The claimant participated in the hearing and was represented by Verle Norris, attorney at law. Thomas Werner, attorney at law, appeared on the employer's behalf and presented testimony from one witness, Clark Fielding. One other witness, Maureen Fielding, was available on behalf of the employer but did not testify. During the hearing, Exhibits One, Two, and Three were entered into evidence. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision. The decision in this case deals with the separation from employment; the claimant's eligibility for partial unemployment insurance benefits prior to the separation is addressed in the concurrently issued decision in appeal 05A-UI-08538-DT.

ISSUE:

Was the claimant discharged for work-connected misconduct?

FINDINGS OF FACT:

The claimant started working for the employer on June 24, 2004. She worked part time as a secretary in the employer's licensed funeral home. Her last day of work was August 10, 2005. The employer discharged her on that date. The reason asserted for the discharge was unsatisfactory job performance.

On July 13, 2005, after the employer learned that the claimant had filed a claim for partial unemployment insurance benefits, Mr. Fielding, the president/secretary of the business and the licensed funeral director, had a meeting with the claimant in which he presented her with ten "Employee Warning Notices" and told her to sign them. (Exhibit Three.) She was not given an opportunity to read the notices. After she signed the notices, dates were entered on the notices "dating" them on ten different dates fairly evenly spaced between August 2, 2004 and July 13, 2005. The only warning the claimant had previously been aware of prior to July 13 was the first one, dated August 2, 2004, although the copy that she signed on July 13 was not the same one that she had actually signed in August 2004. The box, "I agree with Employer's Statement" was marked on all but two of the notices, but the claimant denied that she had marked the box on any of the forms. Even after she signed the notices, she was not given a copy of the warnings nor given any further opportunity to review them.

On August 10, 2005, Mr. Fielding again met with the claimant; he had six "Employee Warning Notices" ready for her signature. (Exhibit Two.) The claimant signed the forms, which were all dated August 10, 2005. The notices all indicated that the "action to be taken" was "warning." The space for the "consequences should incident occur again" was left blank on all of the notices. The claimant did write comments or responses on five of the six notices. The box, "I agree with Employer's Statement" was marked on all of the notices, but the claimant denied that she had marked the box, but that she had purposefully left that box and the box indicating "I disagree . . ." unmarked so as to avoid confrontation. The forms also had spaces filled in for "previous warnings" marked as showing a prior first and second oral warning, and a third warning marked as a prior written warning. However, the spaces for dates for each of these warnings were left blank. Through the testimony at hearing, it became apparent that the prior "written warning" was one of the notices given to the claimant on July 13 for her signature.

The gist of the warnings was that the claimant had failed to follow instructions, had unsatisfactory work quality, and had been careless in a number of respects, such as failing to develop and maintain a list of files and folders on her computer, waiting until cases were closed before printing funeral records, failing to trim and organize records in ledger books correctly,

failing to get current information off the computer weekly, failing to regularly move files from a closet to a storage area downstairs, and failing to routinely update the employer's "black book" of service providers. The most recent issue identified was with regard to the claimant's failure to retrieve information for aftercare from the computer; this was due to the claimant's network connection being down for several weeks. She had reported the problem to the employer, but no action was taken. The employer could not specify what problems had occurred or reoccurred between the time of the claimant's "warnings" on July 13 and August 10.

While the claimant did make some written responses to the August 10 warnings, after the first part of their meeting Mr. Fielding did not find her responses to be adequate, and felt that she was not showing receptiveness to changing her performance. To at least some extent, the claimant argued that her failure to complete all of the responsibilities to the employer's satisfaction was a result in the reduction of her hours from an average of about 32 hours per week to 21 hours or less per week. When the claimant had asked to stay later to finish performing some tasks, the employer had still sent her home. The employer did not find the claimant's explanation on August 10 satisfactory; as a result, Mr. Fielding decided to discharge her.

REASONING AND CONCLUSIONS OF LAW:

The issue in this case is whether the employer discharged the claimant for reasons establishing work-connected misconduct as defined by the unemployment insurance law. The issue is not whether the employer was right to terminate the claimant's employment, but whether the claimant is entitled to unemployment insurance benefits. Infante v. IDJS, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what is misconduct that warrants denial of unemployment insurance benefits are two separate questions. Pierce v. IDJS, 425 N.W.2d 679 (Iowa App. 1988).

A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code §96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982).

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 focus of the definition of misconduct is on acts or omissions by a claimant that "rise to the level of being deliberate, intentional or culpable." Henry v. Iowa Department of Job Service, 391 N.W.2d 731, 735 (Iowa App. 1986). The acts must show:

1. Willful and wanton disregard of an employer's interest, such as found in:
   a. Deliberate violation of standards of behavior that the employer has the right to expect of its employees, or
   b. Deliberate disregard of standards of behavior the employer has the right to expect of its employees; or
2. Carelessness or negligence of such degree of recurrence as to:
   a. Manifest equal culpability, wrongful intent or evil design; or
   b. Show an intentional and substantial disregard of:
      1. The employer's interest, or
      2. The employee's duties and obligations to the employer.

Henry, supra. The reason cited by the employer for discharging the claimant is her work performance. Misconduct connotes volition. A failure in job performance is not misconduct unless it is intentional. Huntoon, supra. There is no evidence the claimant intentionally continued to fail to perform to the employer's expectations after an effective warning to her. The employer's "warnings" to her on July 13, 2005 were not effective warnings. The claimant performed her duties to the best of her abilities within the work time she was allowed. Further, the employer has not identified any specific current act of misconduct as required to establish work-connected misconduct. 871 IAC 24.32(8); Greene v. Employment Appeal Board, 426 N.W.2d 659 (Iowa App. 1988).

The employer has not met its burden to show disqualifying misconduct. Cosper, supra. Based upon the evidence provided, the claimant's actions were not misconduct within the meaning of the statute, and the claimant is not disqualified from benefits.

DECISION:

The representative's October 5, 2005 decision (reference 03) is affirmed. The employer did discharge the claimant but not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits, if she is otherwise eligible.

ld/s