

**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**

**MICHELLE M SMITH  
21 – 3<sup>RD</sup> ST N  
HUMBOLDT IA 50548**

**REGIS CORP  
c/o EMPLOYERS UNITY INC  
PO BOX 749000  
ARVADA CO 80006-9000**

**Appeal Number: 04A-UI-00510-DT  
OC: 12/07/03 R: 01  
Claimant: Respondent (4)**

**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, 4<sup>th</sup> 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 96.5-1 – Voluntary Leaving  
Section 96.5-2-a – Discharge

STATEMENT OF THE CASE:

Regis Corporation (employer) appealed a representative's January 6, 2004 decision (reference 1) that concluded Michelle M. Smith (claimant) was qualified to receive unemployment insurance benefits after a separation from employment. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on February 5, 2004. The claimant participated in the hearing. Judi McBroom of Employer's Unity appeared on the employer's behalf and presented testimony from one witness, Robin Deal. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

FINDINGS OF FACT:

The claimant started working for the employer on June 25, 2002. She worked full time as a stylist in the employer's Fort Dodge, Iowa salon. On November 29, 2003, she tendered her resignation. Her last day would have been December 12, 2003. She gave her notice because she intended to become self-employed as a stylist renting a chair in a new salon in a town about 15 miles from the employer's location. The employer accepted her resignation and warned her about soliciting or competing with the salon during the time prior to her leaving.

On December 9, 2003, the employer discharged the claimant. The stated basis for the discharge was that the employer believed that the claimant was soliciting for her new business in the employer's salon and was competing or conducting personal business in the same field in violation of the employer's conflict of interest policies. Several clients had mentioned to the employer's salon manager, Deal, that the claimant had indicated to them that she was going to be starting up on her own. The claimant asserted that this contact with clients took place outside of the employer's salon and were merely a confirmation when asked that she was going to be opening in a new salon and that the clients should watch the newspaper for information. The final incident that lead to the employer determining to release the claimant before December 12 was that on December 7 the claimant was styling a client when another former coworker at the salon who was the person actually opening up the salon in the other town gave the client a slip of paper with the salon's new phone number.

Because of these reports, the employer concluded the claimant was soliciting business in competition with the employer, and informed her on December 9 that she would not be permitted to finish out her time through December 12. At that time, the claimant indicated that she might not be starting her business at that time anyway. Subsequent to tendering her resignation, the claimant learned that the salon in which she had intended on renting a chair might not be completed to the point where the former coworker/new salon owner was prepared to have another stylist running a chair.

The claimant established a claim for unemployment insurance benefits effective December 7, 2003. The claimant has received unemployment insurance benefits for weeks after her intended separation from employment on December 12, 2003 in the amount of \$1,218.00.

#### REASONING AND CONCLUSIONS OF LAW:

There are two separation incidents that must be reviewed in this case. The first created an issue of whether the claimant voluntarily quit, and if so, whether it was for good cause attributable to the employer.

Iowa Code Section 96.5-1 provides:

An individual shall be disqualified for benefits:

1. Voluntary quitting. If the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department.

871 IAC 24.25 provides that, in general, a voluntary quit means discontinuing the employment because the employee no longer desires to remain in the relationship of an employee with the employer from whom the employee has separated. The claimant did express her intent not to return to work with the employer. A voluntary leaving of employment requires an intention to terminate the employment relationship. Bartelt v. Employment Appeal Board, 494 N.W.2d 684 (Iowa 1993). The claimant did exhibit the intent to quit and did act to carry it out. The claimant

would be disqualified for unemployment insurance benefits unless she voluntarily quit for good cause.

The claimant has the burden of proving that the voluntary quit was for a good cause that would not disqualify her. Iowa Code Section 96.6-2. Quitting in order to enter self-employment is not good cause. 871 IAC 24.25(19). The fact that the circumstances might have changed as of December 9 and she might have sought to retract her resignation at that time does not alter the fact that the employer had accepted her resignation and was under no obligation to allow her to withdraw her resignation due to the change in the plans to become self-employed. Langley v. Employment Appeal Board, 490 N.W.2d 300 (Iowa App. 1992). The claimant has not satisfied her burden. Benefits are denied effective December 14, 2003.

The next issue in this case is whether, for the time prior to the effective date of the claimant's quit, the employer discharged the claimant for reasons establishing work-connected misconduct as defined by the unemployment insurance law. The issue is not whether the employer was right to terminate the claimant's employment, but whether the claimant is entitled to unemployment insurance benefits. Infante v. IDJS, 364 N.W.2d 262 (Iowa App. 1984). What constitutes misconduct justifying termination of an employee and what is misconduct that warrants denial of unemployment insurance benefits are two separate decisions. Pierce v. IDJS, 425 N.W.2d 679 (Iowa App. 1988).

A claimant is not qualified to receive unemployment insurance benefits if an employer has discharged the claimant for reasons constituting work-connected misconduct. Iowa Code Section 96.5-2-a. Before a claimant can be denied unemployment insurance benefits, the employer has the burden to establish the claimant was discharged for work-connected misconduct. Cosper v. IDJS, 321 N.W.2d 6 (Iowa 1982).

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).

The sole reason cited by the employer for discharging the claimant is the belief that she was soliciting business and competing with the employer in violation of the conflict of interest policy. While it appears there was one deed that occurred in the salon, there is no evidence that the claimant herself was responsible for soliciting the client's business within the salon. As to her actions outside the salon, non-compete provisions are generally narrowly construed and generally must have provisions that do not overly restrict competition. Here, the claimant acknowledges that when asked outside of the salon, she did confirm that she was going to open her own chair in the new salon and advised the clients to watch the paper. She did not affirmatively take action even then to solicit business; she had not yet even begun any scheduling of appointments. Under the circumstances of this case, the claimant's behavior during those final weeks were at worst the result of inefficiency, unsatisfactory conduct, inadvertence, or ordinary negligence, and was a good faith error in judgment or discretion. The claimant's actions were not misconduct within the meaning of the statute, and the claimant is not disqualified from benefits for the week ending December 13, 2003 when she was intending to quit.

Iowa Code Section 96.3-7 provides:

7. Recovery of overpayment of benefits. 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.

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.

Because the claimant's separation was disqualifying, benefits were paid to which the claimant was not entitled. Those benefits must be recovered in accordance with the provisions of Iowa law.

#### DECISION:

The representative's January 6, 2004 decision (reference 01) is modified in favor of the employer. The claimant voluntarily quit without good cause attributable to the employer effective December 12, 2003. The employer's discharge of the claimant prior to the effective date of the quit was not for disqualifying reasons. The claimant is qualified to receive unemployment insurance benefits for the week ending December 13, 2003, if she is otherwise

eligible. The employer is chargeable for any benefits paid for that week. As of December 14, 2003, benefits are withheld until such time as the claimant has worked in and been paid wages for insured work equal to ten times her weekly benefit amount, provided she is otherwise eligible. The employer is not chargeable for any benefits after December 14, 2003. The claimant is overpaid benefits in the amount of \$1,218.00.

ld/kjf