

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

JEREMY A MYERS

Claimant,

and

THE UNIVERSITY OF IOWA

Employer.

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HEARING NUMBER: 09B-UI-09919

EMPLOYMENT APPEAL BOARD
DECISION

SECTION: 10A.601 Employment Appeal Board Review

D E C I S I O N

FINDINGS OF FACT:

A hearing in the above matter was held July 28, 2009. The administrative law judge's decision was issued July 30, 2009. The administrative law judge's decision has been appealed to the Employment Appeal Board. The Board finds there are not enough facts to make a decision at this time.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 10A.601(4) (2009) provides:

5. Appeal board review. The appeal board may on its own motion affirm, modify, or set aside any decision of an administrative law judge on the basis of the evidence previously submitted in such case, or direct the taking of additional evidence, or may permit any of the parties to such decision to initiate further appeals before it. The appeal board shall permit such further appeal by any of the parties interested in a decision of an administrative law judge and by the representative whose decision has been overruled or modified by the administrative law judge. The appeal board shall review the case pursuant to rules adopted by the appeal board. The appeal board shall promptly notify the interested parties of its findings and decision.

A disqualification for misconduct must be based on a current act. 871 IAC 24.32(8); *accord Ray v. Iowa Dept. of Job Service*, 398 N.W.2d 191, 194 (Iowa App. 1986); *Greene v. EAB*, 426 N.W.2d 659 (Iowa App. 1988); *Myers v. IDJS*, 373 N.W.2d 509, 510 (Iowa App. 1985). Here the Employer learned of the alleged misconduct almost immediately but did not discharge the Claimant until June 5. We cannot tell from the record what reason the Employer might have had for the delay, or if the Employer had taken any action against the Claimant in the interim, or what notice the Claimant had that discharge

was being considered. Since the record of the hearing before the administrative law judge lacks evidence of these issues, we cannot make an informed decision on the question of current act.

As the Iowa Court of Appeals noted in Baker v. Employment Appeal Board, 551 N.W. 2d 646 (Iowa App. 1996), where the parties are unrepresented by counsel, the administrative law judge has a heightened duty to develop the record from available evidence and testimony given the administrative law judge's presumed expertise. Since the Employment Appeal Board is unable to adequately make a decision based on the record now before it, this matter must be remanded for a supplemental hearing in order that additional evidence may be obtained from the parties.

DECISION:

The decision of the administrative law judge dated July 30, 2009, is not vacated at this time. This matter is remanded to an administrative law judge in the Workforce Development Center, Appeals Section for the limited purpose of developing the record consistent with Board's concerns, namely, to explore the issues of current act including to answer why did the Employer delay in the discharge, was any employment action taken against the Claimant in this period, and what notice of contemplated discharge did the Claimant have. The administrative law judge shall conduct a hearing following due notice. After the hearing, the administrative law judge shall issue a new decision in consideration of the newly acquired evidence, which provides the parties appeal rights.

John A. Peno

Elizabeth L. Seiser

RRA/fnv

DISSENTING OPINION OF MONIQUE 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.

Monique F. Kuester

RRA/fnv