



AMG/fnv

**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 terminated for poor performance and failing to notify the employer of a pending law suit. The claimant did not flag the file for a lawsuit, and admits to failing to follow the specific procedure. The claimant admits that he had problems with the computer system, but was working to the best of his ability. The claimant reasonably believed that he was entering the daily diaries as he was instructed by Mr. Martin. He verbally informed Mark Martin of the situation prior to leaving for the Thanksgiving holiday and vacation. Thus, the employer was aware of the problem on or about November 19<sup>th</sup>, but did not notify, suspend or terminate the claimant until December. 16<sup>th</sup>. For this reason, I would conclude that the claimant was terminated for an act that was not current.

871 IAC 24.32(8) provides:

*Past acts of misconduct.* While past acts and warning can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

The court in Greene v. Employment Appeal Board, 426 N.W.2d 659 (Iowa App. 1988) held that in order to determine whether conduct prompting the discharged constituted a “current act,” the date on which the conduct came to the employer’s attention and the date on which the employer notified the claimant that said conduct subjected the claimant to possible termination must be considered to determine if the termination is disqualifying. Any delay in timing from the final act to the actual termination must have a reasonable basis. Based on this record, there was no reasonable explanation for the delay. As such, I would conclude that the employer failed to satisfy their burden of proof. Benefits should be allowed provided the claimant is otherwise eligible.

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John A. Peno

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