

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

68-0157 (9-06) - 3091078 - EI

**STEVE M BERRY**  
Claimant

**I.T.A. GROUP INC**  
Employer

**APPEAL NO: 10A-UI-08895-S**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 05/09/10  
Claimant: Appellant (2)**

Section 96.5-2-a – Discharge  
871 IAC 24.32(1) – Definition of Misconduct  
871 IAC 24.32(8) – Current Act

**STATEMENT OF THE CASE:**

The claimant appealed a department decision dated June 14, 2010, reference 01, that held he was discharged for misconduct on May 12, 2010, and benefits are denied. A hearing was held in Des Moines, Iowa on August 3, 2010. The claimant, and his Attorney, Melissa Hasso, participate. The employer did not participate. Claimant Exhibits A – M was received.

**ISSUE:**

Whether the claimant was discharged for misconduct in connection with employment.

**FINDINGS OF FACT:**

The administrative law judge having heard the testimony of the witness, and having considered the evidence in the record, finds: The claimant worked for the employer as a full-time creative director from March 28, 2007 to May 12, 2010. The employer called the claimant into a meeting on his last day, and terminated him for an unsatisfactory job performance and lack of leadership. Although the claimant had been conferenced by Manager Rombaleski in November 2009 about some job performance issues, he never received any warning that his job was in jeopardy. Although the claimant was expecting his performance review in March 2010 for his prior year work, it was handed to him on the date of termination. The employer acknowledged to claimant that there is no recent incident of misconduct that it relied upon for discharge.

The employer did not appear for the hearing. Employer Attorney Brick called Attorney Hasso the day before the hearing stating the employer would not participate, as it is not contesting claimant's unemployment claim.

**REASONING AND CONCLUSIONS OF LAW:**

Iowa Code section 96.5-2-a provides:

An individual shall be disqualified for benefits:

2. Discharge for misconduct. If the department finds that the individual has been discharged for misconduct in connection with the individual's employment:

a. The individual shall be disqualified for benefits until the individual has worked in and has been paid wages for insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

871 IAC 24.32(1)a provides:

Discharge for misconduct.

(1) Definition.

a. "Misconduct" is defined as a deliberate act or omission by a worker which constitutes a material breach of the duties and obligations arising out of such worker's contract of employment. Misconduct as the term is used in the disqualification provision as being limited to conduct evincing such willful or wanton disregard of an employer's interest as is found in deliberate violation or disregard of standards of behavior which the employer has the right to expect of employees, or in carelessness or negligence of such degree of recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer. On the other hand mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed misconduct within the meaning of the statute.

871 IAC 24.32(8) provides:

(8) Past acts of misconduct. While past acts and warnings can be used to determine the magnitude of a current act of misconduct, a discharge for misconduct cannot be based on such past act or acts. The termination of employment must be based on a current act.

The administrative law judge concludes the employer has failed to establish claimant was discharged for misconduct and/or any current act of misconduct in connection with employment on May 12, 2010.

The employer failed to appear and offer evidence of job disqualifying misconduct. The claimant's testimony and exhibits show while he may not have performed his job to the satisfaction of his employer, there is no act of misconduct, past or current, to disqualify the claimant from receiving unemployment benefits.

**DECISION:**

The department decision dated June 14, 2010, reference 01, is reversed. The claimant was not discharged for misconduct on May 12, 2010. Benefits are allowed, provided the claimant is otherwise eligible.

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Randy L. Stephenson  
Administrative Law Judge

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Decision Dated and Mailed

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