STATE OF NEW YORK
UNEMPLOYMENT INSURANCE APPEAL BOARD

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IN THE MATTER OF THE CLAIM FOR UNEMPLOYMENT BENEFITS OF NAME DELETED,

Claimant- appellant,

-against-

MID ISLAND YM & YWHA,

Employer- respondent.

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APPELLANT'S STATEMENT ON APPEAL

APPEAL BOARD CASE NO. 553681

STATEMENT ON APPEAL SUBMITTED ON BEHALF OF CLAIMANT

Preliminary Statement

The 63 year old claimant was employed for 21 years in respondent's nursery school as a teaching assistant, a position that did not require any formal training as a teacher. (18, 37)

The employer instituted a change in the educational requirement for teaching staff, in order to pursue an accreditation for its Early Childhood program, which required all members of the teaching staff who did not already have at least 12 college credits in the field, to enroll in and complete a 6- 9 month, college level certification course at their own cost, (approximately $1500.00) without a guarantee of continuing employment. (9-14, 35)

The claimant suffers from attention deficit disorder, a learning disability which makes it difficult for her to comprehend or retain information imparted to her in a classroom setting, and she cannot take tests. (37-38) Claimant's learning disability also has an emotional component, causing panic attacks when claimant realizes she cannot comprehend what is being discussed. The certification course would have been a very difficult experience for the claimant. (38, 39)

This change in the educational requirement for teaching staff was a drastic alteration in the terms and conditions of claimant's employment. With no guarantee of continued employment, and with a learning disability that would have made it difficult or impossible for claimant to successfully complete the course, the claimant did not enroll in the course and was not rehired.

Procedural History

The Department of Labor, in its initial determination dated March 25, 2010, found claimant ineligible. However, in a modified initial determination dated July 1, 2010 the Department changed that finding, and ruled that the claimant was entitled to collect benefits, because the employer's requirement that she enroll in and pass a CDA certification course, which she had to pay for out of her own pocket, with no guarantee that she would be re- hired, constituted a change in the terms and conditions of her employment after 21 years of service. Coupled with the claimant's learning disability, the Department of Labor found the claimant's decision not to enroll in the course was reasonable. A copy of the initial determination dated July 1, 2010 is attached hereto as **Exhibit A.**

The employer objected and requested a hearing, contending that the claimant should have been disqualified from receiving unemployment benefits. A hearing was held before Administrative Law Judge London (hereinafter "ALJ") at which only the employer appeared, while claimant defaulted. That hearing resulted in a decision dated July 16, 2010 disqualifying the claimant on the grounds she voluntarily quit her employment.

The claimant applied to open her default, and requested a new hearing date. Another hearing took place before ALJ London at which both sides appeared. In a decision dated August 23, 2010, the ALJ granted claimant's application to vacate her default in appearing at the July 14, 2010 hearing; however, the ALJ held the claimant was disqualified from receiving

benefits on the grounds she had voluntarily separated from her employment without good cause. [1] (A copy of the August 23, 2010 decision is attached hereto as **Exhibit B**.) It states:

> The credible evidence establishes that the claimant opted out of pursuing the CDA certification course because of her learning disability, thereby withdrawing from her job. I credit the employer's witness' sworn testimony that accommodations were available for those with learning disabilities and claimant's position was never guaranteed even prior to the new accreditation process. It is undisputed that claimant took examinations (sic) during the course of her employment. Therefore, the claimant's contention that she could not take the certification course because of her learning disability is without merit, given the fact that she took previous exams to maintain her employment, despite the methods she chose to pass the CPR exam. Further, the employer was providing reasonable accommodations for those with learning disabilities had she disclosed this information. Accordingly, I conclude that the claimant voluntarily separated from continuing employment without good cause under the law.

It is respectfully submitted that, for the reasons which follow, the ALJ's decision is erroneous and should be reversed, and the initial determination dated July 1, 2010 reinstated.

STATEMENT OF FACTS

The employer, Mid Island YM & YWHA, (hereinafter sometimes referred to as "YMHA") operated a nursery school, in which the claimant was employed as a teaching assistant. She had started working for the employer approximately 21 years before. Claimant's job duties involved working with the children, preparing the classroom, and assisting the teacher. (24) Her work was "hands on."

The claimant was 63 years old, (37) and had no formal educational background as a teacher. In the 21 years that claimant had been employed with the nursery school, she had

[1] The August 23, 2010 decision contains an error which makes it ambiguous. It states: "The employer's objection…that the claimant should be disqualified …because the claimant voluntarily separated from employment is *sustained*. The initial determination, holding the claimant eligible to receive benefits …is *sustained.* The claimant is disqualified…" (emphasis added.) The employer's objection and the initial determination can not both be sustained under this ruling.

never been required to have more than a high school education. (18) Claimant's lack of college education and formal training in the field had never before been an issue. (18)

In the end of 2008 the employer decided to reapply for accreditation with the National Association for the Education of Young Children. (hereinafter referred to as " NAEYC") The school had previously been accredited by NAEYC some five years earlier, and its accreditation had expired. The accreditation was not a licensing requirement, and was not required for the school to function. Accreditation by NAEYC was entirely optional. (11-13)

To facilitate its application for accreditation, the employer instituted a new employment policy (9-10) which required any members of its teaching staff who did not have an educational background which included at least 12 college credits in early childhood, to become certified in that field by completing a CDA certification course. The employer based these educational requirements on the NAYEC accreditation requirements which required the teaching staff of accredited schools to have 12 credits in early childhood education, in education, or in a related field, or to hold a Bachelors Degree; or to be registered with a State recognized CDA certification program. (See hearing exhibit 1) (10-12, 18)

The employer announced this policy change at a staff meeting at the end of 2008, which claimant did not attend. The employer informed the staff present at that meeting that if their educational backgrounds did not meet the specified educational requirements, they were required to either enroll in a CDA certification course, or let the employer know that they were choosing not to enroll. (12-13) Employees who did not enroll in the CDA certification course would not be re-hired.

The CDA certification program cost $1500 (15) Enrolling in the certification program did not guarantee future employment for those employees who did not meet the educational requirement. The certification course was anticipated to take between 6 and 9 months to complete, and was the educational equivalent of 12 college credits. (12) The employer allowed one year to complete the course, and once the

course was completed the examination could be taken as many times as necessary to pass. (13) 16 employees enrolled in the course, and 4 opted out. All four were assistant teachers.

The claimant had been on unrelated disability leave during the 2008 school year when this policy change was being implemented. She was not present at the staff meeting that took place at the end of 2008 when the staff was informed of the policy change. (37)

The claimant stopped at the office in June 2009, and learned about the change in employment requirements. Claimant spoke to Jennifer Fusco and informed her that she had a learning disability, and asked whether she could be grandfathered. She was refused. (29, 37) Fusco did not ask for the details of her learning disability, and said nothing to her about making accommodations for her disability. (29, 41-42, 50)

It was pointed out to the claimant that she had not indicated whether she was enrolling in the course, or opting out and she signed the document indicating she was opting out. (Hearing Exhibit 1) (37-40) The claimant was told she had to pay for the course herself; (35) although the employer claimed a State scholarship was available for those with a qualifying income level, (17, 27) claimant was never informed either verbally or in writing about any scholarships which could defray the cost of the course. (27)

The claimant did not mention the learning disability to Ms. Gerrold, because it never came up. (50) Ms. Fusco did not recall the specifics of her conversation with claimant, but denied being told about claimant's learning disability. (67) She knew that claimant was hesitant about the certification course, however.

Claimant suffers from attention deficit disorder; she is unable to comprehend what is being said in class, and cannot take tests. (37-38) She suffers a "panicky" reaction when she realizes she is not comprehending what is being discussed. (38) She stated that she experienced this in High School, and it has been happening throughout her life. It was the reason she dropped a college English class she had tried to take when she was 19 or 20 years old, "Introduction to English." She dropped the class after two weeks "… because she did not know what was going on in the classroom."(38)

Claimant testified as follows:

> Q. Is that what you were anticipating would be the case if you had gone forward with the CDA course?
>
> A. I know that. I know that for a fact. This has been going on all my life. It is not something that just happened now. (39)

Claimant decided to opt out of the course because she could not handle taking the course with her learning disability. (38, 39) Requiring her to take the course was a change in the terms and conditions of her job; she had not signed up for a position that required her to go back to school. (36)

Had she enrolled in the course, the claimant would have had the same experience of non-comprehension as she had when she tried to take the college English class. She would suffer anxiety and panic attacks whenever she realized she was not comprehending the discussions, or was unable to recall the answers for a test. (38-39, 40, 54)

Over the years the employer had required claimant to participate in various safety training courses which had become mandatory, on subjects including CPR, AED (defibrillator) and first aid. Claimant participated because her job required her to do so. (36, 40, 54) She was unable to follow what was being discussed during those training courses, and she was so concerned about failing the multiple choice test following the CPR training, and of losing her job as a result, that she copied the answers from someone else onto the test. (40, 54-58) She also copied on tests following other training courses. (60)

A R G U M E N T

P O I N T I

THE ALJ COMMITTED REVERSIBLE ERROR DISQUALIFYING CLAIMANT ON THE GROUNDS OF A VOLUNTARY QUIT WITHOUT GOOD CAUSE

The order of ALJ London dated August 23, 2010 entirely overlooked controlling legal principles which should have governed the case and erroneously based the claimant's disqualification on the following grounds:

1. The claimant's contention that she could not take the certification course because of her learning disability is without merit, given the fact that she took previous exams to maintain her employment ;

2. The employer would have made reasonable accommodation for the claimants learning disability had she given them the chance to do so;

3. Claimant's position had never been guaranteed prior to the policy change.

The ALJ overlooked the fact that this was a major change in the terms and conditions of employment, which in itself is a justification for separation, as was the requirement that claimant pay for a certification course lasting 6-9 months, without any guarantee of future employment, even if her previous employment had not been guaranteed. However, on cross examination the employer's witness admitted that after 21 years of employment, claimant was entitled to a reasonable expectation that she would continue to receive a placement letter, until this change in policy. (19)

It is submitted that reasonable accommodation is not a real issue in this case, as the employer was not teaching the certification course, and was therefore not in a position to make reasonable accommodations in the way the course was given. Claimant's disability did not have a physical basis, such that reasonable accommodation could be made by providing visual or auditory aids. There is no accommodation the employer could have reasonably offered that would have assisted the claimant in comprehending the class, and taking the exam, or that would have alleviated the panic attacks she suffered as a result. (See discussion in B below.)

The claimant testified that she informed Ms. Fusco of her learning disability, when she asked to be grandfathered, (50) and Ms. Fusco did not ask for any further details or mention reasonable accommodation to her. (41-42, 50) Ms. Fusco denied a specific recollection of the details of what claimant said, and denied knowledge of claimant's disability. Neither witness provided details of the alleged reasonable accommodations afforded to other members of the staff with learning disabilities, and there was no reason to credit the employer's testimony over the claimant's.

The ALJ erroneously found claimant's contention that she could not take the certification course due to her learning disability, to be without merit based on evidence that claimant had participated in the mandatory training in CPR , AED and First Aid. However, the analogy drawn by the ALJ between the two types of courses, is a false one.

There is no reasonable comparison possible between a training course lasting hours, (certainly less than a day each, since the CPR course is given once a year) and a professional teaching certification estimated to take between 6 and 9 months, and requiring the student to take an examination to acquire the certification, or license. The former is a safety requirement imposed by the State, and designed to be easily understood. The certification course is the equivalent of 12 college credits in the field of Early Childhood, and constitutes the basis for a teaching certification. (10-12)

Claimant participated in the mandatory training because she was required to do so for her job, but that fact has no bearing on whether her refusal to enroll in a college level certification course lasting 6-9 months, and costing $1500.00 was reasonably justified. In fact, the claimant honestly admitted being so lost in the CPR training due to her learning disability, that she felt compelled to copy someone else's answers for the multiple choice test which followed, because she was afraid she might lose her job if she failed the test. (40, 54)

Rather than providing a reason to doubt claimant's disability, this amounts to truly credible evidence of the extent and severity of claimant's learning disability, which prevented her from comprehending even the type of information given in such a training lecture. (40, 54)

A. CLAIMANT'S SEPARATION WAS JUSTIFIED

The initial determination correctly found that claimant was justified in refusing to enroll in the certification course. Claimant is not a professional teacher, by educational background and originally accepted the position because it did not require her to have any formal training or a degree as a teacher; nor was the acquisition of a professional teaching certification among the terms and conditions of the claimant's job.

When claimant was initially hired as a teaching assistant, had the employer required her to go back to school for a period of 6 to 9 months, at a cost to her of $1500.00, she would have been justified in refusing the position, because it was a substantial change in the terms and conditions of the position she accepted. **Matter of Lavecchia** __AD3d __ 695 NYS2d 780 (3d Dept 1999) Therefore, pursuant to Section 593.1 she was justified in separating from her position.

Section 593 provides in pertinent part, as follows:

> **Sec. 593. Disqualification for benefits.** 1. Voluntary separation…
>
> In addition to other circumstances that may be found to constitute good cause, including a compelling family reason as set forth in paragraph (b) of this subdivision, voluntary separation from employment shall not in itself disqualify a claimant if circumstances have developed in the course of such employment that would have justified the claimant in refusing such employment in the first instance….

Analysis of the situation demonstrates that claimant's decision not to enroll in the course was justified on several different grounds:

1) As noted, the employer's new educational requirement was a significant change in the terms and conditions of claimant's employment;

2) The successful completion of a college level certification course was beyond claimant's abilities because of her learning disability; claimant believed the attempt to complete the course would have a negative impact on her health and well being because she suffered panic attacks when she failed to comprehend what people were saying; (A.B. 10,152-43; A-750-551) (A. B. 542700;) and

3) The requirement that claimant pay a fee of $1,500.00 out of her own pocket, as a condition precedent to continuing employment, with no guarantee of employment, has been held to justify refusal or separation from employment; (where the claimant objected to paying for a physical examination, rather than a certification course.) (A.B. 54,075-56; A-750-1410)

Each of these circumstances has individually been held to justify the refusal of and/or the separation from employment; it therefore follows that, since all three circumstances are presented in the case at bar, claimant's separation from her employment was with compelling justification.

i. <u>Requiring Claimant To Obtain A Professional Teaching Certification To Retain Her Position Was A Change In The Terms And Conditions of Employment that Justified Claimant's Separation</u>

The employer's alteration of significant terms and conditions of employment will generally constitute good cause for refusal of or separation from employment. **Matter of Lavecchia** __AD3d __ 695 NYS2d 780 (3d Dept 1999)where claimant was hired as an administrative assistant, and subsequently required to solicit business as a telemarketer;

The primary purpose of the Unemployment Insurance Law is to ease the hardship of involuntary unemployment beyond the control of the employee **Dillon v Greer Children's Hospital** 59 AD2d, 397 NYS2d 468 (3d Dept 1977)

In the following cases, the Appeal Board found changes in the terms and conditions of employment, significantly less drastic than the change in this case, to justify the claimant's voluntary separation;

Good cause for voluntary separation has been found where the employer altered the original terms and conditions of employment by refusing to continue reimbursing certain disbursements by a salesman-collector, which represented a 5% reduction in his already meager remuneration. (A.B. 13,471-46; A-750-761) Good cause has also been found where an employer agreed at time of hire to a vacation after one year, and later breaches that agreement by postponing the vacation for a substantial time. (A.B. 162,485; A-750-1732)

The failure to compensate an employee for overtime work was held to constitute good cause even though the claimant had previously performed such overtime without compensation; (A.B. 37,900-53; A-750-1228; similarly, A.B. 92,506) and an employer's continued failure to pay wages on time, in violation of law, also justifies both leaving, and a subsequent refusal to return when no assurance was provided against a repetition of the practice. (A.B. 249,137; A-750-1847)

An employer's failure to fulfill repeated promises of salary increase, has been held to constitute good cause for voluntary leaving or refusing employment, (A.B. 6592- 41; A-750-324) as has the denial of a promised wage increase after a promotion to a more responsible position. (A.B. 7996-42; A-750-415.)

An agreement made in the course of employment to increase pay, with the amount and date specified, becomes, in the absence of special circumstances, a condition of the employment which, if not fulfilled, justifies voluntary leaving and subsequent refusal to return without such increase. (Matter of Harris, 42 A.D. 2d 1049; aff'g A.B. 165,156A, A-750-1740)

ii. The Certification Course Would Have Adversely Impacted Claimant's Well Being

It is well settled that working conditions which adversely affect the claimant's health constitute good cause for refusal of and voluntary leaving of employment. (A.B. 6275-41; A-750-298) Thus it was held that an arthritic claimant was justified in refusing to accept a job in the basement on the grounds that the dampness there would adversely affect her health (A.B. 9282-43; A-750-498.)

A claimant's refusal of employment which caused his hands to bleed and subjected him to coughing fits was justified even though this difficulty would cease after he became hardened to work. (Ref. 541-17-39R) Similarly, the refusal of employment on an alternating day and night basis, which might have adversely affected claimant's health, was with good cause. (A.B. 9718-43; A-750-481)

A claimant's reasonable, factually supported belief that the work will endanger their health or safety constitute good cause for refusal of employment or resignation from a position. (A.B. 10,152-43; A-750-551, Int. Index No. 1660A-3, 1265-1, 1710, and Appeal Board Case 148,046)

The rule is the same for health as well as safety, and should justify claimant's separation from employment in this case, although the claimant's separation did not result due to a worsening medical condition caused by the conditions of the workplace; rather, good cause also existed because claimant's learning disability would have made it difficult and emotionally distressing for her to complete the certification course, thereby providing good cause under this theory.

Claimant's refusal to enroll in the course, and her resulting separation, were reasonably justified by the detrimental effect on her well being had claimant enrolled in the course. The claimant's testimony established the existence of her learning disability, and the anxiety reaction she sustained when she could not comprehend what was being discussed, or had to take a test; as well as her inability to complete a college English course many years ago, and her belief she had to cheat on the CPR training course test.

The lack of medical evidence is not controlling, where there is credible evidence of the claimant's learning disability. (see, Review Letter No. 4 – 67, March 2009, "Medical Evidence.**")** Indeed, the employer did not question the existence of claimant's learning disability, but argued reasonable accommodation could have been made.

It is submitted that this case should be governed by the holding in Appeal Board No. 542700, which involved a claimant with chronic asthmatic bronchitis, which was worsened by allergens and irritants in the employer's workplace. As a result, the claimant arranged to work for the employer from her home. At her employer's insistence, claimant attended a training course at the workplace, which caused her to become ill. She thereafter resigned. Although no doctor had advised the claimant to quit, the Appeal Board decided that "…the claimant had satisfactorily established her long term medical disability without the need for corroborative medical documentation, and concluded that the claimant quit her job for a compelling medical reason…"

iii. Requiring Claimant to Pay $1500 for a Certification Course Without Guaranteed Employment Justified Claimant's Refusal

In AB 54,075-56 the Appeal Board held that a claimant had refused an offer of employment with good cause where he was required to submit to a physical examination with his own doctor at his own expense, as a prerequisite to obtaining the job. The Appeal Board stated:

> …. claimant also refused the proffered employment on the further ground that the employer required that he submit to a physical examination by his own doctor for which he was to pay the medical bill as a condition imposed for obtaining employment. In Appeal Board, 17,906-48 where the claimant in that case advanced a similar reason for refusing employment offered to him the Board held that he had good grounds for rejecting the proffered employment because it was unjustifiable to make him pay for a physical examination as a condition precedent to his obtaining the job. We, therefore, hold that the instant claimant had good cause, within the meaning of the Law, for refusing the offered employment for the reason indicated.

The requirement that claimant pay a fee of $1,500.00 for the certification course, was a condition precedent to claimant's continued employment with the employer, with no more guarantee of future employment than the claimant in AB 54,075-56. Once the employer changed the educational requirement for teaching staff claimant was no longer qualified for the position she had held, and the same rationale should apply in this case. There was less of a compelling reason for claimant to pay $1500.00 to spend 6 to 9 months in a certification class, then there was to submit to a physical examination , especially with no guarantee of employment.

The employer asserted that the claimant could have applied for a scholarship from the State to defray the expense of the course, however there was no proof such scholarships were available to claimant, as Ms. Gerrold testified that the scholarship's availability depended on income level, however, there was no evidence of what the required income level was in order to obtain such financial aid, and the claimant testified that she was not informed, verbally or in writing, of the availability of a scholarship to defray the cost of the course. (17, 27) Therefore, the existence of financial aid should not be considered a factor.

B. THE EMPLOYER COULD NOT HAVE OFFERED A 'REASONABLE ACCOMMODATION'

The employer contended that it would have made reasonable accommodation for claimant's disability if they had known about it. The claimant testified that she was never asked for the details of her learning disability after she informed the employer of her learning disability. It must be remembered that claimant was out on disability during much of the time that the employer was instituting these changes; and perhaps, she was overlooked by the employer because she was not present, although the employer did remind claimant to sign the form which asked her to either agree to enroll in the course, or opt out.

The concept of reasonable accommodation has been is defined as follows:

> ….the concept of 'reasonable accommodation' developed in the period since the first release of this publication in 1967. It is defined as: '…any modification or adjustment to a job or the work environment that will *enable a qualified applicant or employee with a disability to participate in the application p*rocess or to perform essential job functions."(emphasis added) If a claimant alleges that his or her employment loss related to physical restrictions with respect to duties or working conditions, and that the restrictions were caused by a permanent or temporary disability, it is necessary to establish whether convincing evidence of these restrictions exist and whether such evidence was presented to the employer. Loss of employment in such circumstances is not at all uncommon ….**REVIEW LETTER No. 4 – 67 (Revised March 2009) entitled "<u>MEDICAL EVIDENCE:"</u>**

The employer's new educational policy required the claimant to obtain a professional teaching education she did not have, which had never previously been required, even when the school initially sought NAYEC accreditation. The claimant was no longer "qualified" to be on the employer's teaching staff with her existing background, and the concept of "reasonable accommodation" therefore does not apply in its usual sense, because a reasonable accommodation is normally intended to allow a qualified person to participate. The relevant language from the above definition is "…any modification or adjustment to a job or the work environment that will enable a qualified applicant or employee with a disability to participate…"

There was no "reasonable accommodation" which would have allowed the claimant to comprehend or retain the information imparted during 6 to 9 months in a college level certification course, and which thereafter would have enabled claimant to pass the examination. Nor would any reasonable accommodation have eased the claimant's anxiety at the prospect of college level testing. Attending a 6- 9 month college level course, and sitting for the examination would have amounted to torture for the claimant.

The employer's alleged ability to accommodate another employee with a learning disability is irrelevant, absent further details of that disability, and the accommodation. Every learning disability is different; the claimant's learning disability is not like a physical disability, which may be reasonably accommodated with physical aids and devices such as elevator ramps, handrails etc. Nor is the claimant's learning disability based upon a physical limitation, which would be subject to reasonable accommodation with visual or auditory aids.

In addition, the employer was not teaching the certification course, and was therefore not in a position to make reasonable accommodations in the way the course was given. There is no accommodation the employer could have reasonably offered that would have assisted the claimant in comprehending the class, and taking the exam, or that would have alleviated the panic attacks she would suffer as a result.

The claimant has lived her entire life with this problem, and long ago decided that she was finished with attempts to further her education. She has never been able to comprehend what was being taught in the classroom, and was panic stricken at the thought of having to do so again. Under the circumstances, her refusal was clearly reasonable. The only accommodation that would have helped the claimant was grandfathering her under the new requirements, to allow her continued employment without requiring her to pass the certification course. The employer was unwilling to do so, even as a part time substitute.

This fundamental change in the terms and conditions of claimant's employment would have justified claimant's refusal of the position, had the change in educational requirement taken place 21 years ago; and should be considered good cause for claimant's separation from the position in this instance.

CONCLUSION

The order of the Administrative Law Judge dated August 23, 2010 which disqualified the claimant from receipt of benefits should be reversed, and the initial determination dated Juy1, 2010, which held the claimant was eligible for benefits, should be reinstated.

Dated: Syosset, New York
November 8, 2010

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