

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

EDWIN F BROWN
Claimant

APPEAL NO. 10A-UI-06717-HT

**ADMINISTRATIVE LAW JUDGE
DECISION**

IOWA CATHOLIC CONFERENCE
Employer

OC: 04/04/10
Claimant: Respondent (2-R)

Section 96.5(2)a – Discharge

STATEMENT OF THE CASE:

The employer, Iowa Catholic Conference (ICC), filed an appeal from a decision dated April 26, 2010, reference 01. The decision allowed benefits to the claimant, Edwin Brown. After due notice was issued a hearing was held by telephone conference call on June 23, 2010. The claimant participated on his own behalf. The employer participated by Father Gary Snyder and was represented by Paul Jahnke.

ISSUE:

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

FINDINGS OF FACT:

Edwin Brown was employed by ICC from April 23, 2004 until March 30, 2010 as a full-time custodian of the church and St. Michaels elementary school. He attended Virtus Training which educates staff, clergy and volunteers about the appropriate conduct for those who work with and around young children. He signed updates on April 6, 2004 and January 9, 2009.

On Sunday evening, March 28, 2010, Father Gary Snyder received a call from school principal Mike Sweeney. Mr. Sweeney had received a call from Guy Watkins who owned a business called Perdinko. Mr. Brown was a contract cleaner for that business. Mr. Watkins reported the claimant had been viewing child pornography on a computer at his business.

Mr. Sweeney and Father Snyder contacted the claimant and had him come to a meeting at the rectory around 9:30 p.m. At that meeting they notified him of the call from Mr. Watkins and said he would have to be suspended with pay pending further investigation. The claimant stated at that time he had been cleaning the desk of the salesman at Perdinko that evening and “bumped” the computer. The computer screen then lit up and he could see “pornographic images” on the screen and immediately shut the computer off. While he was there the salesman came in to the office.

Mr. Brown surrendered the keys to the ICC buildings. The next day Father Snyder consulted with Superintendent Dan Ryan and Father Patrick Walsh about the situation. It was confirmed the police department had the computer from Perdinko and an examination of the computers at St. Michael's was done. Child pornography was found on the computer in the kitchen which does not require a password for access. That computer was surrendered to the police department.

It was agreed between Father Snyder and Mr. Ryan the claimant would continue to be suspended until April 9, 2010, by which time it was hoped further information would be available. Father Snyder met with Mr. Brown on March 30, 2010, to inform him of the decision. At that meeting Mr. Brown "broke down" and confessed he had been viewing the child pornography, and Father Snyder discharged him immediately.

Edwin Brown has received unemployment benefits since filing a claim with an effective date of April 4, 2010.

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.

The claimant maintains he did not view child pornography at the location of his other job. His contention is that he was "framed" by the salesman who had accessed the pornography on his computer and left those images on the screen while he was gone. The salesman knew he had

been “caught” when he came in on the evening of March 28, 2010, and found his computer turned off and the claimant cleaning the office. The salesman then allegedly contacted Mr. Walsh and blamed Mr. Brown for the situation.

Mr. Brown denies he confessed any wrong doing to Father Snyder but has not provided any explanation as to why the employer would fabricate such a heinous story about him. The employer acknowledged the claimant’s performance as an employee had been satisfactory prior to that point. The claimant also could not explain the child pornography on the kitchen computer in the school where he performed his custodial duties.

The administrative law judge finds the claimant’s explanation to be questionable. To merely “bump” a computer and find pornography is unlikely. In any event, he should have immediately notified the owner of the company what he found rather than turning off the computer. It is more likely he turned off the computer when the salesman arrived, thinking it would delete what he had been viewing.

More to the point, Mr. Brown has failed to provide any explanation as to why the employer’s witness would fabricate a story about him confessing. ICC was prepared to continue his suspension with pay until April 9, 2010, pending further investigation. There was no need to fire him March 30, 2010, unless he did, in fact, confess.

The viewing of child pornography is conduct which violated the employer’s policies and the Virtus training. It is also a crime. St. Michael’s is an elementary school with young children and persons who view child pornography present a definite threat to them. The employer has the obligation to provide a safe school environment for the students and the claimant’s conduct interfered with its ability to do so. This is conduct not in the best interests of the employer and the claimant is disqualified.

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 claimant has received unemployment benefits to which he is not entitled. The question of whether the claimant must repay these benefits is remanded to the UIS division.

DECISION:

The representative's decision of April 26, 2010, reference 01, is reversed. Edwin Brown is disqualified and benefits are withheld until he has earned ten times his weekly benefit amount, provided he is otherwise eligible. The issue of whether the claimant must repay the unemployment benefits is remanded to UIS division for determination.

Bonny G. Hendricksmeier
Administrative Law Judge

Decision Dated and Mailed

bgh/pjs