

**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**

**ROBERT E MC NICHOLS
1321 CALVIN
DAVENPORT IA 52804**

**EXPRESS LANE INC
D/B/A EXPRESS LANE GAS &
FOOD MART
1305 – 12TH AVE
ROCK FALLS IL 61071**

**Appeal Number: 05A-UI-03214-RT
OC: 02-20-05 R: 04
Claimant: Appellant (2)**

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.

(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

The claimant, Robert E. McNichols, filed a timely appeal from an unemployment insurance decision dated March 17, 2005, reference 01, denying unemployment insurance benefits to him. After due notice was issued, a telephone hearing was held on April 13, 2005, with the claimant participating. Kathy Peugh, Supervisor of Convenience Stores, participated in the hearing for the employer, Express Lane, Inc., doing business as Express Lane Gas & Food Mart.

FINDINGS OF FACT:

Having heard the testimony of the witnesses 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 cashier/assistant manager from June 29, 2004 until he was discharged on February 17, 2005. The claimant had worked at that location as a cashier for eight years in the convenience store. The employer purchased the convenience store on June 29, 2004 and the claimant began working for the employer but had worked there for a total of eight years. The claimant was discharged for selling an age-restricted product, cigarettes, to a minor as part of a compliance check by the state police or a "sting" operation. The employer has a policy that provides that an employee who sells an age-restricted item is automatically discharged. The claimant was aware of this policy and signed an acknowledgement. The employer has a policy of which the claimant was aware that if a customer appears to look under the age of 27, the employee must "card" the customer by asking for and observing a picture ID to see the customer's birth date to be sure the customer is old enough to buy the age-restricted item. The employer's cash register does not trigger a response when an age-restricted item is entered into the cash register. The claimant was also shown a video by Phillip Morris called, "We Card" about selling cigarettes to minors.

On February 16, 2005, a female customer entered the store and purchased cigarettes from the claimant. She looked to be 18 or 19 years old. Accordingly, the claimant "carded" the customer or asked for picture ID. The female customer provided one and the claimant looked at the identification twice. He believed that the birth year was 1986 with a month of January which would make the purchaser old enough to buy the cigarettes. However, the birth year was 1988 making the customer too young to buy the cigarettes. The claimant was not aware of this and sold the cigarettes. The claimant did not willfully or deliberately sell the cigarettes to a person he knew was a minor.

In the eight years that the claimant worked at the convenience store he had never been accused of selling an age-restricted item to someone under the restricted age. He had gone through two or three compliance checks and passed each one. On the sale in question, the claimant did not ask the age of the customer because he thought that he had identified the age from the identification which in this case was a driver's license.

REASONING AND CONCLUSIONS OF LAW:

The question presented by this appeal is whether the claimant's separation from employment was a disqualifying event. It was 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).

Both witnesses were very credible and testified that the claimant was discharged on February 17, 2005 and the administrative law judge so concludes. 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. Although it is a close question, 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. There is no evidence that the claimant's sale of the age-restricted item, cigarettes, to a minor, was willful or deliberate with knowledge of the customer's age. The employer has policies requiring "carding" of anyone who appears to be under the age of 27 by checking a picture identification. The customer was female and looked 18 or 19 and the claimant followed the employer's procedures by "carding" the customer by checking an ID. The claimant followed the employer's procedures. The claimant simply misread the birth year. The customer was born in 1988 making her too young to purchase cigarettes but the claimant looked at the identification twice and believed that it said 1986 which would make the customer old enough to buy cigarettes. There is no doubt the state of Iowa is serious about enforcing the sale of age-restricted items but on the record here, the administrative law judge is constrained to conclude that there is not a preponderance of the evidence that the claimant's sale in this situation was either willful or deliberate. The issue then becomes whether the claimant's sale of this item was carelessness or negligence in such a degree of recurrence as to establish disqualifying misconduct.

The administrative law judge is constrained to conclude that the claimant's sale here was not carelessness or negligence in such a degree of recurrence as to establish disqualifying misconduct but was rather an isolated instance of ordinary negligence. The claimant credibly testified that he twice looked at the identification but misread the year believing the year of birth

was 1986 instead of 1988. The administrative law judge notes that there is similarity between the number 6 and the number 8. The failure of the claimant to ask the age of the customer is justified here because he checked the customer's ID and thought the ID cleared the customer. The claimant also credibly testified that he had been employed in a convenience store at that location for eight years and had never been accused of such behavior before and had passed two or three prior compliance checks. The claimant did receive the proper training and followed the employer's procedures. The claimant simply misread the identification. Accordingly, the administrative law judge must conclude that the claimant's behavior was merely ordinary negligence in an isolated instance and is not disqualifying misconduct. The administrative law judge understands the gravity of the sale of age-restricted items to minors but also notes that in order to be disqualified to receive unemployment insurance benefits, the misconduct giving rise to the discharge must be deliberate or willful or recurring negligence. Misconduct serious enough to warrant the discharge of an employee is 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 is constrained to conclude here that there is insufficient evidence of substantial misconduct on the part of the claimant to warrant his disqualification to receive unemployment insurance benefits. Therefore, 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. Unemployment insurance benefits are allowed to the claimant, provided he is otherwise eligible.

DECISION:

The representative's decision of March 17, 2005, reference 01, is reversed. The claimant, Robert E. McNichols, is entitled to receive unemployment insurance benefits, provided he is otherwise eligible, because he was discharged but not for disqualifying misconduct.

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