

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

PHILIP JONES  
1101½ GAINES ST  
DAVENPORT IA 52804

WAL-MART STORES INC  
c/o FRICK UC EXPRESS  
PO BOX 283  
ST LOUIS MO 63166-0283

Appeal Number: 04A-UI-12429-HT  
OC: 10/24/04 R: 04  
Claimant: Respondent (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, 4<sup>th</sup> 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.

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(Administrative Law Judge)

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(Decision Dated & Mailed)

Section 96.5-2-a – Discharge  
Section 96.3-7 – Overpayment

STATEMENT OF THE CASE:

The employer, Wal-Mart, filed an appeal from a decision dated November 9, 2004, reference 01. The decision allowed benefits to the claimant, Philip Jones. After due notice was issued, a hearing was held by telephone conference call on December 14, 2004. The claimant provided a telephone number of (563)336-3469 immediately prior to the hearing. That number was contacted and no one present had any knowledge of the claimant or his whereabouts. Several other numbers (563)570-5392, (563)445-3280 and (563)445-3200 were called in an attempt to contact the claimant without success and he did not participate. The employer participated by Co-Manager Jason Dennis, District Loss Prevention Supervisor Brian Drechney, and In Store Loss Prevention Associates Ryan Drier and Chris Bowker.

#### 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: Philip Jones was employed by Wal-Mart from September 18, 2003 until September 14, 2004. He was a full-time unloader working 4:00 p.m. until 1:00 a.m.

On September 14, 2004, Co-Manager Jason Dennis was out in the receiving area and noticed several items under one of the Wal-Mart semi-tractor trailers. There was a computer printer, a DVD player and a stack of DVD discs. He called District Loss Prevention Supervisor Brian Drechney at home and he came to the store immediately where the two of them viewed the surveillance tapes from that evening. The tapes showed the claimant taking these items from the truck and also from the unloading area and placing them under the truck. It later showed him driving his personal vehicle to the truck where he then loaded these items into it and drove around to the front of the store. Mr. Drechney checked personally to see that these items were in Mr. Jones's vehicle then summoned the police.

The police arrived, investigated the vehicle and arrested the claimant on charges of theft. The DVD player and the printer were recovered but not the DVD discs. Mr. Drechney spoke with Mr. Jones briefly and he admitted to taking the items and said he had given the DVD discs to someone at the gas station but he would not say who. A review of the surveillance tape on several other dates showed the claimant taking other items from the store in the same manner. The claimant was found guilty of theft in the district court.

Philip Jones has received unemployment benefits since filing a claim with an effective date of October 24, 2004.

#### REASONING AND CONCLUSIONS OF LAW:

The issue is whether the claimant is disqualified. The judge concludes he is.

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 was witnessed taking merchandise from the employer for which he did not pay. He admitted to the employer he had taken the items and has been found guilty of the theft in district court. Theft of merchandise is more than conduct not in the best interests of the employer, it is also a criminal matter. He was fired for misconduct and is disqualified from receiving benefits.

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 9, 2004, reference 01, is reversed. Philip Jones 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 \$356.00.

bgh/tjc