

2009

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

Utah Court of Appeals

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IN THE UTAH COURT OF APPEALS

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KENNETH BOWDREY,

Appellant,

v.

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

Appellees.

**BRIEF OF APPELLANT**

Case No. 20090503-CA

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UTAH APPELLATE COURTS

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**TABLE OF CONTENTS**

Table of Authorities.....	4
Jurisdictional Statement.....	5
Statement of Issues.....	5
Standard of Review.....	5
Statutory Provisions.....	6
Statement of the Case.....	6
Statement of Facts.....	6
Summary of Argument.....	8

Argument.....10

Conclusion.....15

Signature of Counsel of Record.....16

Proof of Service.....16

Addendum (Final Decision of Workforce Services).....17

## **TABLE OF AUTHORITIES**

1. Utah Code Ann. § 35A-4-508(8)(a)(1998)
2. Utah Code Ann. §63G-4-403(4)(g)(2008)
3. *Robinson v. Dept. of Employment Security*, 827 P.2d 250, 252 (Utah Ct. App. 1992)
4. *Arrow Legal Solutions Group, Inc. v. Dept. of Workforce Services*, 156 P.3d 830, 832 (Utah Ct. App. 2007)
5. Utah Admin. Code R 994-405-201
6. *Martinez v. Media-Paymaster Plus/Church of Jesus Christ of Latter-Day Saints*, 164 P.3d 384, 391 (Utah 2007)
7. *Grace Drilling Co. v. Bd. Of Review of Indus. Comm’n*, 776 P.2d 63, 68 (Utah Ct.App. 1989)
8. *Adams v. Bd. of Review of the Industrial Commission of Utah*, 776 P.2d 639, 642 (Utah Ct. App. 1989)
9. *Johnson v. Dept. of Employment Sec.*, 782 P.2d 965, 968 (Utah Ct. App. 1989)
10. *Brown v. Workforce Appeals Board*, 1999 WL 33244666 (Utah Ct. App. 1999)
11. Utah Admin.Code R. 994-405-102
12. Utah Admin.Code R. 994-405-103
13. Utah Admin. Code R. 994-405-101(1).
14. *Salt Lake City Corp. v. Dept. of Employment Sec.*, 657 P.2d 1312, 1317 (Utah 1982).

### **JURISDICTIONAL STATEMENT**

Court of Appeals has jurisdiction of appeals from the Work Force Appeals Board pursuant to Utah Code Ann. § 35A-4-508(8)(a)(1998).

### **STATEMENT OF ISSUES**

1. Whether Bowdrey voluntarily quit or was discharged by his employer.
2. If Bowdrey did voluntarily quit, whether good cause existed for quitting.
3. If he did quit, and good cause did not exist, whether Bowdrey should have received unemployment benefits under the standard of equity and good conscience.

### **STANDARD OF REVIEW**

1. Factual Findings by the Department of Work Force Appeals Board are a mixed question of law and fact and are therefore reviewable under a substantial evidence standard of review. *Utah Code Ann. §63G-4-403(4)(g)(2008).*
2. The Board's decision regarding voluntariness is reviewable under an abuse of discretion standard. *Robinson v. Dept. of Employment Security*, 827 P.2d 250, 252 (Utah Ct. App. 1992).

### **STATUTORY PROVISIONS**

1. Utah Code Ann. § 35A-4-508(8)(a)(1998)
2. Utah Code Ann. §63G-4-403(4)(g)(2008)
3. Utah Admin. Code R 994-405-201
4. Utah Admin. Code R. 994-405-102
5. Utah Admin. Code R. 994-405-101(1)
6. Utah Admin. Code R. 994-405-103

### **STATEMENT OF CASE**

Bowdrey was discharged and therefore, did not voluntarily quit. Even if he did voluntarily quit, he had good cause. Bowdrey's discharge was in contradiction to the standard of equity and good conscience.

### **STATEMENT OF FACTS**

The following facts are undisputed.

1. Kenneth Bowdrey ("Bowdrey") was employed by Pacific Flyway Wholesale for over one year. [Apx 029 ]
2. In August 2008 Bowdrey switched working from the weekend shifts to weekday shifts. The shift started on Monday and concluded on the following Thursday. [Apx 030]



3. Bowdrey missed work on Thursday, August 21, 2008. [Apx 025]
4. On the following work day, Monday, August 25, 2008, Bowdrey's employer confirmed by telephone with a Workforce Services caseworker that Bowdrey was not working at the company. [Apx 034]
5. His employer determined that in accordance with its written policy, Bowdrey voluntarily quit for failing to telephone the employer on August 21, 2008. [Apx 034]
6. During the first and only week Bowdrey worked the day shift, he did not have a car. Instead, he took the bus to the stop nearest his employer, then walked over three miles to his place of employment and then back to the stop upon completion of his shift. Bowdrey developed resulting leg and foot problems and could not go to work. [Apx 027]
7. Bowdrey moved into a motel that did not have a telephone in the room. [Apx 026-27]
8. Because Bowdrey had foot problems, he could not walk to the front desk to see if a phone was available. [Apx 027]
9. Before Bowdrey was released he had never missed a day of work. [Apx 027]
10. Bowdrey was never late for work. [Apx 027]

11. Bowdrey thought that the employer had a “three strikes” rule. [Apx 032]

12. According to his employer, Bowdrey was a great employee, outstanding, and received an award of Employee of the Month. [Apx 031, 034]

The following fact is disputed:

1. Whether a written policy existed calling a failure to contact an employer a voluntary quit. [Apx 034]

**SUMMARY OF ARGUMENT**

The employer denied unemployment benefits to Bowdrey. Appellee Board abused its discretion in determining that Bowdrey was the “moving party” pursuant to Utah Code Ann. §35A-4-405, Utah Admin. Code R994 - 405 -201. Bowdrey did not voluntarily quit. Rather, he was discharged by his employer for failing to appear at work for one day. Bowdrey’s shift had recently changed from weekends to weekdays, as the result of personal reasons. At the time of his termination, he had just started that week (in August 2008) working ten hours per day, Mondays through Thursdays. He was not therefore scheduled to work Friday to Sunday. His employer claimed to have a “no show” policy that required immediate termination but failed to produce the policy before the telephonic administrative hearing.

Bowdrey failed to show up for work, for the first time ever, because he had health issues (swollen feet.) No phone existed in his run-down motel room, so he could not call his employer. His employer knew of his personal situation but did not know about the lack of phone use.

Because the employer determined Bowdrey's final day of work, the employer became the "moving party," and Bowdrey was therefore discharged. In accordance with Utah Code Ann. §35A-4-405, R 994 – 405-102, then, the Board's determination that Bowdrey did not have "good cause" to quit was not supported by substantial evidence.

A review of the "totality of the employment situation," including the record as a whole, shows that the Board did not produce the best evidence that Bowdrey violated written company policy-the policy itself. At the administrative hearing (which factual findings were adopted by the Appeals Board), the employer merely testified as to the existence of the policy. It gave a brief summary of the alleged language of the policy. The record therefore contains no evidence of Bowdrey's purported violation.

In the alternative, even if Bowdrey did not have "good cause" to quit, mitigating factors existed to support the exception to the "good cause" provision of the statute: "equity and good conscience." In accordance with Utah Code Ann. §35A-4-405(1), Utah Admin. Code R-994-405-102 and -103, Bowdrey

suffered hardship and had no reasonable alternative to missing work for one day. The following facts were uncontested: Bowdrey did not have personal transportation, his employer knew of his situation and thereby changed Bowdrey's shift from a weekend one to a ten-hour per day shift, Mondays to Thursdays, no phone existed in Bowdrey's motel room, Bowdrey did not know if the people at the front desk of the motel (a shoddy one) would allow him to use their phone, and as the result of walking three and one-half miles to work, from the bus stop, he injured his feet. Bowdrey was entitled to unemployment benefits.

### **ARGUMENT**

Utah Code Ann. §63G-4-403(4)(g)(2008) provides that a person is ineligible for benefits if that person "left work voluntarily without good cause, if so found by the Division. . . ." Voluntarily leaving employment without good cause makes a claimant ineligible for unemployment benefits. *See, Robinson v. Dept. of Employment Security*, 827 P.2d 250, 252 (Utah Ct. App. 1992) [citing the statute's predecessor, §63-46b-16(4)(g) (1997)]. On the other hand, discharge without cause makes one eligible for benefits.

#### **I. BOWDREY WAS DISCHARGED WITHOUT CAUSE.**

The employer made the first step in determining the date of the actual separation. *Arrow Legal Solutions Group, Inc. v. Dept. of Workforce Services*, 156 P.3d 830, 832 (Utah Ct. App. 2007) (citing Utah Admin. Code R 994-405-201.)

By making the initial move to terminate the relationship, the employer discharged Bowdrey. *Id.* During the hearing, the employer failed to produce a copy of the relevant portions of the employment handbook, purportedly showing that any failure to contact the employer would be considered as a voluntary quit. In fact, Bowdrey thought that the employer had a “three strikes” rule, indicating his perception of the actual policy. The employer testified otherwise. Testimony of the employment policy, without its production, constituted hearsay and a violation of the best evidence rule.

## **II. IF BOWDREY VOLUNTARILY QUIT, GOOD CAUSE EXISTED FOR QUITTING.**

In determining whether an agency decision is supported by substantial evidence, this court must consider the whole record before the lower court. Utah Code Ann. § 63G-4-403(4)(g) . The whole record review under the substantial evidence test considers the evidence in support of the administrative finding, as well as evidence that detracts from the finding. *Id.* (Cited in *Martinez v. Media-Paymaster Plus/Church of Jesus Christ of Latter-Day Saints*, 164 P.3d 384, 391 (Utah 2007). To successfully challenge an agency’s factual findings, the party “must marshal [sic] all of the evidence supporting the findings and show that despite the supporting facts, and in light of the conflicting or contradictory evidence, the findings are not supported by substantial evidence.” *Id.* at 390.

“Substantial evidence exists when the factual findings support ‘more than a mere scintilla of evidence...though something less than the weight of the evidence.’” *Grace Drilling Co. v. Bd. Of Review of Indus. Comm’n*, 776 P.2d 63, 68 (Utah Ct.App. 1989.)

In this case, a review of the whole record reveals that the ALJ made her decision solely based upon testimony of the employer and Bowdrey. The employer based his testimony on a purported employment policy that it did not produce. Specifically, the employer testified that the company had a policy where if one did not show up for work or call by the end of the shift, the person would be considered to have voluntarily quit. Bowdrey did not have the opportunity to review the policy or to examine the employer on its contents. The employer’s testimony was therefore hearsay and a violation of the best evidence rule. Since the policy must be disregarded, less than a “mere scintilla” of evidence was produced, precluding the existence of substantial evidence.

Good cause is a mixed question of law and fact. *See, Adams v. Bd. of Review of the Industrial Commission of Utah*, 776 P.2d 639, 642 (Utah Ct. Appeals 1989). The Board’s application of law to its factual findings will not be disturbed unless its determination “exceeds the bounds of reasonableness and rationality.” *Johnson v. Dept. of Employment Sec.*, 782 P.2d 965, 968 (Utah Ct. App. 1989). “To establish good cause, a claimant must show that continuing

employment would have caused an adverse affect which the claimant could not control or prevent. The claimant must show an immediate severance of the employment relationship was necessary.” Utah Admin.Code R. 994-405-102.

Bowdrey had good cause not to show for work or call during that one day. He testified that he did not have a phone and that he suffered from swollen feet from walking over six miles per day and additionally standing on his feet for eight to nine hours per day. He had just lost the use of his car and to move from his previous home into a motel room. He explained the situation to his employer who initially accommodated him by changing Bowdrey’s shift the week before Bowdrey was released. Bowdrey therefore could not comply with the alleged policy. As a result, Bowdrey was not the “moving party” in ending the employment relationship. Utah Admin. Code R. 994-405-101(1). The employer was the moving party because it discharged Bowdrey. *Id.* 994-405-201. Bowdrey had no intentions of quitting his job. *See, Arrow*, 156 P.3d at 832.

The separation was “ motivated by circumstances which made continuation of the employment a hardship or matter of real concern sufficiently adverse to a reasonable person to outweigh the benefits of remaining employed.” Utah Admin. Code R. 994-405-201 (cited in *Brown v. Workforce Appeals Board*, 1999 WL 33244666 (Utah App. 1999) It was reasonable and prudent for Bowdrey to not go into work on that Thursday and not to call. The undisputed testimony

shows that he had no access to a phone. Significantly, he had to walk almost seven miles per day, thereby injuring his feet while trying to get to work. Bowdrey's decision to protect his health was therefore reasonable.

Bowdrey's employer had awarded Bowdrey as "Employee of the Month." The employer testified that Bowdrey was an outstanding and excellent employee. The employer had never issued any written warnings to Bowdrey regarding his job performance. *See, Arrow*, 156 P.3d at 831. Bowdrey had never missed a day of work before this incident and in fact had worked at the employer for over one year. He was never late. The employer therefore knew that Bowdrey was reliable and responsible. Bowdrey only missed one day. The employer therefore understood that unusual circumstances must have existed for Bowdrey not to show up.

### **III. UNDER THE STANDARD OF EQUITY AND GOOD CONSCIENCE, BOWDREY SHOULD NOT HAVE BEEN RELEASED.**

In determining if the Board's decision was contrary to the equity and good conscience standard, the court must assess "the totality of the employment situation" before awarding benefits under this standard. *Adams v. Bd. of Review*, 776 P.2d at 641 (citing *Salt Lake City Corp., v. Dept. of Employment Sec.*, 657 P.2d 1312, 1317 (Utah 1982)). Even if Bowdrey were determined to have made the initial move to separate the relationship, equity and good conscience required the employer to maintain Bowdrey's employment status. As previously discussed,



Bowdrey had not been disciplined, had received an Employee of the Month award, was noted to be an excellent and outstanding employee, and endured physical pain in walking almost seven miles per day from the bus stop, and did not have access to a telephone. He had no reasonable basis to believe he would be released. He only missed one day of a new shift. The employer suffered no harm.

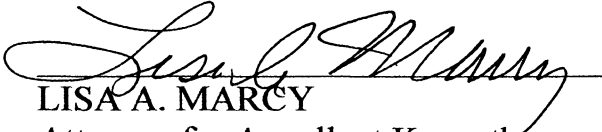
### **CONCLUSION**

No employment policy requiring the employer to consider Bowdrey's failure to contact it as a voluntary quit was put into evidence. The employer's testimony about the policy therefore constituted hearsay and a violation of the best evidence rule. Since existence of the policy must be disregarded, the employer took the first step to terminate the relationship between Bowdrey and it. The employer discharged Bowdrey.

Even if Bowdrey were deemed to have voluntarily quit, good cause existed for his reasons not to call the employer for only one day. Moreover, in reviewing the "totality of the circumstances," equity and good conscience require that Bowdrey receive unemployment compensation.

DATED this 3<sup>rd</sup> day of May, 2010.

MARCY LAW FIRM, LLC

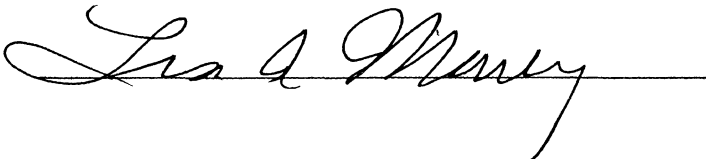
  
LISA A. MARCY  
Attorney for Appellant Kenneth  
Bowdrey

**CERTIFICATE OF DELIVERY**

I hereby certify that on the 4th day of May, 2010, I caused a true and correct copy of the foregoing APPELLANT'S BRIEF to be served upon the following in the manner indicated:

☒ Mail  
☐ Fax (also by stipulation)  
☐ Fed Ex  
☐ Hand Delivery  
☐ Personally Served  
☐ Email

Suzan Pixton  
Attorney for Appellee WORK FORCE  
APPEALS BOARD  
DEPARTMENT OF WORKFORCE  
SERVICES  
140 East 300 South  
Salt Lake City, UT 84145-0244



**ADDENDUM**

**DECISION OF WORKFORCE SERVICES BOARD**

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.

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.

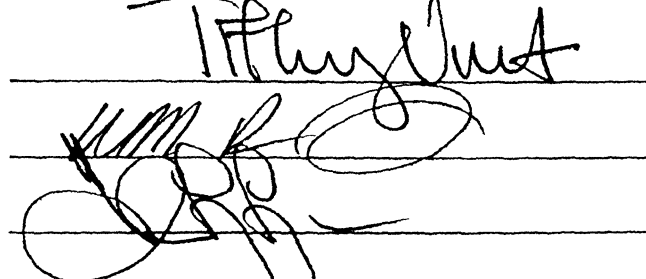
You may appeal this decision to the Utah Court of Appeals. Your appeal must be submitted in writing within 30 days of the date this decision is issued. The Court of Appeals is located on the

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.

Date Issued: May 18, 2009

TV/TL/WS/am/sp/ks

WORKFORCE APPEALS BOARD

Three handwritten signatures are written on three horizontal lines. The top signature is 'Thyng', the middle one is 'M. R.', and the bottom one is 'J. R.'.



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

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PACIFIC FLYWAY WHOLESALE  
7035 HIGH TECH DR STE 100  
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