

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

BRETT M RAPIEN

Claimant,

and

NUTRI-JECT SYSTEMS INC

Employer.

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HEARING NUMBER: 09B-UI-02766

**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 ALLOWED IF OTHERWISE ELIGIBLE

The employer appealed this case to the Employment Appeal Board. The members of the Employment Appeal Board, one member concurring, 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**.

 John A. Peno

 Elizabeth L. Seiser

AMG/fnv

CONCURRING OPINION OF MONIQUE F. KUESTER:

I agree with my fellow board members that the administrative law judge's decision should be affirmed; however, I would comment that while the employer may have compelling business reasons to terminate the claimant, conduct that might warrant a discharge from employment will not necessarily sustain a disqualification from job insurance benefits. Budding v. Iowa Department of Job Service, 337 N.W. 2d 219 (Iowa App. 1983). The employer maintained that the claimant was discharged due to excessive internet usage. However, the employer failed to provide the claimant with a direct verbal or written warning. (Tr. 10, lines 15-22) As a secondary reason, the employer cited insufficient job performance, but the employer failed to effectively prove that assertion. (Tr. 11, lines 12-26) The court in Richers v. Iowa Department of Job Service, 479 N.W.2d 308 (Iowa 1991) held that inability or incapacity to perform well is not volitional and thus, cannot be deemed misconduct. And lastly, I am troubled by the fact that the claimant was never told why he was being discharged. From the employer's viewpoint, the claimant's actions may have violated company policy but the claimant's actions did not disqualify him under unemployment compensation law.

Monique F. Kuester

AMG/fnv

A portion of the employer's appeal to the Employment Appeal Board consisted of additional evidence which was not contained in the administrative file and which was not submitted to the administrative law judge. While the appeal and additional evidence (documents) were reviewed, the Employment Appeal Board, in its discretion, finds that the admission of the additional evidence is not warranted in reaching today's decision.

John A. Peno

Elizabeth L. Seiser

Monique F. Kuester

AMG/fnv