IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

Appeal Number: 05A-UI-11392-RT
OC: 09-25-05 R: 01
Claimant: Respondent (1)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the ***Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319***.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

JASON J COGLIANESE
1736 NASH ST
SIOUX CITY IA 51109

GENESCO INC
C/O UC CONSULTANTS
223 OCEOLA AVE
NASHVILLE TN 37209

_____
(Administrative Law Judge)

_____
(Decision Dated & Mailed)

Section 96.5-2-a – Discharge for Misconduct
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

The employer, Genesco, Inc., filed a timely appeal from an unemployment insurance decision dated October 27, 2005, reference 01, allowing unemployment insurance benefits to the claimant, Jason J. Coglianese. After due notice was issued, a telephone hearing was held on November 22, 2005, with the claimant participating. The employer did not participate in the hearing because the employer did not call in a telephone number, either before the hearing or during the hearing, where any witnesses could be reached for the hearing, as instructed in the Notice of Appeal. The employer is represented by UC Consultants, who is well aware, or should be well aware, that an employer or its representative must, prior to the hearing, call in telephone numbers of any witnesses, if the employer wants to participate in the hearing. The

administrative law judge takes official notice of Iowa Workforce Development Department of unemployment insurance records for the claimant.

FINDINGS OF FACT:

Having heard the testimony of the witness 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 regional sales manager from April 1, 2000 until he was discharged on September 27, 2005. The claimant was discharged for audit results. There was a change in the manager at the employer's store in Lincoln, Nebraska. Anytime there is a change in the manager of a store the store has to have a merchandise audit. The claimant was conducting a merchandise audit and found shoes thrown in a big box and not contained in individual shoeboxes. The shoes were not matched pairs. The claimant believed, since the shoes were not mated or matched properly, that he should return them to the home office as damaged property and the claimant did so. These shoes had been left in a big box by a prior store manager and had been the subject of previous merchandise audits performed by corporate auditors and not the claimant. The employer has a policy that provides that two different shoes should not be sent back as a pair but rather discarded and taken as a loss as if they were stolen. The claimant was unaware of this policy and believed that he was acting properly and correctly when he returned the unmatched or unmated shoes to the home office as damaged merchandise. Nevertheless, the claimant was discharged. This was the only reason for the claimant's discharge. The claimant had never received any warnings or disciplines for this or similar behavior. Pursuant to his claim for unemployment insurance benefits filed effective September 25, 2005, the claimant has received unemployment insurance benefits in the amount of $1,964.00 as follows: Zero benefits for benefit week ending October 1, 2005 (earnings and vacation pay $999.00); $24.00 for benefit week ending October 8, 2005 (vacation pay $300.00); $324.00 for three weeks, from benefit week ending October 15, 2005 to benefit week ending October 29, 2005; $320.00 for benefit week ending November 5, 2005 (earnings $85.00); and $324.00 for two weeks, from benefit week ending November 12, 2005 to benefit week ending November 19, 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 claimant credibly testified, and the administrative law judge concludes, that he was discharged on September 27, 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. 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 did not participate in the hearing and provide sufficient evidence of deliberate acts or omissions on the part of the claimant constituting a material breach of the claimant's duties and/or evincing a willful or wanton disregard of the employer's interest and/or carelessness or negligence in such a degree of recurrence so as to establish disqualifying misconduct. The claimant credibly testified that he was discharged for a merchandise audit when he returned unmatched or unmated shoes to the employer as damaged merchandise which he believed was the appropriate step to take pursuant to the merchandise audit. However, the employer has a policy that provides that two different or unmatched or unmated shoes should not be returned to the employer as a pair as damaged merchandise but rather discarded and taken as a loss as if the shoes were stolen. The claimant was unaware of this policy at the time that he returned the shoes. The claimant had never received any warnings or disciplines for this behavior. This is the only reason for the claimant's discharge. On the record here, the administrative law judge concludes that there is not a preponderance of the evidence that the claimant's act in returning the unmatched or unmated shoes was a deliberate act constituting a material breach of his duties or an act that evinced a willful or wanton disregard of the employer's interest or an act that was carelessness or negligence in such a degree of recurrence so as to establish disqualifying misconduct. At the very most, the evidence indicates that the claimant's act was merely ordinary negligence in an isolated instance and is not disqualifying misconduct.

In summary, and for all of 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 s 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. 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 $1,964.00 since separating from the employer herein on or about September 27, 2005 and filing for such benefits effective September 25, 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 October 27, 2005, reference 01, is affirmed. The claimant, Jason J. Coglianese, 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.

kkf/kjw