

2015

## **Kenneth L. Gray v. Department of Workforce Services, Workforce Appeals Board and State of Utah : Brief of Appellant**

Utah Court of Appeals

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**IN THE UTAH COURT OF APPEALS**

KENNETH L. GRAY,

Petitioner,

v.

DEPARTMENT OF WORKFORCE  
SERVICES, WORKFORCE APPEALS  
BOARD and STATE OF UTAH

Respondents.

**BRIEF OF APPELLANT**

Case No. 20150<sup>420</sup>~~202~~-CA

Appeal from the Decision of the  
Workforce Appeals Board Dated April 30, 2015

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FILED  
UTAH APPELLATE COURTS

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## STATEMENT OF JURISDICTION

The Utah Court of Appeals has jurisdiction of this appeal under Utah Code Section 35A-4-508(8)(a).

## STATEMENT OF THE ISSUES / STANDARDS OF REVIEW

### A. Was Petitioner Denied His Constitutional Right to Due Process?

Claiming authorization under Section 35A-4-406(4) of the Utah Employment Security Act, the Administrative Law Judge (“ALJ”) (1) accused Petitioner of fraud, (2) then ruled that Petitioner was guilty of fraud, (3) then levied a fine for allegedly being guilty of fraud, and (4) then Respondent placed a lien on Petitioner’s property, all with no due process of law.

### STANDARDS OF REVIEW:

#### 1. *Constitution of the United States of America, Amendment XIV:*

No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Petitioner filed for unemployment benefits, that were granted for good cause.

Petitioner was truthful in relaying all pertinent facts to the Department of Workforce Services (“DWS”). The decision of the DWS is their responsibility, and Petitioner should not be penalized for it. He has not at anytime changed his testimony and denies the allegation of fraud. Petitioner was honest in all proceedings related to this case. For the charge of fraud the following due process requirements apply:

2. *Constitution of the United States of America*, Amendment VI:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

**B. Was the Testimony of the Main Witness Impeachable?**

STANDARDS OF REVIEW:

1. There is a glaring damaging difference in testimony given in the ALJ Hearing as compared to previous written documents. In December 2014 and January 2015, Petitioner's supervisor, Jake Payne, recognized in writing the fact that he was assigning Petitioner (1) a new assignment and new type of work—prolonged data entry, and (2) that an average employee could complete the task in about two hours a day.
2. Due to severe arthritis in his hands, fingers and wrists, Petitioner, who is 74 years old, found the new task took three to four hours a day.
3. Mr. Payne's sworn testimony in the ALJ Hearing was vastly different than his previous written statements and therefore impeachable, as he asserted under oath that the assignment was not new and could be completed daily in a few minutes. If these sworn assertions by Payne had been true, Petitioner would never have resigned.
4. The ALJ and Workforce Appeals Board ("the Board") took Mr. Payne's new sworn testimony to mean Petitioner had no good cause to resign, and they therefore falsely ruled accordingly.

**C. Was a Statutorily Unqualified Witness Allowed to Testify?**

STANDARDS OF REVIEW:

1. Damaging testimony was provided by Angela Abbott, Department of Human Resources Management (“DHRM”), who has no personal knowledge regarding the events in this case. She did not work for Department of Technology Services (“DTS”). Ms. Abbott did not meet the minimum requirement to testify against or for Petitioner or anyone else at DTS, as follows:

A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.

Utah Rules of Evidence, Rule 602. Need for Personal Knowledge. *emphasis added*

2. Ms. Abbott had no personal knowledge regarding the matter about which she testified under oath, and her testimony was damaging and inaccurate.

**D. Was the Original Decision Legally Sound and Proper?**

STANDARDS OF REVIEW:

1. On March 13, 2015, the DWS ruled that Petitioner resigned for “Good Cause.” It must be proven that this was in error. Both sides in this case were interviewed before the decision was made. The burden of proof lies with the ALJ and the Board to prove that this thoughtful, legally sound and proper decision was in error:

Good Cause for VQ [voluntary quit] present. The Adverse Effect with respect to the VQ decision was medical based on the nature of the work the Clmt [claimant] was required to perform. Despite being on the job for awhile with data input responsibilities, there is evidence to suggest that this requirement changed towards the end of the Clmt’s time working here.

The Clmt did try to seek relief from the Employer on several levels but none of Clmt's proposals were acceptable to the Employer. . . .

Original DWS Decision, *Record of Index*, Exhibit 30.

2. Good cause is . . . established if a claimant left work which is shown . . . to have been unsuitable new work.

U.C.A. R994-405-102.

3. 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.

U.C.A. R994-405-102.

4. "The conduct [of the employer] complained of must have been severe or pervasive enough to create an objectively hostile or abusive work environment, and additionally the plaintiff must subjectively perceive the environment to be abusive." *Johnson v. Runyon*, 137 F.3d 1081, 1083 (8th Cir. 1998) . . . A plaintiff may satisfy this intent requirement by showing the intolerable situation created by the employer was such that the employer could reasonably foresee that the employee would quit.

*Tatom v. Georgia-Pacific Corp.*, 228 F.3d 926, 932 (8th Cir. 2000) [defining "constructive discharge"].

### STATEMENT OF THE CASE

1. Due to sudden persistent abusive treatment by his employer, Petitioner was forced to resign effective February 6, 2015. He then applied for over 100 jobs, was invited to about 20 interviews, and finally was hired to a temporary part-time position on July 6, 2015, and he continues to seek full-time employment. He was unemployed for 21 weeks. This devastation was compounded, financially and emotionally, when he was denied unemployment benefits because the ALJ and the Board alleged he did not want to

stay employed! This alleged finding by the ALJ and the Board is absurd. It is not supported by the facts of this case, by the relevant law or by common sense.

2. In the Spring of 2014, Petitioner was offered two job opportunities; the salary for one was substantially higher than for the other. Petitioner accepted the position with DTS despite a considerably lower salary because of representations made to him about this position by DTS at that time. The decision to accept this offer was made after considerable review of all options and despite the fact that Petitioner's wife urged him to accept the other position. The ALJ and the Board's conclusion that Petitioner wanted to resign without good cause makes no sense. The forced resignation was devastating!

3. The first eight months of Petitioner's tenure with DTS, in May, June, July, August, September, October, November and December, 2014, were uneventful, in that Petitioner never once received any negative feedback, verbal or written, regarding his DBA work, skills or performance whatsoever, and he received routine compliments and statements of appreciation for helping the database users.

4. In November, 2014, Petitioner discovered a severe security violation on all servers in that password files were too easily accessible and readable and not protected from potential hackers. When he informed his supervisor, Jake Payne, of the problem, he was told to ignore it. He therefore felt he had a legal obligation to report the security violations to management. He did so, and Mr. Payne's supervisor insisted that Mr. Payne solve the problem. Mr. Payne thereupon immediately began treating Petitioner in an abusive and derogatory manner.

5. On November 28, 2014, Petitioner and another senior DBA cancelled their Thanksgiving plans so they could do a major software upgrade in the office. When the assignment was unexpectedly cancelled without notice, Petitioner filed a complaint suggesting that the older employees were treated improperly in that matter. Petitioner was then subjected to additional blatant retaliation for having filed the complaint.

6. Oracle DBA activities are generally similar in all organizations. "Daily activities" means the DBA is looking for problems by reviewing hundreds of entries in logs and reports. There is no legitimate business need to make a duplicate record of anything that is observed in DBA logs or reports because this information already exists in easily accessible, formatted, automatically produced and timely generated reports. Nevertheless, Mr. Payne gave Petitioner a new assignment that had as its goal to recopy already available data into redundant spreadsheets.

7. Petitioner has a health problem that caused him no job related difficulties in his Database Administration (DBA) profession for 19 years. Then, in December 2014, Mr. Payne began giving him new assignments that were far outside his job description (*Record of Index*, Exhibits 22-24) and contraindicated because of his health problem. *See Physician's Statement, Record of Index*, Exhibit 28. Due to severe arthritis in his hands, fingers, and wrists, Petitioner would never accept a position as a data entry clerk.

8. Petitioner asked that the most damaging new assignment be withdrawn, but Mr. Payne refused. Petitioner offered to do the assignment using a different and more state-of-the-art methodology that would provide printed copies of the data and would not

aggravate his health problem, but Mr. Payne refused to accept that feasible solution.

9. It should be noted that Petitioner never objected to minimal typing that DBAs do routinely, such as for emails, job control or creating legitimate instructive reports. Only prolonged data entry was prohibitive.

10. Petitioner was then ordered in writing to do the assignment exactly as Mr. Payne wanted it done, with no consideration for other options. David Burton threatened that disciplinary action would be taken if Jake Payne's instructions were not followed:

On December 29, 2014 Jake sent an email to you [Petitioner] providing you with the new spreadsheets, and instructions on how to use them. . . . On the following day, December 30, 2014 Jake and I met with you to discuss your assigned tasks. You were presented in that meeting with the updated spreadsheet . . . and were directed to complete it on a daily basis. As of today you still have not consistently, on a daily basis, completed this . . . as directed by Jake [therefore] disciplinary action may be taken. . . . [This assignment] should require one to two hours [each] day.  
*emphasis added*

— David Burton, IT Director  
January 9, 2015

*Record of Index*, pp. 64-67.

11. DHRM suggested that Petitioner register under the Americans with Disabilities Act ("ADA") for special accommodations, which was not acceptable to Petitioner as he had no disability that interfered with his ability to do the job he was hired to do. He was not hired to be a data entry clerk and would never have accepted such a position because of his arthritis. Applying for unneeded and unwanted ADA assistance would have probably been illegal and would no doubt interfere with Petitioner's ability to secure work in the future. Petitioner wants to work!

12. Under this threat of “disciplinary action” for not doing an assignment Petitioner could not do, which “disciplinary action” might have been termination of employment and negative references, Petitioner resigned.

13. Petitioner resigned because he could not do two, three or four hours of prolonged typing every day and for no other reason. When Mr. Payne gave Petitioner the new assignment he wrote in an email that it should be commenced immediately upon Petitioner’s arrival at work (7:00 a.m.) and completed before 9:00 a.m. Petitioner always worked four ten-hour shifts a week. *See* Addendum, Exhibit A, p. 26. At that time Mr. Payne never claimed that the new assignment could be done in less than two hours.

14. Unemployment benefits were awarded for the following reasons:

Good Cause for VQ [voluntary quit] present. The Adverse Effect with respect to the VQ decision was medical based on the nature of the work the Clmt [claimant] was required to perform. Despite being on the job for awhile with data input responsibilities, there is evidence to suggest that this requirement changed towards the end of the Clmt’s time working here. The Clmt did try to seek relief from the Employer on several levels but none of Clmt’s proposals were acceptable to the Employer. . . .

Original DWS Decision, *Record of Index*, Exhibit 30.

15. After Petitioner had received unemployment benefits for a few weeks, DTS requested a hearing. In spite of the reason for which Petitioner resigned, and in spite of the fact that Mr. Payne wrote that the new assignment should be commenced immediately upon Petitioner’s arrival at work (7:00 a.m.) and completed before 9:00 a.m., knowing that Petitioner began work at 7:00 a.m., Mr. Payne gave false sworn testimony at the ALJ Hearing that the new data entry assignment took only a few minutes each day.

16. If the objectionable assignment had taken only a few minutes each day, it would not have required prolonged typing, resulting in stiffness, pain and deterioration of the arthritic condition, and Petitioner would not have resigned. At the age of 74, Petitioner felt it unwise to accept deterioration and aggravation of his arthritic condition.

17. Based on Mr. Payne's false sworn testimony, and quoting this several times, the ALJ reversed the initial decision, and on appeal to the Workforce Appeals Board, that Board did not reverse the ALJ's reversal.

18. The ALJ and the Board showed a preference for Mr. Payne's claim that the new assignment required only a few minutes, and only "550 key strokes" a day, not realizing that estimate pertained to only one small part of the new task—inserting a time stamp after each record was typed into the spreadsheet, which Payne originally estimated would take two hours.

19. Petitioner thereupon filed this Petition with the Utah Court of Appeals.

### **SUMMARY OF ARGUMENTS**

A. The ALJ and the Board's conclusion that the ALJ could (1) accuse Petitioner of fraud, (2) rule that Petitioner was guilty of fraud, and (3) levy a fine and place a lien on Petitioner's property for allegedly being guilty of fraud, all with no due process of law, is unconstitutional. This blindly exercised denial of due process by State officials is an egregious abuse of authority and must be overturned.

B. The decisions of the ALJ and the Board were based on the impeachable falsified testimony of the main witness. This is proven in a copy of an email that was not available or expected to be needed at the ALJ Hearing. No one fathomed that a sworn

witness would suddenly claim that a two-hour plus new assignment could be accomplished in a few minutes. Mr. Payne never made such a bizarre claim until he testified at the ALJ Hearing. Mr. Payne falsely testified that the new assignment only took 550 typing key strokes (which even a child could do in a few minutes). That estimate pertained to only one small part of the new task—inserting a time stamp after each record was typed into the spreadsheet.

Fortunately, after a difficult search, Petitioner obtained a copy of a critical email in time for inclusion in this Appeal, but not in time for the Board's consideration. In that email, Mr. Payne wrote that the new assignment should be commenced immediately upon Petitioner's arrival at work and completed before 9:00 a.m., knowing that Petitioner always began work at 7:00 a.m. Therefore, for this reason and because of the fact that the assignment took from two to four hours a day, the decisions of the ALJ and the Board must be overturned.

C. The decisions of the ALJ and the Board were based in part on the testimony of a statutorily "unqualified" witness. This witness is a Human Resource Specialist at DHRM. DHRM is the author and administrator of State of Utah personnel regulations, so it is especially upsetting that a DHRM official, who is expected to give unbiased service to the public, agencies and employees, would give false biased sworn testimony in favor of one side in a tribunal, with no evidence that she had any personal knowledge of the facts as required by law. She claimed she was at the ALJ Hearing to manage the appearance of the witnesses, but she then asked to be sworn in and stated she wanted to

testify in favor of DTS. Therefore, the decisions of the ALJ and Board must be overturned.

D. The decisions of the ALJ and the Board were incorrect under the “Constructive Discharge” rule and related State of Utah statutes, which they failed to properly apply. Petitioner resigned for good cause, and this was correctly stated in the original decision. The original decision was legally sound and proper, and therefore should be upheld.

## ARGUMENTS

### First Argument

**The ALJ and the Board’s conclusion that they could deny Petitioner due process of law was unconstitutional and must therefore be overturned.**

1. The ALJ states that “A fault overpayment of \$2,453 is established pursuant to Section 35A-4-406(4) of the Employment Security Act.” (*Record of Index*, p. 161 ¶ 6.)

Section 35A-4-406(4), cited by the ALJ as his authority, reads as follows:

(4) (a) Any person who, by reason of his fraud, has received any sum as benefits under this chapter to which he was not entitled shall repay the sum to the division for the fund. *emphasis added*

2. In other words, the ALJ believes that as a State of Utah official, he can conduct a hearing, and based on his interpretation of the testimony given in that hearing he can (1) accuse Petitioner of fraud, (2) rule that Petitioner is guilty of fraud, and (3) levy a fine and place a lien on Petitioner’s property for allegedly being guilty of fraud, all with no due process of law. This is clearly an abuse of authority that must be corrected.

It is so far out-of-touch with the law of a constitutional democracy that it is shocking to anyone who believes in the freedoms inherent in living in the United States of America.

Denials of due process to make claims of fraud must be defeated by the Court, because:

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

*Constitution of the United States of America, Amendment VI.*

3. This abuse of authority by the ALJ and the Board is shocking. The Board wrote the following egregious conclusion. How can any ALJ or Board actually accuse, convict, fine and put a lien on a citizen's property based only on false assumptions, as are replete in this, the Board's statement:

When the Claimant filed his initial claim for benefits he told the Department that the Employer retaliated against him because he filed a discrimination complaint, that he physically could not do the additional job duties assigned in December 2014 and that he went to the Employer to try and solve the problem before he left. Based on that information the Department allowed benefits and the Claimant was paid a total of \$2,453 in unemployment benefits. Because some of the information the Claimant provided to the Department when that decision was made could not be substantiated, and were likely untrue, the Claimant was not eligible for benefits thereby creating a fault overpayment of the amounts received. Because he did not accurately describe the issues resulting in his decision to quit this is a fault overpayment. *emphasis added*

There are six charges against Petitioner in this paragraph. They are itemized and answered as follows:

- (1) When the Claimant filed his initial claim for benefits he told the Department that the Employer retaliated against him because he filed a discrimination complaint . . .

Petitioner is of the opinion that the sudden unusual abusive treatment that he was subjected to was because of retaliation. In the United States of America, Petitioner is free to express his honest opinion, right or wrong, without being accused of fraud.

- (2) . . . that he physically could not do the additional job duties assigned in December 2014. . . .

It is Petitioner's sworn testimony that he could not do the newly assigned task of prolonged data entry, outside his job description, without increased pain, stiffness and decreased mobility, as his physician verified. If the Board chooses not to believe that truthful statement given under oath, that is just their opinion, and certainly not grounds for accusing a sworn witness, with a physician's recommendation, of being guilty of fraud.

- (3) . . . and that he went to the Employer to try and solve the problem before he left. Based on that information the Department allowed benefits and the Claimant was paid a total of \$2,453 in unemployment benefits. . . .

Petitioner went to the employer repeatedly to try to solve the issue. He told them why he could not do the task, he told them he could not file an ADA request because he perceived that to be unnecessary to do the job he was hired to do, and was therefore illegal, and he offered to do the new assignment using a state-of-the-art methodology that required printing, not typing! He even provided an example of the modern method for doing the new assignment. How could any ALJ and Board claim that was fraud?

- (4) . . . Because some of the information the Claimant provided to the Department when that decision was made could not be substantiated . . ."

Everything Petitioner has stated can be substantiated by the extensive exchanges of email on these subjects, but DTS failed to submit them before or during the ALJ Hearing.

- (5) . . . and were likely untrue, the Claimant was not eligible for benefits thereby creating a fault overpayment of the amounts received . . .

There is no proof or indication at all that the “information . . . was likely untrue.” That is an egregious statement made with no proof, against a sworn witness. Everything Petitioner has stated can be substantiated by the extensive exchanges of email on these subjects, but DTS failed to submit them before or during the ALJ Hearing. DTS is the custodian of the emails.

- (6) . . . Because he did not accurately describe the issues resulting in his decision to quit this is a fault overpayment . . .

Petitioner “accurately described the issues resulting in his decision to quit.” Furthermore, making a critical decision to resign was a very difficult decision to make, but the DTS provided no other reasonable option. Making such a difficult decision required a personal evaluation of the damage that could be done by the alternate choices. As such, the dynamics of a personal decision making process is not subject to speculation by the ALJ or the Board, and is certainly not fraud.

4. If the Board chooses to not believe the true and provable facts of this case, that is certainly not grounds for accusing a sworn witness (with a physician’s recommendation) of fraud, followed by a unilateral conviction of fraud, and then followed by issuance of a fine and a lien.

5. No judge or board at any level, from the ALJ to the Supreme Court, has the authority that the ALJ and Board have assumed in this case to deny Petitioner his constitutional right to due process.

6. This blindly exercised denial of due process by State officials is an egregious abuse of authority and must be overturned.

## Second Argument

**The decisions of ALJ and the Board were inevitably influenced by the impeachable falsified testimony of the main witness and must therefore be overturned as invalid.**

1. In December 2014 and January 2015, Petitioner's supervisor, Jake Payne, recognized in writing the fact that he was assigning Petitioner (1) a new assignment and new type of work—prolonged data entry, and (2) that the average employee could complete the task in about two hours a day. Due to severe arthritis in his hands, fingers and wrists, Petitioner found the new task took three to four hours a day.

2. On January 8, 2015, Mr. Payne basically confirmed the new assignment took approximately two hours by sending Petitioner an email string that included the following:

Yesterday I sent you [Petitioner] this assignment so that I could ensure that we had a framework in place for the documentation of our routine DBA responsibilities. . . .

I would like you to start on your daily assignments today on the DBA activity log as soon as you received this email, if you have not already stated. Normally this will be easily completed before 9:00 am.

Addendum, Exhibit A, p. 26.

As was the case with most of the DBAs, Petitioner was working a 4 day, 10 hour a day schedule in January, 2015. He worked from 7:00 am to 5:30 pm. So Mr. Payne's reference to "completed before 9:00 am" translates to approximately two hours.

3. On January 9, 2015, David Burton, IT Director, confirmed that the assignment was new and took about two hours, as Mr. Payne had stated in his email

(above) as follows:

On December 29, 2014 Jake sent an email to you [Petitioner] providing you with the new spreadsheets, and instructions on how to use them. . . . On the following day, December 30, 2014 Jake and I met with you to discuss your assigned tasks. You were presented in that meeting with the updated spreadsheet . . . and were directed to complete it on a daily basis. As of today you still have not consistently, on a daily basis, completed this . . . as directed by Jake [therefore] disciplinary action may be taken. . . . [This assignment] should require one to two hours [each] day.  
*emphasis added*

*Record of Index*, pp. 64-67.

4. In his testimony at the ALJ Hearing, Mr. Payne reversed the statement in his email written on January 8, 2015, that Petitioner would be required to spend about two hours each morning doing data entry, and instead under oath claimed the assignment would only take the typing of 550 characters a day. The typing of 550 characters takes only a few minutes.

I don't really agree that it's data entry, but the entire amount of – of characters that would be required to be entered in a day approximates 550.

Payne's testimony, *Record of Index*, p. 170, *Reporter's Transcript*, p. 43, ¶ 1.

The actual filling out of the spreadsheet itself, again, uh – 550 characters on average, uh, so absolutely it does not take two hours to do 550 characters of – uh, in the spreadsheet.

Payne's testimony, *Record of Index*, p. 170, *Reporter's Transcript*, p. 48, ¶ 1.

5. The ALJ and the Board showed a preference for Mr. Payne's claim that the new assignment required only "550 key strokes" a day, not realizing that estimate actually pertained to only one small part of the new task—inserting a time stamp after each record was typed into the spreadsheet. Payne's testimony is therefore misleading. It mislead the ALJ and the Board.

6. Jake Payne's sworn testimony in the ALJ Hearing was false and very different from previously written statements and is therefore impeachable, as he asserted that the assignment was not new and could be completed daily in a few minutes. If these sworn assertions had been true, Petitioner would never have resigned. The ALJ and Workforce Appeals Board took Mr. Payne's new sworn testimony to mean Petitioner had no good cause to resign, and they falsely ruled accordingly.

### **Third Argument**

**The decisions of ALJ and the Board were based partially on the testimony of a statutorily "unqualified" witness and must therefore be overturned as invalid.**

1. Damaging testimony was provided by Angela Abbott, Department of Human Resources Management (DHRM), who has no personal knowledge regarding the events in this case. She did not work for Department of Technology Services (DTS) and never observed Petitioner's work.

2. Ms. Abbott did not meet the minimum requirement to testify against or for Petitioner, as follows:

A witness may testify to a matter only if evidence is introduced sufficient to support a finding that the witness has personal knowledge of the matter.

Utah Rules of Evidence, Rule 602. Need for Personal Knowledge. *emphasis added*

3. No such evidence to prove her personal knowledge as related to this case was introduced by anyone, yet she gave her biased opinions openly as if she had personal knowledge that would inform the ALJ's decision.

4. She made the following charges in the ALJ Hearing:

Regarding this case, the job description [daily duties] that Mr. Gray was given did not change since the day he was hired. What his expectations of the job were, were consistent throughout his employment. He was not assigned clerical work. He was assigned routine DBA-related uh, tasks and he did not want to perform them.

Abbot's testimony, *Record of Index*, p. 170, *Reporter's Transcript*, p. 71.

5. She had no personal knowledge that the daily duties had not changed or when they changed; she had no personal knowledge regarding Petitioner's expectations; she had no personal knowledge of whether or not Petitioner was assigned clerical work, and she certainly did not know what Petitioner wanted to "perform" as an employee. Except for one meeting which both attended, she had no contact with Petitioner.

6. Ms. Abbott asked to serve as a witness, and the ALJ asked her where she worked and then swore her in. So, he knew she did not work for DTS where the true witnesses worked, but he never questioned her qualifications to be a witness. He even asked, "And will you personally be giving testimony today?" but then never asked if she had "personal knowledge" for her testimony, as required under Rule 602.

Abbott: . . . I work for the Department of Human Resource Management . . .

. . .

Judge: And will you [Ms. Abbott] personally be giving any testimony today?

Abbott I will.

. . .

Judge: All right, so let me place the parties under oath.  
Oath Administered.

*Record of Index*, p. 170, *Reporter's Transcript*, pp. 2-3.

7. Since Ms. Abbott had no personal knowledge of material facts upon which to base her testimony, the Court must overturn the decisions of the ALJ and the Board.

#### **Fourth Argument**

**The decisions of ALJ and the Board were unjustified under the “Constructive Discharge” rule and related State of Utah statutes, which they failed to properly apply, and must therefore be overturned as invalid.**

1. On March 13, 2015, the DWS ruled as follows, and the burden of proof lies with the ALJ and the Board to disprove the accuracy of that ruling, which the ALJ and the Board did not achieve. Petitioner resigned for “Good Cause.”

Good Cause for VQ [voluntary quit] present. The Adverse Effect with respect to the VQ decision was medical based on the nature of the work the Clmt [claimant] was required to perform. Despite being on the job for awhile with data input responsibilities, there is evidence to suggest that this requirement changed towards the end of the Clmt’s time working here. The Clmt did try to seek relief from the Employer on several levels but none of Clmt’s proposals were acceptable to the Employer. . . .

Original DWS decision, *Record of Index*, Exhibit 30.

2. The Agency assigned Petitioner “unsuitable” new work, which was grounds for ruling in favor of Petitioner, had the ALJ and the Board properly applied this statute:

Good cause is . . . established if a claimant left work which is shown . . . to have been unsuitable new work.

U.C.A. R994-405-102.

3. The Agency created a hostile environment for Petitioner, which was grounds for ruling in favor of Petitioner, had they properly applied this statute:

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.

U.C.A. R994-405-102.

4. Petitioner was the unwilling subject of a “constructive discharge,” which was grounds for ruling in favor of Petitioner, had the ALJ and the Board properly applied federal precedents on this subject to this case:

“The conduct complained of must have been severe or pervasive enough to create an objectively hostile or abusive work environment, and additionally the plaintiff must subjectively perceive the environment to be abusive.” *Johnson v. Runyon*, 137 F.3d 1081, 1083 (8th Cir. 1998) . . . “A plaintiff may satisfy this intent requirement by showing the intolerable situation created by the employer was such that the employer could reasonably foresee that the employee would quit.” [defining “constructive discharge”]

*Tatom v. Georgia-Pacific Corp.*, 228 F.3d 926, 932 (8th Cir. 2000).

5. The original DWS decision has not been proven to be in error by the ALJ or the Board and therefore the original decision and Petitioner’s full unemployment benefits should be reestablished.

6. **“Good Cause for VQ [voluntary quit] present.”**

Original DWS decision, *Record of Index*, Exhibit 30.

## CONCLUSION

A. The ALJ and Board’s conclusion that they could (1) accuse Petitioner of fraud, (2) rule that Petitioner was guilty of fraud, (3) levy a fine for allegedly being guilty of fraud, and (4) place a lien on Petitioner’s property, all with no due process of law, is unconstitutional. Therefore, any claim that Petitioner is currently liable for repayment of

received benefits should be prohibited by this Court. Since the ALJ and the Board's decisions that they could deny Petitioner due process of law was unconstitutional, the Court must overturn their ruling.

B. Since the decisions of the ALJ and the Board were influenced by the impeachable falsified testimony of the main witness, the Court must overturn their ruling as invalid.

C. Since the decisions of ALJ and the Board were based partially on the testimony of a statutorily "unqualified" witness, whom the ALJ did not disqualify, the Court must overturn their ruling as invalid.

D. Since the decisions of the ALJ and the Board were unjustified under the "Constructive Discharge" rule and related State of Utah statutes, which they failed to properly apply, the Court must overturn their ruling.

THEREFORE, the forgoing arguments and conclusions demonstrate multiple significant judicial errors, by both the ALJ and the Board. (1) The blindly exercised denial of due process by State officials is an egregious abuse of authority and must be overturned. The decision of the ALJ and the Board must also be overturned because of (2) impeachable material testimony, (3) damaging testimony by a statutorily unqualified witness, and (4) because Petitioner was involuntarily subjected to constructive discharge; Petitioner resigned for "Good Cause."

Petitioner moves the Court to reinstate the original decision of the Department of Workforce Services retroactively.

DATED this 8<sup>th</sup> day of July, 2015.

A handwritten signature in black ink, appearing to read "Kenneth L. Gray", written in a cursive style.

Kenneth L. Gray

## ADDENDUM

EXHIBIT A

Email Describing New Assignment for Petitioner

## DBA assignments and instructions.

Inbox x

**Jake Payne**

Jan 7 (1 day ago)

to me, Jonathan, Michael, Arlan, Gary, David

Fellow DBAers

I have been asked to review the instructions for the routine assignments that are outlined on the [DBA Assignment spreadsheet](#).

The things that we need to have pulled together today are the [DBA activity log](#) and the DBA Assignments and Activity Log Instructions google site.

I am going to have some time about 10:00 today so I would like to review the [DBA activity log](#) and the [DBA Assignments and Activity Log Instructions](#) google site (Arlan I realize that you are not in today, so tomorrow will be fine). So that I can review these prior going over them with the managers, please review each task on the [dba assignment spreadsheet](#) that is assigned to you and do the following:

- For the [DBA activity log](#) ensure that there is a tab for each of the daily, weekly or monthly tasks on the [dba assignment spreadsheet](#) (many are already there)
- For the [DBA Assignments and Activity Log](#) we need to make sure that there is at least a heading (in H2) for each task, and then we can start to add the instructions. If you already have the instructions please add them after the heading. If they already exist on the site you could just add a link. At some point, I think that it will probably make sense to break these into some sort of breakdown (daily/weekly/monthly or functional area) , but for now lets just make sure there is a place for the instructions.
- Put together an estimate of how long it will take to create the instructions for the tasks assigned to you. We will want to have a process (high level steps) and procedure (detailed steps) for each tasks. Some tasks are very simple and so these may be combined into one.

These will be living documents so the most important thing at this point is to get it going, even if it is something simple like the sql query that I put in under dbms\_scheduler job status. This is not an example of a final output, just a starting point.

This does not take priority over any tasks that you would normally need to complete in

the morning, so if there is something that you are involved in this morning that will prevent this please let me know as soon as you can.

If you have any other questions let me know.  
Thanks for your help,

Jake  
2 Attachments  
[Preview attachment DBA assignments](#)



[Preview attachment DBA activity log](#)



**Jake Payne** 8:04 AM (5 hours ago)  
to **Michelle**, me, Gary, David

Kenneth,  
Yesterday I sent this assignment so that I could ensure that we had a framework in place for the documentation of our routine DBA responsibilities. I haven't received any information from you about this.  
Additionally it appears that you have not yet completed your daily tasks this week, or your weekly tasks on the [DBA activity log](#), as there are no entries from you this week to show that you have completed these tasks.

I would like you to start on your daily assignments today on the [DBA activity log](#) as soon as you receive this email, if you have not already started. Normally this will easily be completed before 9:00 am.

When this is done please complete the assignment to which I have replied, which was sent yesterday via email. I believe this will only take a few minutes.

At this point I would like you to complete the weekly tasks that are identified on the [DBA Assignment spreadsheet](#) and tracked on the [DBA activity log](#).

Once these daily and weekly tasks are complete, and the assignment I assigned to you yesterday is complete, I would like you to start on the additional responsibilities on the [DBA Assignment spreadsheet](#) as follows:

- Provide a schedule showing how long it will take to complete the documentation that was requested yesterday. This was already addressed.

above, and I would like to receive it this morning. You have expressed many times, including in our meeting on December 12th, that you enjoy writing and feel that this is a strength you have, so I anticipate that this will not be a concern.

- Provide a schedule showing which database you plan on using to test the rman backup this month. I would prefer that you use one that has not been duplicated recently.
- Ensure that the Oracle database summary is up to date.
- Put together a schedule for the remainder of the quarterly PSU patches for the database.

I will review these schedules, and we can discuss the next steps on the database upgrades and rman tests that we will take from this point.

At this point I do not want you to complete the rman test, or the upgrade. Just provide a proposed schedule. If, after you provide the schedule, there is time available today to complete these then we can discuss this.

I am not aware of any other assignments that would prevent the completion of these assignments, so if there are please let me know first thing this morning.

2 Attachments

[Preview attachment DBA activity log](#)



[Preview attachment DBA assignments](#)



A read receipt was sent to jakepayne@utah.gov at 8:29 AM on 1/8/15 show receipt

**Kenneth Gray <kgray@utah.gov>** 10:19 AM (3 hours ago)

to Jake, David, Michelle

Jake,

Could you please post the update/patch dates you and management prefer and indicate the DBAs you want to do them in WiKi. (Or send me this information and I will post it.)

With the best interest of UDOT in mind, Arlan and I gave up our holiday weekend on the quiet Friday after Thanksgiving (perfect for database downtime). We had prepared

for weeks to update and patch all that day only to learn upon arrival on that Friday that management had cancelled our plans without consulting with us first.

Management (including you) obviously had so little respect for me and Arlan (both senior citizens) that consulting with us first never even crossed anyone's mind. This was frustrating, humiliating, degrading and counterproductive.

That cancellation was a huge setback. My plan was to have all the work done before Christmas, which we could have done because it was a good plan, given much thought, attention to detail, and the cooperation of several highly qualified DBAs. Let's avoid a replay of that fiasco.

KGray

**Jake Payne** 12:25 PM (59 minutes ago)

to me, David, Michelle

Kenneth,

In my previous emails today, I have asked you to create the following schedules, and provide them to me today:

- Provide a schedule showing how long it will take to complete the documentation that was requested yesterday. I have asked to receive it this morning.
- Provide a schedule showing which database you plan on using to test the rman backup this month. I would prefer that you use one that has not been duplicated recently.
- Put together a schedule for the remainder of the quarterly PSU patches for the databases.

Once I receive the dates for the PSU patches and review them, I will post the final schedule to the [Oracle database summary](#) on the wiki. If you prefer you can enter the dates directly on the wiki and I can review them there. If you do enter them directly let me know when you have done this. Please ensure that your schedule includes appropriate time to notify change management (ie two weeks lead time).

I would like to provide you with a better understanding of the cancellation of the patch scheduled for November 28th. At the end of the day on November 26th Gary met with me, after talking with Dave. Recognizing that many of the development and infrastructure staff were scheduled to be out, they decided that they would prefer to postpone the Oracle patches. These developers and infrastructure support may have been needed in case of unforeseen problems. As customer service is very important to all of us, we decided that ensuring the systems would be up for that Friday and the following week, it would be in UDOT's best interest to delay the upgrade. As you were

not in the office to personally provide you with this information, I sent you an email so you would be aware of the decision when you arrived at work Friday morning.

As you were scheduled to work November 28th as a normal working day, I assumed that you would just continue to perform your regular DBA assignments without the additional task of the upgrade.

Based on the "2014 Holiday Coverage - Developers & Managers" spreadsheet and the DBA calendar, there was no indication that you had requested time off for the Friday after Thanksgiving. The State only gives Thursday off for the Holiday, taking Friday off requires using your own annual leave or the Administrative hours offered by the Governor and CIO.

Arlan requested to work the Friday after Thanksgiving. He normally works Tuesdays and Thursdays, however because Thanksgiving is on a Thursday he asked to come in on that Friday so that he could still work the two days.

Please let me know when you have the schedules completed today. This should be your top priority after your daily and weekly assigned tasks. Again, let me know if there is anything else that you are working on that would conflict with this priority.

**Kenneth Gray <kgray@utah.gov>** 1:22 PM (2 minutes ago)

to Arlan, Jake, Arlan

Arlan uses UX20 for restoring his backups from scripts. I have no objection, and Arlan said he is available to participate in the process, which would be very helpful as he prefers the script only approach over the more modern method that I prefer, that you have repeatedly rejected. Arlan will you please suggest a date and time that is best for you this month?

Jake, thank you for expressing your interest in my published books (avocation). Four were written and published between 1977 and 2002 (25 years). The subject is energy policy and economics for three of them and LDS Church history for one. I understand that a few copies of the two novels are available for sale at Amazon.com under my name, Kenneth L Gray.

Currently, I do not have any plans for writing another book, but if you read them, suggestions from you and Arlan for sequels are welcome. Be assured, there is not relationship between the harmful effects that some people experience from doing daily excessive clerical work, which I will never do, and being an author, but thanks for your concern.

KGray

EXHIBIT B

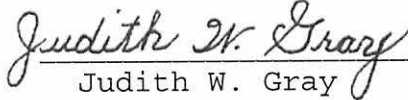
Certificate of Compliance

# CERTIFICATE OF COMPLIANCE

I have measured the number of words in this Brief of Appellant and, using the word counter in WordPerfect, and I determined that it consists of 6,025 words.

This count includes the entire document; Addendum, Exhibit A, excluded.

Dated this 8<sup>th</sup> of July, 2015.

  
\_\_\_\_\_  
Judith W. Gray

PO Box 708244  
Sandy, Utah 84070

EXHIBIT C

Certificate of Service

CERTIFICATE OF SERVICE

I, Kenneth L. Gray hereby certify that on July 8 , 2015 I served two copies of the foregoing Appellant's Brief upon the parties listed below by mailing it by first class mail to the following addresses:

Suzan Pixton #2608  
Workforce Appeals Board  
Department of Workforce Services  
140 East 300 South  
P. O. Box 45244  
Salt Lake City, Utah 84145-0244

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

Kenneth L. Gray