

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

KENDRA S HARLOW

Claimant,

and

WELLS FARGO BANK NA

Employer.

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HEARING NUMBER: 12B-UI-00215

**EMPLOYMENT APPEAL BOARD
DECISION**

N O T I C E

THIS DECISION BECOMES FINAL unless (1) a **request for a REHEARING** is filed with the Employment Appeal Board within **20 days** of the date of the Board's decision or, (2) a **PETITION TO DISTRICT COURT** IS FILED WITHIN **30 days** of the date of the Board's decision.

A **REHEARING REQUEST** shall state the specific grounds and relief sought. If the rehearing request is denied, a petition may be filed in **DISTRICT COURT** within **30 days** of the date of the denial.

SECTION: 96.5-2-A, 24.32-7

D E C I S I O N

UNEMPLOYMENT BENEFITS ARE DENIED

The Claimant appealed this case to the Employment Appeal Board. Two members of the Employment Appeal Board reviewed the entire record. Those members are not in agreement. Monique F. Kuester would affirm and John A. Peno would remand the decision of the administrative law judge.

Since there is not agreement, the decision of the administrative law judge is affirmed by operation of law. The Findings of Fact and Reasoning and Conclusions of Law of the administrative law judge are adopted by the Board and that decision is **AFFIRMED** by operation of law. See, 486 IAC 3.3(3).

Monique F. Kuester

DISSENTING OPINION OF JOHN A. PENO:

I respectfully dissent from the decision of the Employment Appeal Board; I would remand this matter to the administrative law judge for further consideration. The record shows that the final act that led to the Claimant's termination was tardiness due to oversleeping. The Claimant mentioned she was involved in a car accident which caused a prior absence and that she was placed on a formal warning. (Tr. 5) The administrative law judge, however, did not fully develop the record to determine the nature of her prior absences. In determining whether a final absence that led to an employee's termination was disqualifying, the court in *Cosper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982) held that the burden of proof is on the Employer. Thus, the Employer must distinguish between those absences that were due to illness and properly reported, from those which were for other personal reasons. If prior absences were due to illness and properly reported, then those absences are excused, and not misconduct. I need more evidence on those prior absences to render my decision. For this reason, I would remand for the limited purpose of eliciting testimony from the parties as to the nature of the Claimant's prior absences.

John A. Peno

AMG/fnv