

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

RUSSELL R KEPHART

Claimant,

and

STAFF MOTEL LLC

Employer.

HEARING NUMBER: 09B-UI-01550

**EMPLOYMENT APPEAL BOARD
DECISION**

SECTION: 10A.601 Employment Appeal Board Review

FINDINGS OF FACT:

A hearing in the above matter was held August 18, 2009. The administrative law judge's decision was issued August 19, 2009 in which the claimant was determined to be discharged for an act that was not current. The claimant refused work on December 4th, 2008 because he had an appointment with his attorney in Clear Lake. (Tr. 8, 10-11) The employer had already cut Mr. Kephart's hours as a disciplinary measure. (Tr. 4) The claimant worked again on December 12th. (Tr. 2-3, 6, 9) The claimant remained on payroll (Tr. 6), but the employer did not schedule him for work after the 12th (Tr. 7) as he was considered 'temporarily laid.' (Tr. 6) On January 18th, the employer discharged the claimant for coming into the bar causing trouble. (Tr. 7)

The record does not contain evidence as to why the claimant's last day was December 12th and why the claimant was in the bar on January 18th. The administrative law judge's decision has been appealed to the Employment Appeal Board.

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.

Although the employer discharged the claimant on January 18th, it appears that the claimant's final act occurred on December 4th in which case, we would agree with the administrative law judge as far as a no current act. However, because the claimant was placed on temporary layoff as a disciplinary measure, there is nothing in the record to establish what the claimant did on his actual last day of work (December 12th) to trigger the layoff. In addition, the record contains no evidence as to how long the layoff was to extend considering the claimant remained on payroll. There are many unanswered questions, i.e., was the claimant in bar on January 18th as an employee, or as a customer when he became argumentative with the bartender? (Tr. 6-7) Was the claimant's behavior on that day what triggered the discharge?

Since the record of the hearing before the administrative law judge is incomplete, the Employment Appeal Board cannot make a well-reasoned decision. For this reason, this matter is remanded so that the administrative law judge may reopen the record to take additional evidence on these unanswered questions.

DECISION:

The decision of the administrative law judge dated August 19, 2009 is not vacated. This matter is remanded to an administrative law judge in the Workforce Development Center, Appeals Section, for further development of the record consistent with this decision, unless otherwise already addressed. The administrative law judge shall conduct a hearing following due notice, if necessary. If a hearing is held, then the administrative law judge shall issue a decision which provides the parties appeal rights.

Elizabeth L. Seiser

Monique F. Kuester

AMG/ss

DISSENTING OPINION OF JOHN A. PENO:

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.

John A. Peno

AMG/ss