

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

SCOTT P ALFORD

Claimant,

and

FAZOLI'S RESTAURANTS LLC

Employer.

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HEARING NUMBER: 12B-UI-08637

**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. 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**.

Monique F. Kuester

Cloyd (Robby) Robinson

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 Employer received a guest complaint by e-mail on May 20, 2012. The complainant saw a person smoking inside building. An investigation ensued on May 28, 2012 and the Employer obtained statements from various employees. On May 30th, the Claimant was notified that an investigation was in progress for which he denied all allegations. According to the Claimant, he was lighting a cigarette as he exited the building. But Mr. Sherer's follow-up revealed that the Claimant was sitting inside the building on a chair with the door propped open, which several employees allegedly confirmed, but were not presented as witnesses at the hearing. It was also alleged that the Claimant regularly used profanity in the workplace, i.e., 'f' word. The Claimant received no prior warnings and insisted that he only smoked outside.

Based on this record, I would attribute more weight to the Claimant's version of events. I would also conclude that the Employer failed to satisfy his burden of proving disqualifying misconduct. For this reason, I would allow benefits provided the Claimant is otherwise eligible.

John A. Peno

AMG/fnv