

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

DAVID A MARKOFF
Claimant

APPEAL NO. 08A-UI-11140-CT

**ADMINISTRATIVE LAW JUDGE
DECISION**

HOB-LOB LTD
Employer

OC: 10/26/08 R: 04
Claimant: Respondent (1)

Section 96.5(2)a – Discharge for Misconduct

STATEMENT OF THE CASE:

Hob-Lob, Ltd. filed an appeal from a representative's decision dated November 18, 2008, reference 01, which held that no disqualification would be imposed regarding David Markoff's separation from employment. After due notice was issued, a hearing was held by telephone on December 15, 2008. Mr. Markoff participated personally. The employer participated by Roy Shipp, District Manager.

ISSUE:

At issue in this matter is whether Mr. Markoff was separated from employment for any disqualifying reason.

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: Mr. Markoff was employed by Hob-Lob, Ltd., doing business as Hobby Lobby Stores, from May 12 until October 27, 2008. He was employed full time as co-manager. On or about October 8, 2008, there was a theft at Hobby Lobby and employees were asked to consent to a background check. The employer learned on or about October 16 that Mr. Markoff had been charged with fifth degree theft on August 15, 2008. The charge stemmed from a shoplifting incident at a Hy-Vee store in Davenport, Iowa.

The employer sent a letter to Mr. Markoff on October 21 asking him to provide evidence that the charge discovered during the background check was incorrect. He was given 14 days in which to provide the requested evidence. The charge was dismissed on October 24 on the condition that he attend a class and pay court costs. The employer's policies provide a listing of conduct that is deemed unacceptable by Hobby Lobby. The list includes "theft, . . . violation of criminal laws, or any other conduct that results in a loss or increased risk to the Company." Mr. Markoff had received a copy of the employee handbook at the time of hire. The August 15, 2008 criminal charge was the sole reason for the October 27, 2008 discharge.

REASONING AND CONCLUSIONS OF LAW:

An individual who was discharged from employment is disqualified from receiving job insurance benefits if the discharge was for misconduct. Iowa Code section 96.5(2)a. The employer had the burden of proving disqualifying misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). Mr. Markoff was discharged because he was charged with theft. His conduct occurred while he was off duty and did not involve theft of any property belonging to Hobby Lobby. The employer's policy, as written, does not put employees on notice that their off-duty conduct may result in discharge.

It is true that the employer's policy makes reference to "violation of criminal laws" as unacceptable conduct. However, the policy is modified by the words "or any other conduct that results in a loss or increased risk to the Company." This modifier suggests that the violation of criminal laws must result in a loss or increased risk to Hobby Lobby. Since the theft did not involve any property belonging to the employer, there was no loss or potential loss to the employer. It would be stretching application of the rule to hold that Mr. Markoff's theft increased the risk of loss to the employer solely on the basis that he had stolen merchandise from a different, unrelated store.

After considering all of the evidence, the administrative law judge concludes that the conduct that gave rise to Mr. Markoff's discharge was not in connection with his employment as required for a misconduct disqualification. As such, no disqualification is imposed. While the employer may have had good cause to discharge, conduct that might warrant a discharge from employment will not necessarily support a disqualification from job insurance benefits. Budding v. Iowa Department of Job Service, 337 N.W.2d 219 (Iowa 1983).

DECISION:

The representative's decision dated November 18, 2008, reference 01, is hereby affirmed. Mr. Markoff was discharged, but not for misconduct in connection with his employment. Benefits are allowed, provided he satisfies all other conditions of eligibility.

Carolyn F. Coleman
Administrative Law Judge

Decision Dated and Mailed

cfc/kjw