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

MINDY S WENDT	:	
	:	**HEARING NUMBER:** 13B-UI-00942
Claimant,	:	
	:	
and	:	**EMPLOYMENT APPEAL BOARD DECISION**
	:	
UNITED STATES CELLULAR CORP	:	

Employer.

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 scheduled for February 25, 2013 in which the issues to be determined were whether the claimant was discharged for misconduct; and whether the claimant voluntarily left for good cause attributable to the employer; and whether the claimant was overpaid. As the hearing came to an end and the administrative law judge sought for any final comments from the employer, it was clear the employer had been disconnected from the hearing. There is no indication what point the employer became disconnected. The administrative law judge's made no attempt to reconnect with the employer.

The administrative law judge's decision was issued February 26, 2013, which determined that employer failed to satisfy its burden of proof and allowed benefits to the claimant. 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) (2011) 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.

The Employment Appeal Board concludes that the record as it stands is insufficient for the Board to issue a decision on the merits of the case. 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. The record shows that the employer became disconnected at some point during the hearing. This disconnection was not discovered until the point at which the administrative law judge requested final comments from the parties before closing the record. Because the employer was no longer a part of the hearing, the employer was deprived of her right to respond to the claimant's testimony. For this reason, the Board must remand this matter so as to allow the employer an opportunity to complete her case, as there was no call back recording contained in the voice file.

DECISION:

The decision of the administrative law judge dated February 26, 2013 is not vacated. This matter is remanded to an administrative law judge in the Unemployment Insurance Appeals Bureau, 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.

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John A. Peno

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Cloyd (Robby) Robinson

DISSENTING OPINION OF MONIQUE F. KUESTER:

I respectfully dissent from the decision of the Employment Appeal Board; I would reverse the decision of the administrative law judge in its entirety. I would find that the claimant committed disqualifying misconduct when she texted while on the job in violation of company policy for which she had already been verbally warned against using her phone. Not only does her admission make her culpable, but her excuse 'that everybody does it' does not absolve her of her responsibility to comply with company policy. Neither does her allegation that the employer was 'out to get her' because '[she] was a threat' have any merit in light of her past warning. I found the employer's testimony regarding the claimant's final act more credible than that of the claimant. Also, I would note that the administrative law judge closed the record without obtaining final confirmation from the employer. Notwithstanding, I would conclude that the employer satisfied their burden of proof as the record stands and would deny benefits.

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Monique F. Kuester

AMG/fnv