

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**KYLE L KIRBY**  
Claimant

**APPEAL NO. 06A-UI-11268-HT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**ADVANCE STORES COMPANY INC**  
Employer

**OC: 10/22/06 R: 04  
Claimant: Respondent (2)**

Section 96.5(2)a – Discharge  
Section 96.3(7) – Overpayment

**STATEMENT OF THE CASE:**

The employer, Advance Stores, filed an appeal from a decision dated November 17, 2006, reference 01. The decision allowed benefits to the claimant, Kyle Kirby. After due notice was issued, a hearing was held by telephone conference call on December 11, 2006. The claimant participated on his own behalf. The employer participated by Store Manager Bob Montooth. Exhibits One and Two were admitted into the record.

**ISSUE:**

The issue is whether the claimant was discharged for misconduct sufficient to warrant a denial of unemployment benefits.

**FINDINGS OF FACT:**

Kyle Kirby was employed by Advance Stores from November 12, 2005 until October 25, 2006. He was a part-time sales clerk. He received written warnings on June 12 and October 15, 2006, about attendance and insubordination. The second warning advised him any further incidents could lead to discharge.

On October 21, 2006, the claimant punched in early and went immediately to the break room to eat. As a part-time employee he does not get paid lunch breaks. When he reported for work the assistant manager informed him of the store-wide “to do list” which listed 12 jobs everyone in the store was to help do. Mr. Kirby disagreed that the “to do list” was needed as the prior manager had never done it. He was told to do his part of the duties, which he did. However, before leaving he added a 13th item to the list which read, “clean up Bob’s jack-off area.” The list was then put on the clipboard and it was hung on the wall at the end of the counter where it could be seen by employees and customers.

Manager Bob Montooth learned of these incidents when he reported for work the next day. He reviewed the claimant’s disciplinary history and made the decision to discharge him. When Mr. Kirby reported for his next shift on October 25, 2006, he was fired.

Kyle Kirby has received unemployment benefits since filing a claim with an effective date of October 22, 2006.

**REASONING AND CONCLUSIONS OF LAW:**

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 had been advised his job was in jeopardy as a result of his attitude and insubordination. He was subsequently discharged for time clock fraud by eating while on the clock and putting an inappropriate comment on a company document which was subsequently posted in an area accessible to the public. This is insubordinate, dishonest and constitutes conduct not in the best interests of the employer. The claimant is disqualified.

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 claimant has received unemployment benefits to which he is not entitled. These must be recovered in accordance with the provisions of Iowa law.

**DECISION:**

The representative's decision of November 17, 2006, reference 01, is reversed. Kyle Kirby is disqualified and benefits are withheld until he has earned ten times his weekly benefit amount, provided he is otherwise eligible. He is overpaid in the amount of \$448.00.

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Bonny G. Hendricksmeier  
Administrative Law Judge

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Decision Dated and Mailed

bgh/css