



**DISSENTING OPINION OF JOHN A. PENO:**

I respectfully dissent from the majority decision of the Employment Appeal Board; I would reverse the decision of the administrative law judge. The claimant was off work on FMLA when his leave expired. On July 18<sup>th</sup>, the claimant spoke to the employer to see if anything could be done about his attendance point level. The employer told him that nothing could be done. (Tr. 17-18) The claimant was over his point allotment for which he received a final warning that he was at discharge level. The employer asked the claimant to come in for a meeting. The claimant reasonably believed he was going to be discharged at this meeting. Based on the circumstances, any reasonable person would conclude that the claimant retired in lieu of being discharged.

This situation is analogous to the employer's requiring the claimant to quit in lieu of being discharged wherein 871 IAC24.26(21) does not consider such a separation as a voluntary leaving. For the above reasons, I would conclude that the claimant's separation should be characterized as either a discharge for which misconduct was not established; or in the alternative, an involuntary quit due to medical reasons for which the issue of able and available needs to be determined. I would therefore, remand this matter to the Iowa Workforce Development Center Claims Section, for a determination of the able and available issue.

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John A. Peno