

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

---

**LEURICE M PRIMEAUX**

Claimant,

and

**WINNEBAGO TRIBE OF NEBRASKA**

Employer.

:  
:  
:  
:  
:  
:  
:  
:

**HEARING NUMBER: 09B-UI-09966**

**EMPLOYMENT APPEAL BOARD  
DECISION**

**SECTION: 10A.601 Employment Appeal Board Review**

**FINDINGS OF FACT:**

A hearing in the above matter was held July 28, 2009. The administrative law judge's decision was issued July 29, 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) (2005) 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.

"Employers covered by FMLA are required to grant leave to eligible employees... [f]or placement with the employee of a son or daughter for adoption or foster care." 29 CFR §825.112(2). If this case were covered by FMLA then it is entirely possible that the Claimant's quit could be justified under the Employment Security Law. What we do not know from this record is whether the Claimant is an "eligible employee" under FMLA and whether the employer is an "employe[r]" covered by FMLA." Given that the Employer is an Indian Tribe this later question is by no mean trivial, and we should like to at least hear the Employer's position on this point.

We also observe that under the Employment Security Law one can quit and still receive benefits if one "left the employing unit for not to exceed ten working days, or such additional time as may be allowed by the individual's employer, for compelling personal reasons.. and prior to such leaving had informed the individual's employer of such compelling personal reasons, and immediately after such compelling personal reasons ceased to exist the individual returned to the individual's employer and offered the individual's services and the individual's regular or comparable work was not available ..." Iowa Code §96.5(1). We are inclined to think adoption to be a compelling personal reason but are in the dark on the other issues, most notably, the contemplated duration of the leave at the time of the quit. We need to know the answer to this question.

Since the record of the hearing before the administrative law judge lacks evidence on the FMLA and Code §96.5(1)(f) issues we cannot make an informed decision.

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 29, 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 issue of FMLA coverage for both Claimant and Employer, and to explore the issues related to Iowa Code §96.5(1)(f). 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

**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 Kuester