

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

ANDREW J TODD
Claimant

APPEAL NO: 18A-UI-11351-TN-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

THE HON COMPANY
Employer

OC: 10/28/18

Claimant: Respondent (2)

Iowa Code § 96.5(2)a – Discharge
Iowa Code § 96.3(7) – Benefit Overpayment

STATEMENT OF THE CASE:

The Hon Company, the employer filed a timely appeal from a representative's unemployment insurance decision dated November 13, 2018, (reference 01) which held Andrew J. Todd eligible to receive unemployment insurance benefits, finding that the claimant was dismissed from work on October 25, 2018, but finding that the record did not show willful or deliberate misconduct. After due notice was provided, a telephone hearing was held on December 6, 2018. Claimant participated. Employer participated by Ms. Pamila Drake, Hearing Representative, Employer's Edge LLC and witness Mr. Michael L. Johnson, Human Resource Generalist. Employer's Exhibits 1 through 7 were admitted into the hearing record.

ISSUES:

The first issue is whether the claimant was discharged for work-connected misconduct sufficient to warrant the denial of unemployment insurance benefits.

The second issue is whether the claimant has been overpaid job insurance benefits.

The third issue is if the claimant has been overpaid, whether the claimant is liable to repay the overpayment or the employer should be chargeable based upon the employer's participation in the fact-finding interview.

FINDINGS OF FACT:

Having considered all of the evidence in the record, the administrative law judge finds: Andrew J. Todd was most recently employed by The Hon Company from February 25, 2018 until October 24, 2018, when he was discharged from employment. Mr. Todd was last employed as a full-time powder painter and was paid by the hour. His immediate supervisor was Scott Ernst.

Mr. Todd was discharged from employment based upon the employer's reasonable belief that he had intentionally violated the company's fairness and respect policy by inappropriate touching of two female employees on their buttocks on October 23, 2018.

On October 23, 2018, Tonya Peine complained that Mr. Todd had slapped her on the butt. Ms. Peine had told the claimant not to touch her again and then reported Mr. Todd's actions to her manager. Subsequently Ms. Peine identified Mr. Todd as the person that had touched her. Later during the morning of October 23, 2018, a second female employee, Katie Fuller reported that Mr. Todd had slapped her on the butt, Ms. Fuller further reported that after she had told Mr. Todd to "keep his hands off her", Mr. Todd replied "relax, I'm joking around, I just did it to Tonya too."

The complaints of the two female workers were referred to Michael Johnson for investigation. Mr. Johnson spoke with the claimant. Mr. Todd initially denied any knowledge of any inappropriate conduct that he may have committed. Later, as Mr. Todd was leaving the facility after being suspended pending investigation in the matter, Mr. Todd stated that he "accidentally slapped Tonya Peine's butt at work today." While investigating the allegations against Mr. Todd, Ms. Fuller disclosed that Mr. Todd had inappropriately touched her in a similar way on two previous occasions although she had told Mr. Todd to stop after each incident. She had not previously reported the conduct because she feared it might cause the claimant to lose employment. Both of the female witnesses' had specifically complained about Mr. Todd's conduct and were fearful that the claimant might repeat inappropriate conduct in the future.

It is the claimant's position that he inadvertently caused a chair to touch Tonya Peine's buttocks on October 23, 2018. Mr. Todd asserts that he has no recollection of the personal contact with Ms. Katie Fuller. It is the claimant's belief that Ms. Peine's statement was motivated to a desire to cause trouble. The claimant was unable to cite a reason that Ms. Fuller might make statements about him that were untrue.

REASONING AND CONCLUSIONS OF LAW:

The question before the administrative law judge is whether the evidence in the record establishes work-connected misconduct on the part of the claimant sufficient to warrant the denial of unemployment insurance benefits. It does.

In discharge cases, the employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by unemployment insurance law. *Cosper v. Iowa Dep't of Job Serv.*, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct and culpability. See *Lee v. Employment Appeal Board*, 616 N.W.2d 661, 665 (Iowa 2000).

In the case at hand, two female employees made separate and independent complaints to company management when Mr. Todd had sexually harassed them by touching their buttocks by slapping them. The company followed a reasonable course of action by investigating. Both female workers provided written statements to the employer. One of the workers had also reported the incident and complained to her immediate supervisor the same day. That worker had also complained that Mr. Todd had touched her in a similar way on two previous occasions. Neither female worker acquiesced to Mr. Todd's conduct, and each had objected and told him to stop on each occasion.

Although the administrative law judge is mindful of Mr. Todd's denials, the weight of evidence is nevertheless established in favor of the employer. The evidence in the record establishes the claimant engaged in a pattern of harassment of female employees that was willful and in

violation of company policy and law. Claimant's conduct was repetitive, intentional and in violation of the law. Accordingly, the claimant is disqualified for unemployment insurance benefits until he has worked in and been paid wages for insured work equal to ten times his weekly benefit amount and is otherwise eligible.

Because the claimant has been deemed ineligible for benefits, any benefits the claimant has received could constitute an overpayment. The administrative record reflects that the claimant has received unemployment insurance benefits in the amount of \$2,145.00 since filing a claim with an effective date of 01-22-18 for the benefit weeks ending November 3, 2018 through December 1, 2018. The hearing record also establishes that the employer did participate in the fact-finding interview or make a first-hand witness available for rebuttal.

The unemployment insurance law requires benefits be recovered from a claimant who receives benefits and is later denied benefits even if the claimant acted in good faith and was not at fault. However, a claimant will not have to repay an overpayment when an initial decision to award benefits on an employment separation issue is reversed on appeal if two conditions are met: (1) the claimant did not receive the benefits due to fraud or willful misrepresentation, and (2) the employer failed to participate in the initial proceeding that awarded benefits. In addition, if a claimant is not required to repay an overpayment because the employer failed to participate in the initial proceeding, the employer's account will be charged for the overpaid benefits. Iowa Code section 96.3(7)a, b.

The claimant received benefits but has been denied benefits as a result of this decision. The claimant, therefore, was overpaid benefits.

Because the employer participated in the fact-finding interview, the claimant is required to repay the overpayment and the employer will not be charged for benefits paid.

DECISION:

The representative's unemployment insurance decision dated November 13, 2018, reference 01 is reversed. Claimant was discharged for work-connected misconduct. Unemployment insurance benefits are withheld until the claimant has worked in and been paid wages for insured work equal to ten times his weekly benefit amount and is otherwise eligible. Claimant has been overpaid job insurance benefits in the amount of \$2,145.00 and liable to repay this amount. The employer's account shall not be charged, based upon the employer's participation in the fact-finding interview.

Terry P. Nice
Administrative Law Judge

Decision Dated and Mailed

tn/scn