

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS BUREAU**

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

PRESTON A TAYLOR
Claimant

APPEAL NO. 19A-UI-02036-TN-T

**ADMINISTRATIVE LAW JUDGE
DECISION**

RED LOBSTER RESTAURANTS LLC
Employer

OC: 09/02/18
Claimant: Respondent (2)

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

STATEMENT OF THE CASE:

Red Lobster Restaurants, LLC, the employer, filed a timely appeal from a representative's unemployment insurance decision dated February 28, 2019, reference 09, which held the claimant, Preston A. Taylor, eligible to receive unemployment insurance benefits, finding that he was dismissed from work on January 29, 2019 for no disqualifying reason. After due notice was provided, a telephone hearing was held on March 22, 2019. Claimant participated. The employer participated by Ms. Barbara Buss, Hearing Representative with ADP Unemployment Claims, and witness Ms. Andrea Carroll, General Manager. Employer's Exhibits A through D and Department Exhibit D-1 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 unemployment insurance benefits.

The third issue is if the claimant has been overpaid, is the claimant liable to repay the overpayment or should the employer be held 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: Preston Taylor was employed by Red Lobster Restaurants, LLC from October 27, 2018 until January 29, 2019, when he was discharged from employment. Mr. Taylor was employed as a part-time server and was paid by the hour. His immediate supervisor was Ms. Andrea Carroll, General Manager.

Mr. Taylor was discharged on January 29, 2019 after two female servers had complained to the company's general manager about Mr. Taylor's conduct at work. During the incident, Mr. Taylor had snapped a wet towel on the buttocks of both female servers, as he was completing his side-work duties prior to January 29, 2019. Mr. Taylor stopped this conduct when one of the two female workers had requested him to do so, but Mr. Taylor continued to snap the towel and strike the buttocks of the other female worker, although she had requested him to stop more

than once. In addition to slapping the buttocks of one of the female workers, after being specifically requested to stop, Mr. Taylor also made a reference to the effect of the towel slapping on that female server's buttocks. The female worker filed a complaint with company management reporting that Mr. Taylor had stated that snapping had "made her butt giggle." Other employees who were present at the time also provided statements to the employer verifying that Mr. Taylor had continued these activities after he had been told to stop. When the employer received the complaint from the female worker stating that Mr. Taylor had hit her on the buttocks and continued to hit her on the buttocks after she had asked him to stop and alleged that Mr. Taylor had made an inappropriate comment about her butt that made her feel uncomfortable, the general manager considered the complaint to be of a serious nature and further investigated. The general manager took statements from employees who were present and a statement from Mr. Taylor. Mr. Taylor, in his explanation to the employer, stated that he was playing with a wet towel and hitting people on the backside. Mr. Taylor explained that his actions were done in a joking, friendly way and he did not believe his actions would be offensive to either female worker because he had stopped snapping the towel when one worker requested that he do so, and only continued snapping the towel against the buttocks of the second female worker because he believed that his conduct was in effect consensual and they had a friendly relationship in the past.

Red Lobster Restaurants, LLC has a sexual and other unlawful harassment policy in place which prohibits harassment on the basis of sex and other legally protected groups that creates an abusive or hostile work environment. The policy prohibits unwanted and unwelcome sexual overtones, prohibiting unwelcome sexual advances, requests for sexual favors, or other verbal, non-verbal or physical conduct that creates an offensive, hostile, or intimidating work environment to other employees. The policy sets forth examples of prohibited conduct including conduct that is humiliating of a joking nature that might be offensive to a reasonable person or protected group. The policy further warns employees that, even though an action might not be intended to be discriminatory or harassing, it may be perceived so by the recipient.

The employer concluded that Mr. Taylor's conduct had violated the company's strict anti-sexual harassment rules and he was discharged from employment.

It is Mr. Taylor's position that, although he did engage in snapping the towel against the female worker's buttocks, he also slapped other workers in a similar way. Mr. Taylor agrees that he continued to slap the buttocks of one female worker after she had told him not to do so, because he felt that she would not consider his conduct objectionable. Mr. Taylor believes that his statement to the female worker was not that slapping her buttocks made her butt "giggle", but that it had caused her to "tighten" her buttocks.

REASONING AND CONCLUSIONS OF LAW:

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

Iowa Code section 96.5(2)a provides:

An individual shall be disqualified for benefits, regardless of the source of the individual's wage credits:

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 disqualification shall continue 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.

Iowa Admin. Code r. 871-24.32(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 Dep't of Job Serv.*, 275 N.W.2d 445, 448 (Iowa 1979).

The employer has the burden of proof in this matter. See Iowa Code section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment insurance benefits. Misconduct that may be serious enough to warrant the discharge of an employee may not necessarily be serious enough to warrant the denial of unemployment insurance benefits. See *Lee v. Employment Appeal Board*, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional or culpable acts by the employee. See *Gimbel v. Employment Appeal Board*, 489 N.W.2d 36, 39 (Iowa Ct. of Appeals 1992).

In the case at hand, Mr. Taylor was discharged after he engaged in conduct on the job that was objectionable and embarrassing to a female worker and caused the female worker to complain to company management about his behavior.

The evidence establishes that Mr. Taylor continued to slap the female worker's buttocks with a wet towel after she had requested him to stop and that in addition to his unwanted slapping of her buttocks, Mr. Taylor also made references to the effect that the slapping had on the recipient's buttocks.

While Mr. Taylor may have intended his conduct to be in the nature of banter and horseplay, it was not perceived by the recipient in the same manner. The female worker was upset and embarrassed creating an offensive work environment in violation of company policy.

Although Mr. Taylor intended his conduct to be joking and horseplay, he knew or should have known striking a female worker's buttocks and making reference to her buttocks while doing so, was contrary to the employer's interests and standards of behavior, and would jeopardize his employment with the company.

For the above stated reasons, the administrative law judge concludes that the employer has sustained its burden of proof in establishing the claimant's job separation took place under

disqualifying conditions. 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.

As 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 \$1210.00, since opening his claim for unemployment insurance benefits with an effective date of September 2, 2018 for the benefit weeks ending February 16, 2019 through March 16, 2019. The administrative record also establishes that the employer did not participate in the fact-finding interview.

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 claimant did not receive benefits due to fraud or willful misrepresentation and the employer failed to participate in the fact finding interview, the claimant is not required to repay the overpayment and the employer remains subject to charge for the overpaid benefits.

DECISION:

The representative's unemployment insurance decision dated February 28, 2019, reference 09, 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 unemployment insurance benefits in the amount of \$1210.00. Claimant is not liable to repay that amount and the employer's account shall be charged based up the employer's failure to participate in the fact-finding interview.

Terry P. Nice
Administrative Law Judge

Decision Dated and Mailed

rvs/rvs