during the period between the two jobs.

**(2)      Reduction of Hours.**

The reduction of an employee's working hours generally does not establish good cause for leaving a job. However, in some cases, a reduction of hours may result in personal or financial hardship so severe the circumstances justify leaving.

**(3)      Personal Circumstances.**

There may be personal circumstances that are sufficiently compelling or create sufficient hardship to establish good cause for leaving work, provided the claimant made a reasonable attempt to make adjustments or find alternatives prior to quitting.



(4) Leaving to Attend School.

Although leaving work to attend school may be a logical decision from the standpoint of personal advancement, it is not compelling or reasonable, within the meaning of the Act.

(5) Religious Beliefs.

To support an award of benefits following a voluntary separation due to religious beliefs, the work must conflict with a sincerely held religious or moral conviction. If a claimant was not required to violate such religious beliefs, quitting is not compelling or reasonable within the meaning of the Act. A change in the job requirements, such as requiring an employee to work on the employee's day of religious observance when such work was not agreed upon as a condition of hire, may establish good cause for leaving a job if the employer is unwilling to make adjustments.

(6) Transportation.

If a claimant quits a job due to a lack of transportation, good cause may be established if the claimant has no other reasonable transportation options available. However, an availability issue may be raised in such a circumstance. If a move resulted in an increased distance to work beyond normal commuting patterns, the reason for the move, not the distance to the work, is the primary factor to consider when adjudicating the separation.

(7) Marriage.

(a) Marriage is not considered a compelling or reasonable circumstance, within the meaning of the Act, for quitting employment. Therefore, if the claimant quit to get married, benefits will be denied even if the new residence is beyond a reasonable commuting distance from the claimant's former place of employment.

(b) If the employer has a rule requiring the separation of an employee who marries a coworker, the separation is a discharge even if the employer allowed the couple to decide who would leave.

(8) Health or Physical Condition.

(a) Although it is not essential for the claimant to have been advised

by a physician to quit, a contention that health problems required the separation must be supported by competent evidence. Even if the work caused or aggravated a health problem, if there were alternatives, such as treatment, medication, or altered working conditions to alleviate the problem, good cause for quitting is not established.

(b) If the risk to the health or safety of the claimant was shared by all those employed in the particular occupation, it must be shown the claimant was affected to a greater extent than other workers. Absent such evidence, quitting was not reasonable.

(9) Retirement and Pension.

Voluntarily leaving work solely to accept retirement benefits is not a compelling reason for quitting, within the meaning of the Act. Although it may have been reasonable for a claimant to take advantage of a retirement benefit, payment of unemployment benefits in this circumstance is not consistent with the intent of the Unemployment Insurance program, and a denial of benefits is not contrary to equity and good conscience.

(10) Sexual Harassment.

(a) A claimant may have good cause for leaving if the quit was due to discriminatory and unlawful sexual harassment, provided the employer was given a chance to take necessary action to stop the objectionable conduct. If it would have been futile to complain, as when the owner or top manager of the employer company is causing the harassment, the requirement that the employer be given an opportunity to stop the conduct is not necessary. Sexual harassment is a form of sex discrimination prohibited by Title VII of the United States Code and the Utah Anti-Discrimination Act.

(b) "Sexual harassment" means unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature when:

(i) submission to the conduct is either an explicit or implicit term or condition of employment, or

(ii) submission to or rejection of the conduct is used as a basis for an employment decision affecting the person, or

(iii) the conduct has a purpose or effect of substantially interfering

with a person's work performance or creating an intimidating, hostile or offensive work environment,

(c) Inappropriate behavior which has sexual connotation but does not meet the test of sexual discrimination is insufficient to establish good cause for leaving work.

(11) Discrimination.

A claimant may have good cause for leaving if the quit was due to prohibited discrimination, provided the employer was given a chance to take necessary action to stop the objectionable conduct. If it would have been futile to complain, as when the owner or top manager of the employer company is the cause of the discrimination, the requirement that the employer be given an opportunity to stop the conduct is not necessary. It is a violation of federal law to discriminate against employees regarding compensation, terms, conditions, or privileges of employment, because of race, color, religion, sex, age or national origin; or to limit, segregate, or classify employees in any way which would deprive or tend to deprive them of employment opportunities or otherwise adversely affect their employment status because of race, color, religion, sex, age or national origin.

(12) Voluntary Acceptance of Layoff.

If the employer wishes to reduce its workforce and gives the employees the option to volunteer for the layoff, those who do volunteer are separated due to reduction of force regardless of incentives.

**R994-405-204.      Quit or Discharge.**

The circumstances of the separation as found by the Department determine whether it was a quit or discharge. The conclusions on the employer's records, the separation notice, or the claimant's report are not controlling.

(1)      Discharge Before Effective Date of Resignation.

(a)      Discharge.

If a claimant notifies the employer of an intent to leave work on a definite date, and the employer ends the employment relationship prior to that date, the separation is a discharge unless the claimant is paid through the resignation date. Unless there is some other evidence of disqualifying conduct, benefits will be awarded.

(b)      Quit.

If the claimant gives notice of an intent to leave work on a particular date and is paid regular wages through the announced resignation date, the separation is a quit even if the claimant was relieved of work responsibilities prior to the effective date of resignation. A separation is also a quit if a claimant announces an intent to quit but agrees to continue working for an indefinite period, even though the date of separation is determined by the employer. The claimant is not considered to have quit merely by saying he or she is looking for a new job. If a claimant resigns but later decides to stay and announces an intent to remain employed, the reasonableness of the employer's refusal to continue the employment is the primary factor in determining whether the claimant quit or was discharged. If the employer had already hired a replacement, or had taken other action because of the claimant's impending quit, it may not be practical for the employer to allow the claimant to rescind the resignation, and it would be held the separation was a quit.

(2)      Leaving in Anticipation of Discharge.

If a claimant leaves work in anticipation of a possible discharge and if the reason for the discharge would not have been disqualifying, the separation is a quit. A claimant may not escape a disqualification under the discharge provisions, Subsection 35A-4-405(2)(a), by quitting to avoid a discharge that would result in a denial of benefits. In this circumstance the separation is considered a discharge.

(3) Refusal to Follow Instructions.

If the claimant refused or failed to follow reasonable requests or instructions, and knew the loss of employment would result, the separation is a quit.

**R994-508-109.      Hearing Procedures.**

(1) All hearings will be conducted before an ALJ in such manner as to provide due process and protect the rights of the parties.

(2) The hearing will be recorded.

(3) The ALJ will regulate the course of the hearing to obtain full disclosure of relevant facts and to afford the parties a reasonable opportunity to present their positions.

(4) The decision of the ALJ will be based solely on the testimony and evidence presented at the hearing.

(5) All testimony of the parties and witnesses will be given under oath or affirmation.

(6) All parties will be given the opportunity to provide testimony, present relevant evidence which has probative value, cross-examine any other party and/or other party's witnesses, examine or be provided with a copy of all exhibits, respond, argue, submit rebuttal evidence and/or provide statements orally or in writing, and/or comment on the issues.

(7) The evidentiary standard for ALJ decisions, except in cases of fraud, is a preponderance of the evidence. Preponderance means evidence which is of greater weight or more convincing than the evidence which is offered in opposition to it; that is, evidence which as a whole shows that the fact sought to be proved is more probable than not. The evidentiary standard for determining claimant fraud is clear and convincing evidence. Clear and convincing is a higher standard than preponderance of the evidence and means that the allegations of fraud are highly probable.

(8) The ALJ will direct the order of testimony and rule on the admissibility of evidence. The ALJ may, on the ALJ's own motion or the motion of a party, exclude evidence that is irrelevant, immaterial, or unduly repetitious.

(9) Oral or written evidence of any nature, whether or not conforming to the rules of evidence, may be accepted and will be given its proper weight. A party has the responsibility to present all relevant evidence in its possession. When a party is in possession of evidence but fails to introduce the evidence, an inference may be drawn that the evidence does not support the party's position.

(10) Official Department records, including reports submitted in connection with the administration of the Employment Security Act, may be considered at any time in the appeals process including after the hearing.

(11) Parties may introduce relevant documents into evidence. Parties must mail, fax, or deliver copies of those documents to the ALJ assigned to hear the case and all other interested parties so that the documents are received three days prior to the hearing. Failure to prefile documents may result in a delay of the proceedings. If a party has good cause for not submitting the documents three days prior to the hearing or if a party does not receive the documents sent by the Appeals Unit or another party prior to the hearing, the documents will be admitted after provisions are made to insure due process is satisfied. At his or her discretion, the ALJ can either:

- (a) reschedule the hearing to another time;
- (b) allow the parties time to review the documents at an in-person hearing;
- (c) request that the documents be faxed during the hearing, if possible, or read the material into the record in case of telephone hearing; or
- (d) leave the record of the hearing open, send the documents to the party or parties who did not receive them, and give the party or parties an opportunity to submit additional evidence after they are received and reviewed.

(12) The ALJ may, on his or her own motion, take additional evidence as is deemed necessary.

(13) With the consent of the ALJ, the parties to an appeal may stipulate to the facts involved. The ALJ may decide the appeal on the basis of those facts, or may set the matter for hearing and take further evidence as deemed necessary to decide the appeal.

(14) The ALJ may require portions of the testimony be transcribed as necessary for rendering a decision.

(15) All initial determinations made by the Department are exempt from the provisions of the Utah Administrative Procedures Act (UAPA). Appeals from initial determinations will be conducted as formal adjudicative proceedings under UAPA.

UNEMPLOYMENT INSURANCE  
DECISION OF ELIGIBILITY FOR  
UNEMPLOYMENT INSURANCE BENEFITS



DATE MAILED. 2/11/09

VQPR

KENNETH BOWDREY  
GENERAL DELIVERY  
SALT LAKE CITY UT 84101-9999

SSN XXX-XX-X451

EMPLOYER PACIFIC FLYWAY WHOLESALE

**Notice: This decision is made on your claim for benefits:**

You voluntarily left your job for personal reasons which you have not shown to be compelling

You did not establish good cause for leaving by showing that staying in this job would cause sufficient hardship to make it necessary for you to quit before finding another job or that you had no reasonable alternative to quitting

Benefits cannot be allowed under the equity and good conscience provision because you have not shown that your reasons for leaving were sufficiently mitigating and/or you have not demonstrated a continuing attachment to the labor force

Benefits are denied under Section 35A-4-405(1) of the Utah Employment Security Act beginning January 25, 2009 and ending when you have earned wages in bona fide covered employment equal to at least six times your weekly benefit amount and you are otherwise eligible To reopen your claim, you can file online at jobs utah gov or you can call the Claim Center This reopening will be effective as of the week you reopen your claim You will be notified separately of any other issues on your claim

RIGHT TO APPEAL. If you believe this decision is incorrect, appeal by mail to Utah Department of Workforce Services, Appeals Section, PO Box 45244, Salt Lake City UT 84145-0244 or Fax (801) 526-9242, or online at www.jobs.utah.gov Your appeal must be in writing and must be received or postmarked on or before February 26, 2009 An appeal received or postmarked after February 26, 2009 may be considered if good cause for the late filing can be established Your appeal must be signed by you or your legal representative MAKE SURE YOUR NAME IS WRITTEN LEGIBLY AND THAT YOU INCLUDE YOUR SOCIAL SECURITY NUMBER AND CURRENT ADDRESS Also, please state the reason for your appeal A copy of your appeal will be sent to any other interested parties It is very important for you to continue to file your weekly claims while the appeal process is pending You will not be paid for any weeks not filed timely unless you can show good cause for late filing

UTAH CLAIMS CENTER PHONE NUMBERS S L 526-4400, Ogden 612-0877, Provo 375-4067, Out of Area (888) 848-0688

REPR J Fruin

EMP # 5863

DO NOT WRITE BELOW THIS LINE



\*5945557\*



Form APDEC  
01

DEPARTMENT OF WORKFORCE SERVICES  
APPEALS UNIT

Decision of Administrative Law Judge

Appellant

KENNETH BOWDREY  
GENERAL DELIVERY  
SALT LAKE CITY UT 84101-9999

Respondent

PACIFIC FLYWAY WHOLESALE  
7035 HIGH TECH DRIVE STE 100  
MIDVALE UT 84047-3759

S.S.A. NO: XXX-XX-4451

CASE NO: 09-A-03262

**APPEAL DECISION:** Good cause for the untimely appeal is found.  
Benefits are denied.  
The Employer is relieved of charges

**CASE HISTORY:** Date of Initial Agency Determination: February 11, 2009  
Date of Appeal filed by Claimant: March 2, 2009  
Appearances: Claimant/Employer  
Issues to be Decided: 35A-4-406(3) - Timeliness of Appeal  
35A-4-405(1) - Voluntary Quit  
35A-4-307 - Employer Charges

The Department's decision denied unemployment insurance benefits on the grounds the Claimant voluntarily quit without good cause and for reasons that do not meet the standards of equity and good conscience. That decision also relieved the Employer's benefit ratio account for benefits paid to the Claimant.

**APPEAL RIGHTS:** The following decision will become final unless, within **30 days** from **March 30, 2009**, further written appeal is received by the Workforce Appeals Board (PO Box 45244, Salt Lake City, UT 84145-0244; FAX 801-526-9244; or online at <http://www.jobs.utah.gov/appeals>) setting forth the grounds upon which the appeal is made.

**FINDINGS OF FACT:**

**Timeliness of Appeal**

The Claimant does not have a direct mailing address and his mail is sent to "general delivery." The Claimant picked up his mail at the end of February and learned of the Department's decision to deny benefits. He filed an appeal within a few days.

**Separation**

Prior to filing a claim for unemployment insurance benefits effective January 25, 2009, the Claimant worked for Pacific Flyway Wholesale, as a shipper, from May 18, 2007, until August 21, 2008. The Employer has an attendance policy. If an employee is not able to appear to work as scheduled, the employee is required to contact his or her direct supervisor by the end of the shift. If an employee fails to call as expected, the employee is considered to have voluntarily quit. Employees are notified of the policy upon hire.

The Claimant was a good employee and had received an "employee of the month" award. He worked on the weekend shift, working 12-hour shifts Friday through Sunday. In August 2008, the Claimant and his girlfriend broke up and the Claimant moved to a motel. He allowed his former girlfriend to keep their shared vehicle because she had children. The Claimant advised the Employer of the situation and requested that he be allowed to switch to a weekday shift, so he could take public transportation. The Employer agreed. The Claimant's new 10-hour shift began at 6 a.m., Monday through Thursday.

The Claimant worked three days on the new shift. The bus stop is three miles from the work site. The Claimant walked to work from the bus, then worked on his feet all day, then walked as quickly as possible back to the bus stop to catch the last bus. By the end of the three days, the Claimant's feet were swollen. He was unable to walk and did not go to work. He did not call the Employer because there was not a phone in his motel room. The Employer considered the Claimant to have quit when he did not appear to work on Thursday, August 21, 2008. On Monday, August 25, 2008, the Claimant went to the local Department of Workforce Services office to apply for assistance. The caseworker called the Employer on the Claimant's behalf and learned that the Claimant's employment had ended. The Claimant began seeking other work closer to public transportation but has not been able to secure any new work as of this time.

**REASONING AND CONCLUSIONS OF LAW:****Timeliness of Appeal**

Section 35A-4-406(3) of the Utah Employment Security Act provides that the Claimant, or any other party entitled to notice of a determination, may file an appeal from such determination within ten days after the date of mailing of the notice to his last-known address or, if the notice is not mailed, within ten days after the date of delivery of the notice. However, Rule R994-508-102 adds an additional five days when the determination is sent through the U. S. mail, for a total of fifteen (15) days rather than ten. The unemployment insurance rules pertaining to this section provide, in part:

**R994-508-104. Good Cause for Not Filing Within Time Limitations.**

A late appeal may be considered on its merits if it is determined that the appeal was delayed for good cause. Good cause is limited to circumstances where it is shown that:

- (1) the appellant received the decision after the expiration of the time limit for filing the appeal, the appeal was filed within ten days of actual receipt of the decision and the delay was not the result of willful neglect;

- (2) the delay in filing the appeal was due to circumstances beyond the appellant's control; or
- (3) the appellant delayed filing the appeal for circumstances which were compelling and reasonable.

The Claimant has established good cause for the untimely appeal because he did not receive the decision until after the time to timely file an appeal had passed, and he filed an appeal within ten days of receiving the decision. Therefore, the Administrative Law Judge has jurisdiction to consider the merits of the case.

### Separation

The Unemployment Insurance Rules provide in Section 35A-4-405(2)(a) that a separation is a discharge if the Employer is the moving party in determining the date the employment ended. The Unemployment Insurance Rules provide in Section 35A-4-405(1) that a separation is a voluntary quit if the Claimant is the moving party in determining the date the employment ended. The Employer argues that the Claimant was the moving party in the separation because he failed to appear to work as scheduled on August 21, 2008, thereby abandoning his job. The Claimant also failed to appear to work the following Monday and applied for assistance the same day, making it apparent that the Claimant did not intend to return to work. Therefore, the Claimant was the moving party in determining the date the employment ended and the separation is a voluntary quit.

Section 35A-4-405(1) of the Utah Employment Security Act provides that an individual is ineligible for benefits or for purposes of establishing a waiting period if a claimant left work voluntarily without good cause or if a denial of benefits would not be contrary to equity and good conscience. The unemployment insurance rules pertaining to this section provide, in part:

#### **R994-405-102. Good Cause.**

To establish good cause, a claimant must show that continuing employment would have caused an adverse effect which the claimant could not control or prevent. The claimant must show an immediate severance of the employment relationship was necessary. Good cause is also established if a claimant left work which is shown to have been illegal or to have been unsuitable new work.

- (1) Adverse Effect on the Claimant.
  - (a) Hardship.

The separation must have been motivated by circumstances that made the continuance of the employment a hardship or matter of concern, sufficiently adverse to a reasonable person to outweigh the benefits of remaining employed. There must have been actual or potential physical, mental, economic, personal or professional harm caused or aggravated by the employment. The claimant's decision to quit must be measured against the actions of an average individual, not one who is unusually sensitive.

(b) Ability to Control or Prevent.

Even though there is evidence of an adverse effect on the claimant, good cause may not be established if the claimant:

- (i) reasonably could have continued working while looking for other employment, or
- (ii) had reasonable alternatives that would have made it possible to preserve the job. Examples include using approved leave, transferring, or making adjustments to personal circumstances, or,
- (iii) did not give the employer notice of the circumstances causing the hardship thereby depriving the employer of an opportunity to make changes that would eliminate the need to quit. An employee with grievances must have made a good faith effort to work out the differences with the employer before quitting unless those efforts would have been futile.

The Claimant did not quit because he was required by the Employer to violate the law. His legal rights were not violated, nor did the Employer refuse to comply with the law. Further, he did not quit because the work itself was unsuitable. The Claimant quit because his feet had become swollen after walking from the bus to the work site and back three days in a row. The Claimant was harmed by the change in his transportation and the pain it caused in his feet. However, he did not notify the Employer of the problem with his transportation and made no effort to notify the Employer that he was unable to work. Had he notified the Employer of the problem with his feet, the Employer might have been able to give him time off or helped him find alternative transportation, such as having a coworker pick him up at the bus stop. Therefore, good cause for quitting has not been established.

The unemployment insurance rules pertaining to Section 35A-4-405(1) of the Utah Employment Security Act provide, in pertinent part:

**R994-405-103. Equity and Good Conscience.**

(1) If the good cause standard has not been met, the equity and good conscience standard must be applied in all cases except those involving a quit to accompany, follow, or join a spouse as outlined in Section R994-405-104. If there are mitigating circumstances, and a denial of benefits would be unreasonably harsh or an affront to fairness, benefits may be allowed under the provisions of the equity and good conscience standard if the following elements are satisfied:

- (a) the decision is made in connection with the employer;
- (b) the claimant acted reasonably;
- (c) the claimant demonstrated a continuing attachment to the labor market.

(2) The elements of equity and good conscience are defined as follows: . . .

(b) The Claimant Acted Reasonably.

The claimant acted reasonably if the decision to quit was logical, sensible or practical. There must be evidence of circumstances which, although not sufficiently compelling to establish good cause, would have motivated a reasonable person to take similar action. Behaviors that may be acceptable to a particular subculture do not establish what is reasonable.

(c) Continuing Attachment to the Labor Market.

A continuing attachment to the labor market is established if the claimant took positive actions which could have resulted in employment during the first week subsequent to the separation and each week thereafter. Evidence of an attachment to the labor market may include: making contacts with prospective employers, preparing resumes, and developing job leads. An active work search should have commenced immediately subsequent to the separation whether or not the claimant received specific work search instructions from the Department. Failure to show an immediate attachment to the labor market may not be disqualifying if it was not practical for the individual to seek work. Some examples of circumstances that may interfere with an immediate work search include illness, hospitalization, incarceration, or other circumstances beyond the control of the claimant provided a work search commenced as soon as practical.

The Claimant has shown that he had an immediate attachment to the labor market after voluntarily quitting his position. However, he has not established that it was reasonable, practical, or logical to quit prior to checking every reasonable avenue to preserve the job. It was not reasonable for the Claimant to fail to advise the Employer of his problems with his feet. The Claimant could have found some way to contact the Employer before the end of the 10-hour shift, even if his motel room did not have a telephone. Therefore, the standards of equity and good conscience have not been met. Benefits are denied.

### **Employer Charges**

An employer may be relieved of charges when a claimant was separated from employment for reasons which would have resulted in a denial of benefits under Section 35A-4-405(1) or Section 35A-4-405(2) of the Act. In this case, the reason for the Claimant's separation is disqualifying, therefore, the Employer is relieved of charges.

### **DECISION AND ORDER:**

#### **Timeliness of Appeal**

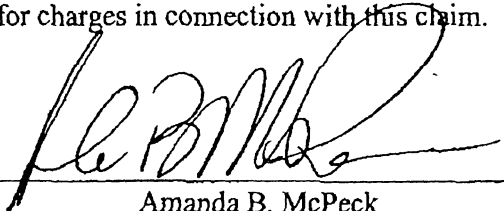
Good cause for the late filing of the appeal was established pursuant to Section 35A-4-406(3) of the Utah Employment Security Act. The Administrative Law Judge, therefore, has jurisdiction to consider the merits of the case.

**Separation**

The Department's decision denying unemployment insurance benefits pursuant to the provisions of Section 35A-4-405(1) of the Utah Employment Security Act is herein affirmed. The Claimant is denied unemployment insurance benefits effective January 25, 2009, and continuing until the Claimant has performed services in bona fide covered employment and earned wages for those services equal to at least six times his weekly benefit amount and is otherwise eligible.

**Employer Charges**

The Department's decision relieving the Employer of charges for its prorated share of benefit costs paid to the Claimant pursuant to the provisions of Section 35A-4-307 of the Utah Employment Security Act is herein affirmed. The Employer is relieved of liability for charges in connection with this claim.

  
\_\_\_\_\_  
Amanda B. McPeck  
Administrative Law Judge  
DEPARTMENT OF WORKFORCE SERVICES

Issued: **March 30, 2009**

ABM/kf

Form BRDEC  
ISSUE 01

WORKFORCE APPEALS BOARD  
Department of Workforce Services  
Division of Adjudication

KENNETH BOWDREY, CLAIMANT  
S.S.A. No. XXX-XX-4451

:

:

Case No. 09-B-00367

PACIFIC FLYWAY WHOLESALE,  
EMPLOYER

:

**DECISION OF WORKFORCE APPEALS BOARD:**  
The decision of the Administrative Law Judge is affirmed.  
Benefits are denied.  
The Employer is eligible for relief of benefit charges.

**HISTORY OF CASE:**

In a decision dated March 30, 2009, Case No. 09-A-03262, the Administrative Law Judge affirmed a Department decision and denied unemployment insurance benefits to the Claimant effective January 25, 2009. The Employer, Pacific Flyway Wholesale, was found eligible for relief of benefit charges in connection with this claim.

**JURISDICTION OF WORKFORCE APPEALS BOARD:**

The Workforce Appeals Board has authority to review the Administrative Law Judge's decision pursuant to §35A-4-508(4) and (5) of the Utah Employment Security Act and the Utah Administrative Code (1997) pertaining thereto.

**CLAIMANT APPEAL FILED:** April 3, 2009.

**ISSUES BEFORE WORKFORCE APPEALS BOARD AND APPLICABLE PROVISIONS OF UTAH EMPLOYMENT SECURITY ACT:**

1. Did the Claimant have good cause to quit his employment pursuant to the provisions of §35A-4-405(1)?
2. Is it contrary to equity and good conscience to deny unemployment insurance benefits pursuant to the provisions of §35A-4-405(1)?
3. Is the Employer eligible for relief of charges pursuant to the provisions of §35A-4-307(1)?

**FACTUAL FINDINGS:**

The Workforce Appeals Board adopts in full the factual findings of the Administrative Law Judge.

**REASONING AND CONCLUSIONS OF LAW:**

The Claimant worked in the Employer's shipping department and had been working the weekend shift. The Claimant and his girlfriend shared a vehicle and the Claimant was able to coordinate transportation to the weekend shift with his girlfriend. The Claimant and his girlfriend broke up and he no longer had access to a vehicle. The Claimant notified the Employer of his transportation problem, and the Employer agreed to transfer the Claimant to a day shift, Monday through Friday, so he could use public transportation to get to and from work. The Claimant worked three days on the new shift and decided it was not going to work for him, because the bus dropped him off three and one half miles from the Employer's facility. By the time the Claimant completed his shift, walked to the bus stop, and arrived home his legs were swollen. The Claimant quit going to work and did not inform the Employer of his physical condition. The Administrative Law Judge found the Claimant quit without good cause and his decision to quit was not reasonable under the standard of equity and good conscience.

On appeal to the Board, the Claimant references the case Pacheco V. Board of Review, 717 p.2d 712 (Utah 1986), as a standard for good cause. In the Pacheco case the Claimant was late filing the appeal after being told by the Administrative Law Judge to file an appeal as soon as possible rather than within the next 10 days. The court found the Claimant had good cause for the untimely appeal because the Claimant was misled by the Administrative Law Judge. The Pacheco case is not relevant to the Claimant's job separation, because there is no issue of a late filing in this case. The good cause standard the Claimant must show in quitting his job is outlined as follows:

The Unemployment Insurance Rules pertaining to Section 35A-4-405(1) of the Utah Employment Security Act provide, in pertinent part:

**R994-405-102. Good Cause.**

To establish good cause, a claimant must show that continuing the employment would have caused an adverse effect which the claimant could not control or prevent. The claimant must show that an immediate severance of the employment relationship was necessary. Good cause is also established if a claimant left work which is shown to have been illegal or to have been unsuitable new work.

(1) Adverse Effect on the Claimant.

(a) Hardship.



09-B-00367

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XXX-XX-4451  
KENNETH BOWDREY

The separation must have been motivated by circumstances that made the continuance of the employment a hardship or matter of concern, sufficiently adverse to a reasonable person so as to outweigh the benefits of remaining employed. There must have been actual or potential physical, mental, economic, personal or professional harm caused or aggravated by the employment. The claimant's decision to quit must be measured against the actions of an average individual, not one who is unusually sensitive.

(b) Ability to Control or Prevent.

Even though there is evidence of an adverse effect on the claimant, good cause will not be found if the claimant:

(i) reasonably could have continued working while looking for other employment,

(ii) had reasonable alternatives that would have made it possible to preserve the job like using approved leave, transferring, or making adjustments to personal circumstances, or,

(iii) did not give the employer notice of the circumstances causing the hardship thereby depriving the employer of an opportunity to make changes that would eliminate the need to quit. An employee with grievances must have made a good faith effort to work out the differences with the employer before quitting unless those efforts would have been futile.

(2) Illegal.

Good cause is established if the claimant was required by the employer to violate state or federal law or if the claimant's legal rights were violated, provided the employer was aware of the violation and refused to comply with the law.

(3) Unsuitable New Work.

Good cause may also be established if a claimant left new work which, after a short trial period, was unsuitable consistent with the requirements of the suitable work test in rule R994-405-306. The fact the claimant accepted a job does not necessarily make the job suitable. The longer a job is held, the more it tends to negate the argument that the job was unsuitable. After a reasonable period of time a contention the quit was motivated by unsuitability of the job is generally no longer persuasive. The Department has an affirmative duty to determine whether the employment was suitable, even if the claimant does not raise suitability as an issue.

The Claimant has not shown any hardship that was caused or aggravated by his employment. The Claimant had transportation issues, and while this affected his ability to attend work, work was not the cause of his transportation issues. Furthermore, the Employer had already demonstrated a willingness to work with the Claimant by adjusting his schedule. Once the Claimant decided the adjusted schedule was not going to work, he made no effort to contact the Employer to see if there was any other alternative such as riding with a coworker. The Claimant argues on appeal that he never had a chance to speak with the Employer. However, the record shows the Claimant never attempted to speak with the Employer prior to the separation. He just simply quit coming to work.

The Board does not find the Claimant had good cause to quit his employment, nor was his decision to quit reasonable under the standard of equity and good conscience.

The Board affirms the decision of the Administrative Law Judge and adopts in full her reasoning and conclusions of law.

**DECISION:**

The decision of the Administrative Law Judge denying benefits to the Claimant effective January 25, 2009, pursuant to the provisions of §35A-4-405(1) of the Utah Employment Security Act, is affirmed.

The Employer, Pacific Flyway Wholesale, is eligible for relief of benefit charges in connection with this claim as provided by §35A-4-307(1) of the Act.

**APPEAL RIGHTS:**

Pursuant to §63-46b-13(1)(a) of the Utah Administrative Procedures Act, you may request reconsideration of this decision within 20 days from the date this decision is issued. Your request for reconsideration must be in writing and must state the specific grounds upon which relief is requested. The request must be filed with the Workforce Appeals Board at 140 East 300 South, Salt Lake City, Utah, or may be mailed to the Workforce Appeals Board at P.O. Box 45244, Salt Lake City, Utah 84145-0244. A copy of the request for reconsideration must also be mailed to each party by the person making the request. If the Workforce Appeals Board does not issue an order within 20 days after the filing of the request, the request for reconsideration shall be considered to be denied pursuant to §63-46b-13(3)(b) of the Utah Administrative Procedures Act. The filing of a request for reconsideration is not a prerequisite for seeking judicial review of this order. If a request for reconsideration is made, the Workforce Appeals Board will issue another decision. This decision will set forth the rights of further appeal to the Court of Appeals and time limitation for such an appeal.

You may appeal this decision to the Utah Court of Appeals. Your appeal must be submitted in writing within 30 days of the date this decision is issued. The Court of Appeals is located on the

## ADDENDUM D

09-B-00367

- 5 -

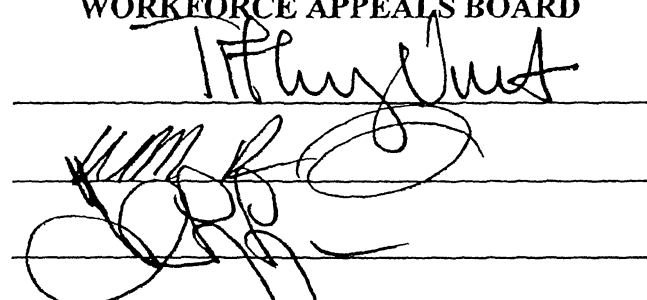
XXX-XX-4451  
KENNETH BOWDREY

fifth floor of the Scott M. Matheson Courthouse, 450 South State Street, P. O. Box 140230, Salt Lake City, Utah 84114-0230. The appeal must show the Workforce Appeals Board, Department of Workforce Services and any other party to the proceeding as Respondents. To file an appeal with the Court of Appeals, you must submit to the Clerk of the Court a Petition for Writ of Review setting forth the reasons for appeal, pursuant to §35A-4-508(8) of the Utah Employment Security Act; §63-46b-16 of the Utah Administrative Procedures Act; and Rule 14 of the Utah Rules of Appellate Procedure, followed by a Docketing Statement and a Legal Brief as required by Rules 9 and 24-27, Utah Rules of Appellate Procedure.

**WORKFORCE APPEALS BOARD**

Date Issued: May 18, 2009

TV/TL/WS/am/sp/ks

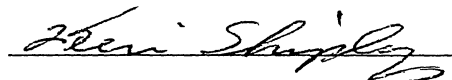
The image shows three handwritten signatures in black ink, each written over a horizontal line. The top signature is the most legible, appearing to read 'Thyng'. The middle signature is more stylized and less legible. The bottom signature is also stylized and less legible. The signatures are written in a cursive or semi-cursive style.

MAILING CERTIFICATE

I hereby certify that I caused a true and correct copy of the foregoing DECISION to be served upon each of the following on this 18th day of May, 2009, by mailing the same, postage prepaid, United States mail to:

KENNETH BOWDREY  
GENERAL DELIVERY  
SALT LAKE CITY UT 84101-9999

PERSONNEL DEPARTMENT  
PACIFIC FLYWAY WHOLESALE  
7035 HIGH TECH DR STE 100  
MIDVALE UT 84047-3759

A handwritten signature in cursive script, appearing to read "Sheri Shipley", is written over a horizontal line.

## Statement. SP - Separation (Voluntary quit)

Claimant Name KENNETH BOWDREY

Print Date 03/09/09

Claimant SSN 414 11 4451

Created By David Allen - 01/28/09

Emprid 130950-1

Answer modified?

Empr PACIFIC FLYWAY WHOLESALE

WS Name

Address 7035 HIGH TECH DR STE 100

Address

City/ST/Zip MIDVALE, UT 84047-3759

City/ST/Zip

Phone (801) 304-4300

Phone

Start Dt 05/18/07 End Dt 08/25/08

Pro Athlete

Cleared on PBY

RFS VQ - Voluntary quit

Send Med Form

Clmt Earn 6xWBA Yes

Did you retire/quit for medical or health reasons?

No

Did you give advance notice of your intention to quit?

No

Did your employer require you to leave before your intended quit date?

No

Were you paid through your intended quit date? Yes

Comment Created By David Allen 01/28/09 @ 04 45 PM

Transportation issues Clmt said he should have asked for time off but was going thru a lot of hard times Said he knows it's his fault not his employer's but he wasn't thinking straight

JUDGE            So I am trying to get into a back up system. It hasn't even pulled up Exhibit 3 for me yet. I apologize here folks I should have known it was going to happen because its Monday morning. They are always slow on Monday morning. Okay-okay then Exhibit #4 is a uh notation from uh Raquel Cook a case manager a note to the Department. Exhibit #5 is the original claim for unemployment benefits. Now this-this document is made when you open a claim. They go through all of those questions with you and all those instructions this is where that uh stays and it continues on to Exhibits #6, 7 and 8. Exhibit #9 says statement sp dash separation and then in parenthesis voluntary quit. Now when you call in to indicate or to open a claim the claims taker will ask you questions about what happened with your job and they'll put it in either a quit category or a discharge category. Uh and then they take they take notes about what you tell them about what happened. so Mr. Bowdrey if you'll look just at the middle of that page do you see the line across the page just under it says comment created by David Allen created January the 28<sup>th</sup> and then it starts talking about transportation issues and everything.

CLAIMANT        On the 8<sup>th</sup>?

JUDGE            Yeah you see oh page nine?

CLAIMANT        Uh-huh.

JUDGE            Look at the two lines right in the middle of the page that begins transportation issues. Do you see that?

CLAIMANT        No ma'am.

JUDGE            On Exhibit 9. The last two lines on the page.

CLAIMANT        Oh-oh. Yes ma'am.

JUDGE            Okay does that look like what you told the Department when you opened your claim for unemployment back in January?

CLAIMANT        Yes ma'am.

JUDGE            Okay. I just wanted to make sure they didn't write it down wrong. Now Exhibit #10 is an adjudication case note. When the Department representatives call you and ask more questions about what happened they have to take notes too so if you look at that last paragraph on Exhibit #10 Mr. Bowdrey-

CLAIMANT        Yeah I see it.

JUDGE            - where it begins my feet swelled up-

1  
2 CLAIMANT So you know and uh-  
3  
4 JUDGE Can you tell me what specifically was the situation what were the lots of things you  
5 were-  
6  
7 CLAIMANT Well I had to move I had to move out of my house you know you know they and  
8 things I had you know I had no kin people there to help me no whatsoever so I was  
9 going through a lot of stress you know a lot of headaches and all that you know so um  
0 I was constantly trying to work but what I should have done and I know I was wrong  
1 by doing that I should have uh-uh at least uh told them I need some time I was trying  
2 to straighten some things out but I want to thank him I was trying to keep my job and  
3 uh and I just want to thank him you know.  
4  
5 JUDGE Now did they did they tell you that you were fired or did-  
6  
7 CLAIMANT You know they terminated me on the 25<sup>th</sup>.  
8  
9 JUDGE What days of the week were you supposed to work what days-  
0  
1 CLAIMANT Uh they uh changed me to the weekdays but that was just temporary. I was working  
2 weekends.  
3  
4 JUDGE So did you now show up to work for a few days?  
5  
6 CLAIMANT Yes ma'am that's all you know. Just too late they didn't give me chance to do nothing  
7 you know cause you know my supervisor really didn't want me to work on that shift  
8 because he-he already know I believe he already know they wanted to get rid of me,  
9 you know-  
0  
1 JUDGE Okay.  
2  
3 CLAIMANT So, you know. And uh-  
4  
5 JUDGE Did you call oh excuse me I'm sorry.  
6  
7 CLAIMANT So that's-that's how come he really didn't want me to get on that shift, you know.  
8  
9 JUDGE Okay did you call in every day that you were gone?  
0  
1 CLAIMANT Ma'am I was I didn't have no phone or nothing you know you know I didn't have  
2 nothing and I was staying in a motel didn't have no phone so-  
3  
4 JUDGE You were in a motel that didn't have a phone?  
5

CLAIMANT Yes ma'am they it was one of them old uh this old messed up place-

JUDGE How about the front desk would they let you use the phone at the front desk?

CLAIMANT Ma'am I don't know I couldn't even walk ma'am that's all I know. It took me a couple of days before I got my feet back together.

JUDGE What was can you tell me what was going on with your feet?

CLAIMANT See ma'am look yeah for one thing I was catching the bus. You know me I have no transportation no nothing to do nothing you know me so therefore when I catch the bus they bus don't take me all the way out there. I had to get off the bus and walk about 3 and a half more miles to get to work. Then when I get to work I got to stand on my feet for eight or nine hours then I had to run back for three and a half miles trying to catch the last bus you know. That was a lot of pressure on me ma'am a lot of headaches.

JUDGE So what happened to your feet were they injured?

CLAIMANT How do you think ma'am I'm 48 years old I can't be ripping and running like that you know me. I'm 48 I'm not twenty something.

JUDGE Well I don't know you sir that's why I have to ask you the questions.

CLAIMANT Yes ma'am yeah I respect that ma'am.

JUDGE Okay. So you'd been working there for quite a while for over a year-

CLAIMANT Yes ma'am I have never missed a day of nothing when I was working there for them. I never been late for nothing.

JUDGE Up to that point?

CLAIMANT Up to that point.

JUDGE Okay so what happened to your transportation?

CLAIMANT Well the bus uh we had only one transportation at the time ma'am. so she you know she had you know I left here with the car cause she had to take the kids you know her daughter to uh school today you know so therefore that leave me with nothing.

JUDGE So you gave your girlfriend your car?

CLAIMANT We had bought it together so we gave I gave-

JUDGE You had it together.



CLAIMANT Yes ma'am.

JUDGE Okay. Okay it looked like uh from the kind of jobs that you had been doing before that you had gotten some work through staffing agencies in the past-

CLAIMANT Yes.

JUDGE Have you been keeping in contact with them?

CLAIMANT Yes ma'am I they didn't have nothing so far. I've been constant uh I been constant uh filing application everywhere at different agents (?) and different places you know so and I've been going through the company inviting (?) myself trying to get a job.

JUDGE Okay. Well Mr. Bowdrey I don't have any more questions for you today about what happened with Pacific. Can you think of anything else you'd like to tell me about that situation sir?

CLAIMANT No ma'am.

JUDGE Mr. Williams did you have any questions for Mr. Bowdrey?

WILLIAMS Uh no questions no.

JUDGE Okay. Now of the two of you gentleman there who is going to testify first you Mr. Williams or Mr. Jarvis?

WILLIAMS I'll go ahead.

JUDGE All right Mr. Williams if you could state your full legal name for the record sir.

WILLIAMS Yeah Jeremy D. Williams.

JUDGE And what is your position there with pacific?

WILLIAMS General Manager.

JUDGE Is it correct that Mr. Bowdrey worked in the shipping Department?

WILLIAMS Yes it is.

JUDGE And it is correct that he began working there in May of 2007?

WILLIAMS Yep uh 5-18 of '-07. The last day worked was August 20<sup>th</sup> of 2008.

JUDGE Okay. Now uh what was his schedule at that time what hours was he working at that point do you know?

WILLIAMS Well he was working our weekend shift which is a Friday, sturdy and Sunday shift. Twelve hour days um about a week before his uh last day worked he did tell us his situation he was going through. Uh we came to an agreement that we would put him on a shift that would uh accommodate his needs-

JUDGE You mean like the bus schedule?

WILLIAMS No uh he said that he could not work the weekend shift just for transportation reasons that he could work a first shift which is a Monday through Thursday. Uh it's a morning shift he said that getting transportation would be a whole lot easier to work that shift.

JUDGE Okay and what time does that shift start?

WILLIAMS Well at the time it was at six o'clock in the morning.

JUDGE Until when?

WILLIAMS Three thirty. So we agreed to move him to uh to the first shift which is a Monday through Thursday am uh shift. Uh he did show up for two or three days um but then after that he just quit coming to work. He didn't call anybody and it is company policy if you don't contact your employer by the end of that uh shift you are voluntarily terminated.

JUDGE So you have a one no call no show is a termination-

WILLIAMS Correct yep.

JUDGE Now he says he recalls uh contacting on Monday august 25<sup>th</sup>. Is that correct?

WILLIAMS Uh I who did you talk to I he didn't talk to me?

JUDGE Okay but I he didn't talk to you on Monday?

WILLIAMS No.

JUDGE Did he ever return or call you that you recall?

WILLIAMS Nope never talked to me personally ma'am.

JUDGE Okay. Now how do you make or do you let me rephrase this sorry. Do you have like an employee manual that says one no call no show?

1 WILLIAMS Yes we do. Uh anytime we hire an employee they are given an employee packet and  
2 through that uh packet it pretty much tells them all of our procedures policies and  
3 procedures. And under attendance uh it does that uh if you do your no call no show  
4 you are you have uh voluntarily quit your employment.  
5  
6 CLAIMANT But excuse me I object on that Your Honor. Uh for one thing they stated that it's a no  
7 show no call but I know a lady that worked there once before-  
8  
9 JUDGE Mr. Bowdrey-  
0  
1 CLAIMANT Wait a minute wait a minute-  
2  
3 JUDGE No you need to listen to me.  
4  
5 CLAIMANT Yes ma'am.  
6  
7 JUDGE You can tell me that in just a moment. Right now Mr. Williams is on the stand.  
8  
9 CLAIMANT Yes ma'am.  
10  
11 JUDGE Okay and I understand your that your objecting to what he is saying-  
12  
13 CLAIMANT Yes.  
14  
15 JUDGE But he gets the right to tell me his side of the story and then I will let you respond to  
16 his testimony in a moment okay?  
17  
18 CLAIMANT All right. Thank you ma'am.  
19  
20 JUDGE Your welcome. All right Mr. Williams since I don't have any other questions for you  
21 is there anything else that you would like to add to your testimony?  
22  
23 WILLIAMS Um other than the fact that Ken things we were out to terminate him to get rid of him  
24 that's definitely not the case. I mean we have documentation saying that Ken was a  
25 great employee. You know he's won employee of the month award. I mean up to this  
26 point I mean he was a great employee but this is he violated company policy. I mean  
27 that's the fact right there he even admitted so-so that's pretty much all I have to say.  
28  
29 JUDGE Now Mr. Bowdrey do you have questions you'd like to ask Mr. Williams?  
30  
31 CLAIMANT Yes-yes of course. Uh they say that three days of strikes you out of there but I recall a  
32 person that was working there once before and uh I'm not mistaken she didn't call one  
33 notsoever but she still had a job. That's what I can't understand.  
34  
35 JUDGE Okay Mr. Williams are let me help you let me turn this into a question.

and so you know I agreed and he was moved to my shift and then I believe um he was there only one or two days that I recall.

JUDGE Did you have any problems with his work?

JARVIS No.

JUDGE Did you have room for him on you team?

JARVIS Yes we did.

JUDGE Okay. I don't have any further questions for you Mr. Jarvis. Can you think of anything else you'd like to tell me?

JARVIS Um I would just second uh what Jeremy Williams just said is that um you know Ken was in good standing with our company as an outstanding employee on the third shift and uh you know we were willing and able to help by moving him to another shift and were very wiling to help him through some of the things but as Jeremy mentioned earlier our company policy is no call no show and it's a voluntary abandonment of their position so according to-to our company policy is that I am required to follow and uphold as a manager I-I didn't have any choice but to terminate him.

JUDGE Mr. Williams did you have any other questions for Mr. Jarvis?

WILLIAMS No I don't.

JUDGE Okay. Mr. Bowdrey did you have questions for Mr. Jarvis?

CLAIMANT No I just wanted uh-

JUDGE Would you like to add something to your testimony?

CLAIMANT I'd just like to you know thank them for giving me the opportunity and uh I did make the mistake so you know and um so that's all I got.

JUDGE You I had one other question for you Mr. Bowdrey. You had said before that you knew you were terminated on the 25<sup>th</sup>. How did you find that out?

CLAIMANT Uh I was trying to get some kind of assistance at the moment I think it was and they called the place and uh that's how I found out.

JUDGE So like at Workforce services a case worker called for you?

CLAIMANT Yes ma'am.