



**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 in its entirety. The Claimant gave a co-worker the finger and said, "F-ck you," while outside the building. The Claimant provided firsthand testimony that the use of profanity is commonplace in the kitchen, which the Employer did not refute. The record is void of any prior disciplines. Although the Employer submitted its work rules into the record, I would note that work rules, alone, are not dispositive of the issue of entitlement to unemployment insurance benefits. At worst, I would view the Claimant's comment, made under duress, to be an isolated act of poor judgment. I would also note that the administrative law judge's finding that the Employer also fired the Claimant's co-worker assumes facts that are not in the record. The Employer's witness, Terri de la Hunt, did not know why the Claimant's co-worker was no longer an employee. Based on this record, I would conclude that the Employer failed to satisfy their burden of proof. Benefits are allowed provided the Claimant is otherwise eligible.

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John A. Peno

AMG/fnv