IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

AMY J NELSON
820 N I ST
OSKALOOSA IA 52577

OTTUMWA COMMUNITY SCHOOL DISTRICT
ATTN: HUMAN RESOURCES DEPT
422 MCCARROLL
OTTUMWA IA 52501

Appeal Number: 05A-UI-04753-RT
OC: 04/03/05 R: 03
Claimant: Appellant (2)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the ***Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319***.

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

_____
(Administrative Law Judge)

_____
(Decision Dated & Mailed)

Section 96.5-2-a – Discharge for Misconduct

STATEMENT OF THE CASE:

The claimant, Amy J. Nelson, filed a timely appeal from an unemployment insurance decision dated April 27, 2005, reference 02, denying unemployment insurance benefits to her. After due notice was issued, a telephone hearing was held on May 25, 2005, with the claimant participating. Dr. Jon K. Sheldahl, Associate Superintendent for Personnel, participated in the hearing for the employer, Ottumwa Community School District. The administrative law judge attempted to reach, without success, Jean Zimmerman and Judy Klingman, to testify for the employer. Claimant's Exhibit A was admitted into evidence.

FINDINGS OF FACT:

Having heard the testimony of the witnesses, and having examined all of the evidence in the record, including Claimant's Exhibit A, the administrative law judge finds: The claimant was employed by the employer as a part-time special education associate from January 29, 2004, until she was forced to resign, or be discharged, on April 7, 2005. The claimant chose to resign, but if she had not resigned, she would have been discharged, or, at least, discharge proceedings would have been brought against her by the school district, with every intention that the school board would discharge the claimant. The claimant averaged 6 ¼ hours per day. The claimant began, initially, as a substitute in September 2003. The claimant was a special education associate assigned to the Severe and Profound Room. Judy Klingman was the teacher assigned to that room. The claimant's job duties were to assist with individual students. She was not assigned one-on-one to Student A, but was assigned to provide assistance to Student A, as well as other students. Student A is a severely mentally retarded individual who can walk with assistance, but is not verbal and needs assistance with both feeding and restroom matters. On March 30, 2005, the claimant was alleged to have used profanity at Student A, telling him to "get off the couch you stupid son of a bitch." However, the claimant did not say that to the student. Nevertheless, a report was made of this to the middle school principal, Davis Eidahl, who informed the employer's witness, Dr. Jon K. Sheldahl, of this on April 5, 2005. After an investigation of these matters, the claimant was confronted on April 7, 2005, and told Dr. Sheldahl that she did not remember saying that, but rather recalls saying, "If that's what they say I said." However, the claimant did, in some way, deny making this statement, and now categorically denies making this statement. At the time of the confrontation on April 7, 2005, the claimant was in shock over the allegation. The claimant was then given the choice of resigning or having discharge proceedings brought, and the claimant chose to resign. The claimant would have been discharged had she not resigned.

The claimant is also alleged to have become agitated and impatient with the students in the Severe and Profound Room, and further was short with them and would yell at the students about little things. She demonstrated frustrations with the students, especially with Student A. At times, the claimant would be frustrated with Student A when he screamed, and he did scream occasionally, but she was only impatient with the student once and never yelled at students. The claimant was never accused of this behavior before, nor had she ever received any warnings or disciplines for such behavior. The claimant was evaluated on May 19, 2004, by a previous principal, Gary Kruse, and was found to be satisfactory in all areas, as shown at Claimant's Exhibit A.

REASONING AND CONCLUSIONS OF LAW:

The question presented by this appeal is whether the claimant's separation from employment was a disqualifying event. It was not.

871 IAC 24.26(21) provides:

> Voluntary quit with good cause attributable to the employer and separations not considered to be voluntary quits. The following are reasons for a claimant leaving employment with good cause attributable to the employer:
>
> (21) The claimant was compelled to resign when given the choice of resigning or being discharged. This shall not be considered a voluntary leaving.

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.

This definition has been accepted by the Iowa Supreme Court as accurately reflecting the intent of the legislature. Huntoon v. Iowa Department of Job Service, 275 N.W.2d 445, 448 (Iowa 1979).

When one is compelled to resign, when given the choice of resigning or being discharged, the resignation shall not be considered a voluntary leaving. The administrative law judge concludes that the evidence here establishes that the claimant was compelled to resign or face discharge. It is true that the school board ultimately makes the decision to discharge, but discharge proceedings would have been brought, and the evidence establishes that the claimant would have been discharged. The claimant chose to resign, but the administrative law judge concludes that the claimant's resignation was not voluntary, and was in the nature of a discharge. In order to be disqualified to receive unemployment insurance benefits pursuant to a discharge, the claimant must have been discharged for disqualifying misconduct. It is well established that the employer has the burden to prove disqualifying misconduct. See Iowa Code section 96.6(2) and Cosper v. Iowa Department of Job Service, 321 N.W.2d 6, 11 (Iowa 1982) and its progeny. The administrative law judge concludes that the employer has failed to meet its burden of proof to demonstrate by a preponderance of the evidence that the claimant was discharged for disqualifying misconduct.

The employer's witness, Dr. Jon K. Sheldahl, Associate Superintendent for Personnel, credibly testified about these matters, but he testified from hearsay and, in fact, in some cases double hearsay. The administrative law judge attempted to contact the program associate, Jean Zimmerman, and the special education teacher assigned to the Severe and Profound Room where the claimant was employed, Judy Klingman. However, the administrative law judge was not able to reach either of those two individuals who had eyewitness direct evidence of these matters. The claimant's direct credible testimony outweighs the hearsay evidence of Dr. Sheldahl. Accordingly, the administrative law judge is constrained to conclude that the claimant did not make the statement to Student A that she was alleged to have made, namely, "Get off the couch you stupid son of a bitch."

Dr. Sheldahl also testified from hearsay that the claimant was agitated and impatient with the handicapped students and quick to judge them, short with them, and yelled at the students about little things and had numerous frustrations, especially with Student A. The claimant denied much of this, but did concede that, at times, she would become frustrated when Student A would scream, but that she would try to distract him. The claimant did indicate that she did become impatient once with all of the students. The administrative law judge understands an occasional, but rare, situation in which one may become impatient with severely handicapped or disabled students. There is not a preponderance of the evidence that the claimant's behaviors were willful or deliberate. The administrative law judge concludes that they were negligence. The issue then becomes whether they were carelessness or negligence in such a degree of recurrence as to establish disqualifying misconduct. The administrative law judge concludes that here they do not. There is no evidence beyond the claimant's own admissions that she got impatient once and, occasionally, was frustrated at Student A. The evidence also establishes that the claimant never received any specific warnings or disciplines for such behavior, nor was she ever accused of this behavior before. Accordingly, the administrative law judge is constrained to conclude that the claimant's behavior was not carelessness or negligence in such a degree of recurrence as to establish disqualifying misconduct, but was, rather, ordinary negligence in an isolated instance and is not disqualifying misconduct.

Dr. Sheldahl testified that when the claimant was confronted about these matters on April 7, 2005, that the claimant said that she did not remember saying to Student A "Get off the couch you stupid son of a bitch," but said something to the effect of "Well, if that's what they say I said." The claimant did not admit to Dr. Sheldahl that she had made that statement, nor did she specifically deny it, although the claimant testified that she did deny it. However, the claimant did credibly testify that she was in shock at the time she was confronted with this, and really did not know what to respond. The claimant was then immediately given the choice to resign or be discharged and she chose to resign. Under the evidence here, the administrative law judge cannot conclude that the claimant admitted this behavior to Dr. Sheldahl.

In summary, for all the reasons set out above, the administrative law judge is constrained to conclude that there is not a preponderance of the evidence that the claimant was discharged for disqualifying misconduct. Therefore, the administrative law judge is constrained to conclude that the claimant was discharged, but not for disqualifying misconduct and, as a consequence, she is not disqualified to receive unemployment insurance benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment insurance benefits, and misconduct to support a disqualification from unemployment insurance benefits, must be substantial in nature, including the evidence therefore. Fairfield Toyota, Inc. v. Bruegge, 449 N.W.2d 395, 398 (Iowa App. 1989). The administrative law judge concludes that there is insufficient evidence here of substantial

misconduct on the part of the claimant to warrant her disqualification to receive unemployment insurance benefits. Unemployment insurance benefits are allowed to the claimant, provided she is otherwise eligible.

DECISION:

The representative's decision of April 27, 2005, reference 02, is reversed. The claimant, Amy J. Nelson, is entitled to receive unemployment insurance benefits, provided she is otherwise eligible, because she was discharged, but not for disqualifying misconduct.

kjw/pjs