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

TODD RENKEN Claimant, and EXPRESS LLC Employer.	:	HEARING NUMBER: 08B-UI-06205 EMPLOYMENT APPEAL BOARD DECISION

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

UNEMPLOYMENT BENEFITS ARE ALLOWED IF OTHERWISE ELIGIBLE

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 Employment Appeal Board **REVERSES** as set forth below.

FINDINGS OF FACT:

The claimant, Todd Renken, worked for Express, LLC from December 14, 2006 through May 3, 2008 as a full-time co-sales manager. (Tr. 2, 10) The claimant's responsibilities consisted of "… cleaning the store, doing all of the displays (floor mopping), mannequin changes, getting out new product in a timely way…" (Tr. 4) Mr. Renken experienced difficulty in performing his job duties to the employer's satisfaction during his first year. By the second year, the employer noticed no improvement in his job performance. (Tr. 4)

The employer placed Mr. Renken on a written action plan on January 29, 2008. (Tr. 3, 12) On February 4, 2008, the employer did a monthly follow-up to which the claimant was placed on a

continued performance improvement plan. (Tr. 3, 12) When the claimant showed little improvement, the employer issued a final written notice on April 9, 2008 in which the claimant was directed to touch

base with the store manager on a weekly basis. (Tr. 3, 4, 5, 12-13) On April 22nd, the employer put the claimant on notice that there were several items he needed to get done by his final follow-up meeting scheduled for May 15th (Tr. 6-7), lest his failure to complete those tasks would result in his termination that same day. (Tr. 8)

Mr. Renken continued to have difficulty completing tasks in a satisfactory manner. On April 24th, Allison Plut and Liz Holts contacted him on his day off to request that he come in to a meeting. (Tr. 11) When he arrived, the two women expressed their concern that he would not be able to meet the two-week deadline and that "…it was no longer in [his] favor to be employed…[he] was not performing to the company standard…" The employer went on to give him the choice to either quit or be terminated right then. (Tr. 11, 14-15) The next day, the claimant contacted the employer to relay his unhappiness with the job, stating that "[he] didn't think this is the right place for [him]…" and subsequently "…put in [his two-week] notice…" (Tr. 9, 10)

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.5(1) (2007) 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.

871 IAC 24.25 provides:

> *Voluntary quit without good cause*: In general, a voluntary quit means discontinuing the employment because the employer no longer desires to remain in the relationship of an employee with the employer from whom the employee has separated. The employer has the burden of proving that the claimant is disqualified for benefits pursuant to Iowa Code section 96.5…

The claimant has the burden of proving that the voluntary leaving was for good cause attributable to the employer. Iowa Code §96.6(2) (amended 1998).

The record establishes that Mr. Renken had difficulty satisfactorily performing his job responsibilities throughout the most of his employment. And even with the employer's placing him on a performance improvement plan, the claimant still had difficulty in the face in increasingly frequent scrutiny under that plan. The parties conflict as to whether or not the claimant was directed to either quit or accept termination prior to his final review date (May 15th). However, it should be noted that the employer failed to provide either person (Allison Plut or Liz Holts) as witnesses to refute the claimant's firsthand testimony about being given such a choice, which ultimately forced him to quit. For this reason, we attribute more weight to the claimant's version of that fateful meeting. Additionally, Iowa law provides that good cause attributable to the employer for a voluntary quit exists where "The claimant was compelled to resign when given the choice of resigning or being discharged. This shall not be considered a voluntary leaving." 871 IAC 24.26(21).

It is clear from this record that the claimant worked to the best of his ability. The employer's

dissatisfaction stemmed from his chronic poor performance. When it became clear based on his meeting with the two women that there was no expectation of improvement within the given time frame, Mr.

Renken, understandably felt pushed against the wall, believing he had no choice, but to sever his employment relationship. Even if this case were analyzed as a discharge, the court in Richers v. Iowa Department of Job Service, 479 N.W.2d 308 (Iowa 1991) held that inability or incapacity to perform well is not volitional and thus, cannot be deemed misconduct.

DECISION:

The administrative law judge's decision dated July 22, 2008 is **REVERSED**. The claimant voluntarily quit with good cause attributable to the employer. Accordingly, he is allowed benefits provided he is otherwise eligible.

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John A. Peno

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Elizabeth L. Seiser

AMG/kk

DISSENTING OPINION OF MONIQUE F. KUESTER:

I respectfully dissent from the majority decision of the Employment Appeal Board; I would affirm the decision of the administrative law judge in its entirety.

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Monique F. Kuester

AMG/kk