

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

**NICOLE L MCNEAR**  
Claimant

**DOLGENCORP LLC**  
Employer

**APPEAL 21A-UI-18543-DZ-T**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**OC: 07/11/21  
Claimant: Appellant (1)**

Iowa Code § 96.5(2)a – Discharge for Misconduct  
Iowa Code § 96.5(1) – Voluntary Quit

**STATEMENT OF THE CASE:**

Nicole L McNear, the claimant/appellant, filed an appeal from the August 19, 2021, (reference 01) unemployment insurance decision that denied benefits. The parties were properly notified of the hearing. A telephone hearing was held on October 14, 2021. Ms. McNear participated and testified. The employer participated through Deb Schlichte, store manager.

**ISSUE:**

Was Ms. McNear discharged for disqualifying, job-related misconduct?

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge finds: Ms. McNear began working for the employer on 08/09/18. She worked as a part-time lead sales associate. Her employment ended on June 23, 2021.

The employer's policy requires employees to ask for photo ID for every sale of tobacco. The policy further provides that employees who make a purchase must take their purchases out of the store before the store closes. Employees who violate the policy are subject to discipline up to, and including, termination of employment.

Ms. McNear was written up on May 24, 2021 for selling cigarettes without asking for a photo ID. Ms. McNear told the employer that she did not ask for photo ID because the customer was her boyfriend. The employer told Ms. McNear that there were no exceptions to the policy: employees are required to ask for photo ID for every sale of tobacco. The employer had previously issued a verbal warning to Ms. McNear about selling tobacco without asking for a photo ID. On June 21, 2021, Ms. McNear sold cigarettes to a regular customer without asking for photo ID.

On June 20, 2021, Ms. McNear was working with the closing shift with another employee. The other employee bought products from the store, and was about to take the products out of the store. Ms. McNear told the other employee to not take the products out of the store. The other

employee put the products the front door and the other employee and Ms. McNear closed the store.

On June 23, 2021, Ms. McNear clocked in. Ms. Schlichte called her to the office and handed her two write-ups. One was for selling cigarettes without asking for photo ID on June 21, 2021, and the other was for stopping the other employee from taking the products the employee had purchased from the store before closing the store on June 20, 2021. Ms. Schlichte told Ms. McNear that her employment was terminated for selling cigarettes without asking for photo ID, and for stopping the other employee from taking the products the employee had purchased from the store before closing the store.

The employer had also written up Ms. McNear on February 5, 2021 and May 7, 2021 for attendance issues. After the second write up, Ms. McNear did not have any attendance issues. Ms. Schlichte listed Ms. McNear's attendance issue as one of the reasons the employer terminated her employment. Attendance is not one of the reasons Ms. Schlichte gave to Ms. McNear when the employer terminated her employment on June 23, 2021.

### **REASONING AND CONCLUSIONS OF LAW:**

For the reasons that follow, the administrative law judge concludes Ms. McNear was discharged from employment due to job-related misconduct.

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 employer has the burden of proof in establishing disqualifying job misconduct. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). The issue is not whether the employer made a correct decision in separating claimant, but whether the claimant is entitled to unemployment insurance benefits. *Infante v. Iowa Dep't of Job Serv.*, 364 N.W.2d 262 (Iowa Ct. App. 1984). The Iowa Court of Appeals found substantial evidence of misconduct in testimony that the claimant worked slower than he was capable of working and would temporarily and briefly improve following oral reprimands. *Sellers v. Emp't Appeal Bd.*, 531 N.W.2d 645 (Iowa Ct. App. 1995). Generally, continued refusal to follow reasonable instructions constitutes misconduct. *Gilliam v. Atlantic Bottling Co.*, 453 N.W.2d 230 (Iowa Ct. App. 1990). Misconduct must be "substantial" to warrant a denial of job insurance benefits. *Newman v. Iowa Dep't of Job Serv.*, 351 N.W.2d 806 (Iowa Ct. App. 1984). Poor work performance is not misconduct in the absence of evidence of intent. *Miller v. Emp't Appeal Bd.*, 423 N.W.2d 211 (Iowa Ct. App. 1988).

The employer is entitled to establish reasonable work rules and expect employees to abide by them. The employer has presented credible evidence that Ms. McNear sold cigarettes without asking for photo ID after having been given a verbal warning and a written warning. Despite these warnings, Ms. McNear continued to engage in similar behavior. This is disqualifying misconduct. Benefits are denied.

**DECISION:**

The August 19, 2021, (reference 01) unemployment insurance decision is affirmed. Ms. McNear was discharged from employment due to job-related misconduct. Benefits are withheld until such time as she has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible.



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October 20, 2021  
Decision Dated and Mailed

dz/kmj