

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

MARK A WILKINSON

Claimant

and

FURNITURE MART USA INC

Employer

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HEARING NUMBER: 21B-UI-13992

**EMPLOYMENT APPEAL BOARD
DECISION**

SECTION: 10A.601 Employment Appeal Board Review

DECISION

FINDINGS OF FACT:

A hearing in the above matter was held August 4, 2021. The administrative law judge's decision was issued August 9, 2021. The administrative law judge's decision has been appealed to the Employment Appeal Board. The Board finds there is not enough evidence in the record to make a decision at this time.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 10A.601(4) (2021) provides:

5. Appeal board review. The appeal board may on its own motion affirm, modify, or set aside any decision of a 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.

As the Iowa Court of Appeals noted in *Baker v. Employment Appeal Board*, 551 N.W. 2d 646 (Iowa App. 1996), 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. This principle is also expressed in the reference note to criteria number 3 (Exhibits) of the US Department of Labor "Handbook for Measuring Unemployment Lower Authority Appeals Quality" Second Edition page 13, which provides in part:

The Hearing Officer should assume the responsibility to introduce on his/her own motion exhibits that are competent, relevant, and material to the issue but are not introduced by the parties. Common among these would be documents that are in agency files. It is important to realize that the Hearing Officer cannot consider in his/her decision –making process any document that was not properly entered.

If this is encouraged by the US Department of Labor for documents in the agency file it is certainly no less important for evidence submitted by the parties to be used as exhibits for the hearing.

Here the Employer supplied substantial evidence of sexual harassment, and the Claimant denied it. But the Administrative Law Judge failed to solicit from either party the specifics or circumstances of what was alleged to have occurred. A conclusory statement that some action was, or was not, sexual harassment is insufficient. We need to know what, if anything, each party claims actually happened. The failure to elicit this information was a failure to develop the record by the Administrative Law Judge contrary to the *Baker* duty. 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 August 9, 2021 is not vacated and remains in force unless and until the Department makes a differing determination pursuant to this remand. This matter is remanded to an administrative law judge in the Workforce Development Center, Appeals Bureau. The administrative law judge shall conduct a new hearing following due notice. After the hearing, the administrative law judge shall issue a decision which provides the parties appeal rights. In making the new decision the Administrative Law Judge may consider the evidence as developed in both hearings. In the new hearing both parties may offer witnesses and exhibits, as before, provided they follow the applicable procedures below.

James M. Strohman

Myron R. Linn