

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**CONSTANTINO MENDOZA**  
Claimant

**APPEAL NO. 12A-UI-14596-VST**

**ADMINISTRATIVE LAW JUDGE  
NUNC PRO TUNC DECISION**

**00-728-3641**  
**AMERICAN POP CORN CO**  
Employer

**OC: 11/11/12**  
**Claimant: Respondent (2R)**

Section 96.5-2-a – Discharge for Misconduct  
Section 96.3-7 – Overpayment of Benefits

**STATEMENT OF THE CASE:**

The employer filed an appeal from the representative's decision dated December 7, 2012, reference 01, which held that the claimant was eligible for unemployment insurance benefits. After due notice was issued, a hearing was held by telephone conference call on February 14, 2013. The hearing could not be completed at that time and was resumed on February 18, 2013. The claimant participated. The employer participated by Craig Nolan, the production manager; Greg Hoffman, the vice president of production; Maria Ruelas, A Shift Supervisor; Rosa Bailey, the human resources manager (February 18, 2013 only); and Bill Pursinger, the team leader. The record consists of the testimony of Greg Hoffman; the testimony of Bill Pursinger; the testimony of Maria Ruelas; the testimony of Craig Nolan; the testimony of Constantino Mendoza; and Employer's Exhibits 1-10. Ninfa Redmond served as Spanish interpreter.

**ISSUES:**

Whether the claimant was discharged for misconduct; and

Whether the claimant has been overpaid unemployment insurance benefits.

**FINDINGS OF FACT:**

Having reviewed all of the evidence in the record, the administrative law judge makes the following findings of fact:

The employer does manufacturing and processing of popcorn at its facility located in Sioux City, Iowa. The claimant was hired on November 3, 1997. His job was full-time stacker on the B shift for microwave popcorn. His last day of work was November 8, 2012. He was terminated on November 8, 2012.

The incident that led to the claimant's termination occurred on November 8, 2012. The claimant called his team leader, Bill Pursinger, a "cabron." Mr. Pursinger did not know what this Spanish term meant and so he went to Maria Ruelas and asked her. She said it was a "bad" word.

Mr. Pursinger was angry and went to the human resources. A meeting was held. The claimant said that he intended the word to mean "big tough guy." Ms. Bailey, the human resources manager, disagreed as the word could also mean "fucker."

Greg Nolan joined the meeting. By this time the claimant was very agitated and angry. The claimant refused to answer Mr. Nolan's questions. Mr. Nolan felt that the claimant was being insubordinate. He suspended the claimant and told him to go home and cool down. The claimant repeatedly asked Mr. Nolan: "What do you want to do – fire me?" He then started laughing and Mr. Nolan asked the claimant if he thought this was funny. The claimant asked again whether Mr. Nolan wanted to fire him. Mr. Nolan followed the claimant down the hallway and as the claimant was going away he called Mr. Nolan a "fucker." Mr. Nolan then told the claimant that he was terminated.

The employer has writing rules that prohibit threatening, intimidating, coercing or interfering with employees, including but not limited to foul or abusive language. Also prohibited is insubordination or the failure to obey a direct order of management or a member of management, or the use of abusive or threatening language toward any manager or a member of management. The claimant knew about these rules.

#### **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.

Misconduct occurs when there are deliberate acts or omissions that constitute a material breach of the worker's duty to the employer. Profanity or other offensive language in a confrontational or disrespectful context may constitute misconduct, even in isolated situations or in situations in which the target of the statements is not present to hear them. See Myers v. EAB, 462 N.W.2d 734(Iowa App. 1990) In Henecke v. IDJS, 533 N.W.2d 573 (Iowa App. 1995), the Iowa Court of Appeals stated that an employer has the right to expect decency and civility from its workers. Insubordination, which is the continued failure to follow reasonable instructions, constitutes misconduct. See Gilliam v. Atlantic Bottling Company, 453N.W.2d 230 (Iowa App. 1990) The employer has the burden of proof to show misconduct.

The claimant is not eligible for unemployment insurance benefits. The claimant called his team leader a "cabron." The claimant said that he meant nothing disrespectful by the use of this word but the team leader was told by another Spanish speaking member of management that this was a "bad" word. The claimant then engaged in a series of disrespectful exchanges with members of management, including the human resources manager and the vice president of production. The claimant apparently considered the whole matter to something of a joke and in effect challenged the employer to fire him when all the employer had intended to do was suspend him. The claimant then directly called Mr. Nolan a "fucker." The claimant clearly violated the employer's written rules; engaged in insubordination; and violated his material duty of geniality and civility. Benefits are denied.

The next issue is overpayment of benefits.

Iowa Code section 96.3-7, as amended in 2008, provides:

7. Recovery of overpayment of benefits.

a. 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.

b. (1) 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. However, provided the benefits were not received as the result of fraud or willful misrepresentation by the individual, benefits shall not be recovered from an individual if the employer did not participate in the initial determination to award benefits pursuant to section 96.6, subsection 2, and an overpayment occurred because of a subsequent reversal on appeal regarding the issue of the individual's separation from employment. The employer shall not be charged with the benefits.

(2) An accounting firm, agent, unemployment insurance accounting firm, or other entity that represents an employer in unemployment claim matters and demonstrates a continuous pattern of failing to participate in the initial determinations to award benefits, as determined and defined by rule by the department, shall be denied permission by the

department to represent any employers in unemployment insurance matters. This subparagraph does not apply to attorneys or counselors admitted to practice in the courts of this state pursuant to section 602.10101.

The overpayment issue is remanded to the Claims Section for determination.

**NUNC PRO TUNC DECISION:**

The unemployment insurance decision dated December 7, 2012, reference 01, is reversed. Unemployment insurance benefits are denied. The overpayment issue is remanded to the Claims Section for determination.

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Vicki L. Seeck  
Administrative Law Judge

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Decision Dated and Mailed

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