BEFORE THE
EMPLOYMENT APPEAL BOARD
Lucas State Office Building
Fourth floor
Des Moines, Iowa 50319

CAREY A RYAN	:	
	:	**HEARING NUMBER:** 11B-UI-17931
Claimant,	:	
and	:	**EMPLOYMENT APPEAL BOARD DECISION**
NEW DIRECTIONS IN SALES INC	:	
Employer.		

N O T I C E

THIS DECISION BECOMES FINAL unless (1) a **request for a REHEARING** is filed with the Employment Appeal Board within **20 days** of the date of the Board's decision or, (2) a **PETITION TO DISTRICT COURT** IS FILED WITHIN **30 days** of the date of the Board's decision.

A REHEARING REQUEST shall state the specific grounds and relief sought. If the rehearing request is denied, a petition may be filed in **DISTRICT COURT** within **30 days** of the date of the denial.

SECTION: 96.5-1

D E C I S I O N

The Claimant appealed this case to the Employment Appeal Board. The members of the Employment Appeal Board reviewed the entire record. A majority of the Appeal Board, one member dissenting, finds it cannot affirm the administrative law judge's decision. The majority of the Employment Appeal Board **REVERSES** as set forth below.

FINDINGS OF FACT:

Carey Ryan (Claimant) most recently worked full time as a president of, and owned 51% of the stock of, New Directions In Sales Inc. (Employer). (Tran at p. 2-3; p. 11). The Claimant was separated from employment on November 12, 2009. (Tran at p. 6; p. 8).

The Claimant's marriage was dissolved on November 12, 2009 after a trial on the disputed issue of equitable distribution of the parties' business interests, among others. (Employer's Exhibit 1). The district court judge awarded New Directions in Sales, Inc., a wholly owned subsidiary of Ryan Holding Company, L.C., to Donald Ryan, and ordered Claimant to execute a resignation from those companies. (Employer's Exhibit 1, page 2 – page 61 of the Decree). This the Claimant did and thereby became separated from employment as of November 12, 2009. (Tran at p. 2; p. 6; p. 7-8).

REASONING AND CONCLUSIONS OF LAW:

Quitting In General: Iowa Code section 96.5(1) provides:

> An individual shall be disqualified for benefits: Voluntary Quitting. If the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department.

Since the Employer had the burden of proving disqualification the Employer had the burden of proving that a quit has taken place. On the issue of whether a quit is for good cause attributable to the employer the Claimant had the burden of proof by statute. Iowa Code §96.6(2). It is not entirely clear who has the burden of proving whether a quit is voluntary, but for the purposes of this decision we place the burden of proving involuntariness on the Claimant.

Voluntariness: The law does recognize that even when a Claimant quits sometimes this is not a voluntary quit. For example, if "[t]he claimant was compelled to resign when given the choice of resigning or being discharged [then] this shall not be considered a voluntary leaving." 871 IAC 24.26(21). Here the Claimant was compelled to resign by an order of the court. This is even greater compulsion than being compelled to resign or be fired – it's resign or be held in contempt. As the rule puts it "[t]his shall not be considered a voluntary leaving." 871 IAC 24.26(21). Indeed, since the Claimant was the respondent in the proceedings, and the order was the result of a contested proceeding, there was nothing at all voluntary about the leaving.

The cases of the Supreme Court have also recognized that not all quitting is voluntary. In *Ames v. Employment Appeal Board*, 439 N.W.2d 669 (Iowa 1989) the employees, out of fear of violence, refused to cross a picket line. The *Ames* court found that their quit was not "voluntary" and thus did not have to be attributable to the employer in order to allow benefits. In *Sharp v.* EAB, 479 N.W.2d 280 (Iowa 1991) the fact that an employee's jaundice threatened the Employer's business, thereby forcing a quit, meant that the quit was not disqualifying. The Court concluded that "for purposes of unemployment compensation, Sharp left her employment involuntarily." *Sharp* at 284. The Court in *White v. Employment Appeal Board*, 487 N.W.2d 342 (Iowa 1992) refused to extend this doctrine to the situation where a person is compelled to quit by their health. This is due, in part, to the fact that under Code §96.5(1)(d) a claimant who is advised to quit for health reasons may requalify by presenting a full release. If such a health driven quit were deemed "involuntary" then why would §96.5(1)(d) be necessary? But the case before us is not a health case, and the concept of voluntariness still remains in the statute. And subsequent to *White* the Court decided the case of *Bartelt v EAB*, 494 N.W.2d 684 (Iowa 1993). In *Bartelt* the Court was faced with a claimant who had been a company president. With involuntary bankruptcy looming Mr. Bartelt filed a voluntary petition for bankruptcy. Naturally he lost his job. The Board disqualified for voluntary quitting. The Supreme Court of Iowa reversed. The Court made quit clear that the idea of a quit being "voluntary" is still necessary to a disqualification. The Court was explicit that "involuntary leaving can be attributable to someone other than the employer…when that is the case the employee, if otherwise qualified, can receive unemployment compensation." *Bartelt* at 686.

Now we must decide if the quit here was voluntary. The Court in *Bartelt* wrote "[w]e understand voluntary to entail a free choice." *Bartelt* at 686. So do we. There is none here. The Claimant was

married. Her husband petitioned to dissolve the marriage. The Claimant did not consent to a property division and a contested hearing resulted. The Judge then issued a decision directing the Claimant to "execute any resignations from any position with [New Directions in Sales]." (Ex. 1, p. 61). This is compulsion if we have ever seen it. The resignation was, of course, involuntary. No disqualification can be imposed.

In the odd setting of this case on might argue that the court-ordered payments to the Claimant are in the nature of severance pay. We do not deal with the issue since it was not noticed for hearing. Also it is no more than a possibility since one might equally argue that this payment was made in consideration of factors other than the mere loss of employment, was not "granted" by the employer, and thus was not severance. *See McClure v. International Livestock Imp. Services Corp., 369 N.W.2d 801, 805 (Iowa 1985)*. Another difficulty is that a designation of severance pay must be made under rule 24.13(1). In any event, we cannot and do not address the issue.

As mentioned by the Administrative Law Judge in the hearing the evidence suggests that availability for work may be an issue. We therefore remand the matter to the Claims Section on the issue of availability.

DECISION:

The administrative law judge's decision dated February 28, 2011 is **REVERSED**. The Employment Appeal Board concludes that the claimant was not separated from employment in a manner that would disqualify the Claimant from benefits. Accordingly, the Claimant is allowed benefits provided the Claimant is otherwise eligible.

The matter is remanded to the Iowa Workforce, claims section, to address the Claimant's availability for work if not already addressed.

Board Vice-Chair Monique Kuester recused and took no part in the consideration of this case.

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John A. Peno

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Elizabeth L. Seiser

RRA/fnv