

DISSENTING OPINION OF JOHN A. PENO:

I respectfully dissent from the decision of the Employment Appeal Board; I would reverse the decision of the administrative law judge. The record establishes that the claimant was in a disagreement about his number of tardies. He worked a flexible schedule and disagreed with the employer's warnings. Although the claimant's explanation for the final act of punching in 18 minutes late is somewhat sketchy, the employer failed to participate in the hearing to present any firsthand testimony to refute the claimant's testimony. The burden is on the employer to establish that the claimant committed job-related misconduct. *Casper v. Iowa Department of Job Service*, 321 N.W.2d 6 (Iowa 1982). Even if the final act was considered unexcused, the employer bears the burden to establish that the claimant had excessive absenteeism. For this reason, I would conclude that misconduct was not established and that benefits should be denied provided the claimant is otherwise eligible.

John A. Peno

AMG/kk