

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

RYAN L BAUMANN

Claimant,

and

G & G FRANCHISING CORP

Employer.

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HEARING NUMBER: 11B-UI-09324

**EMPLOYMENT APPEAL BOARD
DECISION**

NOTICE

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

DECISION

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 reverse 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 reverse the decision of the administrative law judge. The record establishes that the Claimant was late 61 times between January and May of 2011, which exemplifies his poor attendance record. The employer was aware of this problem as late as April 14, 2011, yet did nothing to discipline the Claimant such that would put him on notice that his job was in jeopardy until the day he was actually terminated on July 6th. I do not find a post-it note to be adequate notice.

The employer's failure to discipline the claimant over such an extended period of time amounted to the employer's acquiescence to his behavior. For this reason, I would conclude that the employer terminated the Claimant for an act that was not current within the meaning of the law. 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. The employer failed to put forth any reason for the delay. Thus, I would allow benefits provided the Claimant is otherwise eligible.

John A. Peno

AMG/lms