

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

JOSEPH A HERING	:	
Claimant,	:	HEARING NUMBER: 09B-UI-04710
	:	
and	:	EMPLOYMENT APPEAL BOARD
	:	DECISION
HARVEY'S BR MANAGEMENT CO INC	:	
Employer.	:	

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. The members of the Employment Appeal Board, one member dissenting, reviewed the entire record. The Appeal Board finds the administrative law judge's decision is correct. The administrative law judge's Findings of Fact and Reasoning and Conclusions of Law are adopted by the Board as its own. The administrative law judge's decision is **AFFIRMED**.

Elizabeth L. Seiser

Monique F. Kuester

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. While trying to make conversation with a customer at his table, the claimant made a statement that he and the server (Heather) had a 'hate/hate' relationship. The claimant also complimented her stating she was a great server who does her job well. Heather became upset when a player from the table later spoke to her. It is unclear whether she was upset because of the customer or because of the claimant's statements. There is nothing in the record to support that this incident occurred as a result of any evil intent on the claimant's part. The employer failed to provide Heather as a witness to provide any firsthand testimony regarding this incident. For this reason, I would attribute more weight to the claimant's version of events.

The claimant's work history reveals that he had prior issues with this co-worker and supervision; however, he was working hard to establish a better relationship with them. At worst, his behavior may be considered poor judgment, but I would conclude that his behavior did not rise to the legal definition of misconduct. Benefits should be allowed provided he is otherwise eligible.

John A. Peno

AMG/fnv