FINDINGS OF FACT:

Having heard the testimony of the witnesses and having examined all of the evidence in the record, the administrative law judge finds: The claimant was employed by the employer as a full-time hourly production worker from February 22, 2005 until he was discharged on September 1, 2005. The claimant was discharged for poor performance namely, failing to "pull his count" or work on the next item on the conveyer belt that was rightfully his and for violating rules of conduct when he got into a confrontation with a substitute supervisor. The claimant was on an assembly line where guts went down the line. The employer would have between two and eight employees working on the line. They would alternate picking a gut and working on it. Failing to "pull the count" refers to the fact that the individual who was supposed to work on the gut in the proper order does not pull the gut and work on it and makes someone else do it. On August 30, 2005, the claimant let a gut go by because it was more difficult to separate than the others and he could not get it separated. He was admonished for this by a substitute supervisor, Rachel Gleason. The claimant did not deliberately fail to pull his count because the gut that went by was more difficult to separate. This occasionally happens on the assembly line. Later that day the claimant was waiting for a gut to arrive for him to work on or waiting for his count when Ms. Gleason approached him and asked why he was not working. The claimant said that he was working, he was merely waiting for the gut to arrive. Ms. Gleason then told the claimant that she was going to give him a write-up and the claimant asked why, since he was working but was simply waiting for the gut to arrive. Apparently, the two exchanged words about this write-up. The claimant was asking Ms. Gleason why she was going to give him a write-up. There were no threats made by the claimant and no physical contact by the claimant and no profanity used by the claimant. Nevertheless, Ms. Gleason took the claimant to Human Resources and the claimant was discharged the next day.

The claimant had received a written counseling on May 17, 2005 and a written warning on May 18, 2005 and a written counseling on May 27, 2005, all for not pulling his count. The claimant was then suspended on June 14, 2005 for not pulling his count. The claimant at that point had failed on occasion to pull his count. Thereafter the claimant never failed to pull his count. His regular supervisor is Dave Maar, and the claimant had no problems with Mr. Maar after these warnings and counselings.

Pursuant to his claim for unemployment insurance benefits filed effective August 28, 2005, the claimant has received unemployment insurance benefits in the amount of $830.00 as follows: $50.00 for benefit week ending September 3, 2005 and $112.00 per week, for seven weeks from benefit week ending September 10, 2005 to benefit week ending October 22, 2005.

REASONING AND CONCLUSIONS OF LAW:

The questions presented by this appeal are as follows:

1. Whether the claimant's separation from employment was a disqualifying event. It was not.

2. Whether the claimant is overpaid unemployment insurance benefits. He is not.

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

The parties agree, and the administrative law judge concludes, that the claimant was discharged on September 1, 2005. In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been discharged for disqualifying misconduct. It is well established that the employer has the burden to prove disqualifying misconduct. See Iowa Code section 96.6(2) and Cosper v. Iowa Department of Job Service, 321 N.W.2d 6, 11 (Iowa 1982) and its progeny. Although it is a close question, the administrative law judge concludes that the employer has failed to meet its burden of proof to demonstrate by a preponderance of the evidence that the claimant was discharged for disqualifying misconduct. The employer's witness, David Duncan, Complex Human Resources Manager, testified that the claimant was discharged for poor performance when he failed to "pull his count" meaning he failed to do the work that was properly attributable to him and then after being admonished for that by his substitute supervisor had words or an incident with the substitute supervisor. The claimant denies failing to "pull his count" on the day in question, August 30, 2005. The claimant credibly testified that there was a gut that came by but that because it was more difficult to separate, he let that one go. The claimant credibly testified that

this occasionally happens. It was at that time that he was admonished by the substitute supervisor Rachel Gleason.

Later the claimant was leaning on a rail waiting for his gut to get to him so that he could work on it. Ms. Gleason approached the claimant and accused him of not working. The claimant said he was working but was merely waiting for the gut to arrive on the assembly line belt. She then told the claimant that she was going to give him a write-up. The claimant asked why because he was working and was not failing to "pull his count." Apparently, Ms. Gleason insisted and the claimant objected and was taken to the human resources office and discharged the next day. At no time during this incident did the claimant make any threats to Ms. Gleason nor did he make any physical contact with Ms. Gleason nor did he use any profanity directed at Ms. Gleason. Mr. Duncan testified that the claimant, three times, failed to pull his count on August 30, 2005, the last of which was when Ms. Gleason told the claimant that he was going to get a write-up. The claimant denies this. On the record here, and in the absence of any other evidence to the contrary, the administrative law judge is constrained to conclude that the claimant's version is more credible. The claimant testified from first hand personal knowledge and Mr. Duncan testified only from hearsay evidence. Accordingly, although it is a close question, the administrative law judge concludes that the claimant did not fail to "pull his count" on August 30, 2005 and, as a result, the threatened warning was unjustified and the claimant's objections to it were negligent or careless. This is a close question, but on the record here, the administrative law judge is constrained to conclude that there is not a preponderance of the evidence of any deliberate acts on the part of the claimant constituting a material breach of his duties and/or that evinced a willful and wanton disregard of an employer's interests and/or that were carelessness or negligence in such a degree of recurrence as to establish disqualifying misconduct. The argument with Ms. Gleason was negligence or carelessness but it was in an isolated instance. There was no evidence of any other warnings or disciplines to the claimant regarding relationships or arguing with a supervisor. Ms. Gleason was merely a substitute supervisor and the claimant had no problem with his regular supervisor. It is true that the claimant had received a number warnings in the past for not "pulling his count" and the claimant credibly conceded that he had failed to pull his count on those occasions. However, the claimant credibly testified that after his suspension on June 14, 2005, he never failed to pull his count and did not fail to do so on August 30, 2005. Accordingly, the administrative law judge concludes that the claimant did not fail to "pull his count" on August 30, 2005 and that his objection to the written warning made to Ms. Gleason, was merely negligence in an isolated instance, none of which is disqualifying misconduct.

In summary, and for all the reasons set out above, the administrative law judge concludes that the claimant was discharged but not for disqualifying misconduct and, as a consequence, he is not disqualified to receive unemployment insurance benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment insurance benefits and misconduct to support a disqualification from unemployment insurance benefits must be substantial in nature, including the evidence therefore. Fairfield Toyota, Inc. v. Bruegge, 449 N.W.2d 395, 398 (Iowa App. 1989). The administrative law judge concludes that there is insufficient evidence here of substantial misconduct on the part of the claimant to warrant his disqualification to receive unemployment insurance benefits. Unemployment insurance benefits are allowed to the claimant provided he is otherwise eligible.

Iowa Code section 96.3-7 provides:

> 7. Recovery of overpayment of benefits. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.
>
> If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

The administrative law judge concludes that the claimant has received unemployment insurance benefits in the amount of $834.00 since separating from the employer herein on or about September 1, 2005 and filing for such benefits effective August 28, 2005. The administrative law judge further concludes that the claimant is entitled to these benefits and is not overpaid such benefits.

DECISION:

The representative's decision of September 28, 2005, reference 02, is affirmed. The claimant, Wesley T. Montgomery, is entitled to receive unemployment insurance benefits, provided he is otherwise eligible, because he was discharged but not for disqualifying misconduct. As a result of this decision the claimant is not overpaid any unemployment insurance benefits arising out of his separation from the employer herein.

dj/kjw