

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

CANDACE R MOFFETT
Claimant

APPEAL NO. 07A-UI-00017-NT

**ADMINISTRATIVE LAW JUDGE
DECISION**

DUCKWALL-ALCO STORES INC
Employer

**OC: 11-12-06 R: 03
Claimant: Respondent (1)**

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

STATEMENT OF THE CASE:

The employer filed an appeal from a representative's decision dated December 21, 2006, reference 01, which allowed benefits based upon her separation from Duckwall-Alco Stores, Inc. After due notice was issued, a hearing was held by telephone conference call on January 18, 2007 and Ms. Moffett participated personally. The employer participated by Joan Carroll, Hearing Representative, and Beth McCauley, Store Manager.

ISSUE:

At issue in this matter is whether Ms. Moffett was discharged for intentional disqualifying misconduct in connection with her work and whether the claimant has been overpaid unemployment insurance benefits.

FINDINGS OF FACT:

Having heard the testimony of the witnesses and having reviewed all of the evidence in the record, the administrative law judge finds: Ms. Moffett was employed by Duckwall-Alco Stores, Inc. from July 12, 2005 until November 17, 2006 when she was discharged from employment. The claimant worked as a part-time price change coordinator and office worker and was paid by the hour.

Ms. Moffett was discharged because the company believed that she should have reported to the company that another employee who she was acquainted with possessed items that could have been misappropriated from the company. As a result of an anonymous tip, all employees who had had interaction with the suspected thief were interviewed by the company's loss prevention investigator. During the investigation, Ms. Moffett was interviewed and stated that Jeremy Benard (a friend of the alleged thief) had visited the claimant's house approximately one and one-half weeks before to visit the claimant's daughter and while there had in his possession some new items and that the claimant had questioned Mr. Bernard about them. Ms. Moffett concluded her statement indicating that in her mind she identified the items as being stolen from Alco. Based upon the claimant's statement to the loss prevention investigator, the company believed that Ms. Moffett knew the items were being misappropriated from the company and

had failed to take the affirmative step of reporting the potential thief to company management. It was not alleged that the claimant had taken part in the misappropriation or that the claimant had been a recipient of any stolen property or proceeds from the stolen property.

Although the claimant had later, in hindsight, questioned in her mind Mr. Bernard's possession of the items, she did not clearly associate Mr. Bernard's possession of an "X game" and some other items as being stolen from the company. Ms. Moffett presumed that Mr. Bernard may have purchased the items elsewhere and did not consider the matter further at that time. Although Ms. Moffett was aware that "rumors" had circulated that Mr. Bernard's friend, who also was employed at the company, had been misappropriating items, she did not believe Mr. Bernard's possession of an "X game" or other games established that Mr. Bernard had misappropriated them from Alco. The claimant, therefore, had not reported the matter to the company during the approximately one and one-half weeks that elapsed between the time that she was interviewed by the company's loss prevention manager.

It is the employer's position that the claimant should have known that she had an affirmative duty to report any suspicions, no matter how small, to the company based upon her acknowledgement of essential job functions at the time of her hire which included communicating effectively with other associates in management and assisting in providing security for the facility. See Exhibit Five.

REASONING AND CONCLUSIONS OF LAW:

Ms. Moffett was discharged from her employment because of the employer's perception that the claimant had reasonable suspicion that an individual who was employed by the company and who had visited her home was misappropriating company property and that the claimant had failed to assist company security by reporting it. As a basis for this position the employer cited an acknowledgement signed by the claimant at the time of hire relating to job functions which included communicating with associates and managers and assisting in security as one of a number of enumerated job responsibilities.

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.

Although when unexpectedly interviewed about the matter on November 20, 2006, the claimant indicated that she identified those items as being stolen from the company, Ms. Moffett explained at length in her testimony that in hindsight it then appeared to her that there was a link between Mr. Bernard's conduct, the items and the rumors of misappropriation. The claimant further testified, however, that at the time that she had observed the items and briefly questioned Mr. Bernard, she had no concrete basis to believe that they were stolen from the company and that there was nothing to establish, in fact, the items were stolen from the company. The administrative law judge finds the claimant to be credible in her testimony and finds that her testimony is not inherently improbable. In addition the evidence does not clearly establish that Ms. Moffett was aware that she had agreed to or that company policy required her to report these matters to the company under those circumstances. For these reasons the administrative law judge finds that the employer has not sustained its burden of proof in establishing intentional disqualifying misconduct on the part of the claimant at the time of separation.

The question before the administrative law judge in this case is not whether the employer has the right to discharge an employee for these reasons but whether the discharge is disqualifying. While the decision to terminate Ms. Moffett may have been a sound decision from a management viewpoint, the administrative law judge is not convinced that the claimant had sufficient knowledge of misappropriation prior to November 20, 2006 and the claimant did not have sufficient knowledge of what the employer considered to be her affirmative obligation to report any and all suspicions to the employer.

DECISION:

The representative's decision dated December 21, 2006, reference 01, is hereby affirmed. The claimant was discharged under non-disqualifying conditions and is eligible to receive unemployment insurance benefits, provided that she meets all other eligibility requirements.

Terence P. Nice
Administrative Law Judge

Decision Dated and Mailed

pjs/kjw