

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

KATHERINE R BOTT
Claimant

APPEAL NO. 15A-UI-03140-JTT

**ADMINISTRATIVE LAW JUDGE
DECISION**

**ULTA SALON COSMETICS &
FRAGRANCE INC**
Employer

**OC: 10/19/14
Claimant: Respondent (1)**

Iowa Code Section 96.5(2)(a) – Discharge for Misconduct

STATEMENT OF THE CASE:

The employer filed a timely appeal from the February 24, 2015, reference 02, decision that that allowed benefits to the claimant, provided she was otherwise eligible, and that held the employer's account could be charged for benefits; based on an Agency conclusion that the claimant had been discharged on February 9, 2015 for no disqualifying reason. After due notice was issued, a hearing was held on April 16, 2015. Claimant Katherine Bott participated. David Regan represented the employer. The administrative law judge took official notice of the Agency's record of benefits disbursed to the claimant and received Exhibits One, Two, and Three into evidence. The administrative law judge took official notice of the fact-finding materials for the limited purpose of determining whether the employer participated in the fact-finding interview and, if not, whether the claimant engaged in fraud or intentional misrepresentation in connection with the fact-finding interview.

ISSUE:

Whether the claimant was discharged for misconduct in connection with the employment that disqualifies the claimant for unemployment insurance benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Katherine Bott was employed by Ulta Salon Cosmetics & Fragrance, Inc. as a full time "Prestige Manager" from November 4, 2014 until February 9, 2015 when the employer discharged her for violation of the employer's "gratis product" policy. Ms. Bott's immediate supervisors were David Regan, District Manager, and Brian Starr, Co-manager. During Ms. Bott's employment, the employer lacked a general manager at the Cedar Rapids location where Ms. Bott worked. Mr. Starr functioned as Ms. Bott's on-site manager, whereas Mr. Regan worked off-site.

"Gratis product" refers to product that the employer received from vendors free of charge for the purpose of allowing the employer staff to become familiar with the product. The employer's written policy concerning "gratis product" restricted the authority to disperse such product to the general manager. In the absence of a general manager at the Cedar Rapids location, the employer interpreted the policy to mean that only Mr. Starr could authorize disbursement of

“gratis product.” The employer’s written policy concerning “gratis product” required that disbursement of such product to staff members be preceded by their participation in education concerning the product. The employer’s written policy concerning “gratis product” prohibited disbursement of such product to staff members as a reward or incentive for performance. At the start of her employment, Ms. Bott formally acknowledged the employer’s online work rules and her obligation to familiarize herself with those work rules. Ms. Bott received her training concerning “gratis product” from two junior managers at the Cedar Rapids location. Ms. Bott did not review the written work rules located on the employer’s intranet.

Toward the end of January 2015, Katie Kopoyuae, Lead Cashier, sent an email to the employer expressing concern about Ms. Bott’s disbursement of “gratis product” to Ms. Kopoyuae. The employer’s establish work rules required that staff members’ personal bags be checked by a manager before the staff member laughed at the end of her shift. Ms. Kopoyuae alleged in her email that Ms. Bott had given Ms. Kopoyuae “gratis product” and had then directed Ms. Kopoyuae to keep quiet about the disbursement and to only have Ms. Bott check her bag at the end of the shift. Upon receiving the report from Ms. Kopoyuae, the employer enlisted the assistance of its loss prevention staff person, Sabine Egelby to further investigate.

On February 5, 2015, Mr. Regan and Ms. Egelby met with Ms. Bott. During the meeting, I discussed multiple concerns with Ms. Bott’s employment including time management, fraternization, favoritism, break policies and the “gratis product” policy. Ms. Bott provided oral and written statements that indicated a lack of understanding of how the “gratis product” merchandise was supposed to be disbursed. Ms. Bott further indicated her willingness to adhere to the written “gratis product” policies and to exercise better judgment going forward.

Upon separating from the employment, Ms. Bott established an additional claim for benefits and received \$1548 in benefits for the four-week period between March 15, 2015 and April 11, 2015.

The employer had appropriate notice of the February 23, 2015 fact-finding interview. At the time the Claims Deputy telephoned Mr. Regan, Mr. Regan was indisposed. Mr. Regan attempted to return the call immediately thereafter but encountered an extended hold time and abandoned his attempt to participate in the fact-finding interview. Ms. Bott did not participate in the fact-finding interview.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code § 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.

Iowa Admin. Code r. 871-24.32(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 Dep't of Job Serv., 275 N.W.2d 445, 448 (Iowa 1979).

The employer has the burden of proof in this matter. See Iowa Code Section 96.6(2). Misconduct must be substantial in order to justify a denial of unemployment benefits. Misconduct serious enough to warrant the discharge of an employee is not necessarily serious enough to warrant a denial of unemployment benefits. See Lee v. Employment Appeal Board, 616 N.W.2d 661 (Iowa 2000). The focus is on deliberate, intentional, or culpable acts by the employee. See Gimbel v. Employment Appeal Board, 489 N.W.2d 36, 39 (Iowa Ct. App. 1992).

While past acts and warnings can be used to determine the magnitude of the current act of misconduct, a discharge for misconduct cannot be based on such past act(s). The termination of employment must be based on a current act. See 871 IAC 24.32(8). In determining whether the conduct that prompted the discharge constituted a "current act," the administrative law judge considers the date on which the conduct came to the attention of the employer and the date on which the employer notified the claimant that the conduct subjected the claimant to possible discharge. See also Greene v. EAB, 426 N.W.2d 659, 662 (Iowa App. 1988).

Allegations of misconduct or dishonesty without additional evidence shall not be sufficient to result in disqualification. If the employer is unwilling to furnish available evidence to corroborate the allegation, misconduct cannot be established. See 871 IAC 24.32(4). When it is in a party's power to produce more direct and satisfactory evidence than is actually produced, it may fairly be inferred that the more direct evidence will expose deficiencies in that party's case. See Crosser v. Iowa Dept. of Public Safety, 240 N.W.2d 682 (Iowa 1976).

The weight of the evidence in the record fails to establish conduct on the part of Ms. Bott that rises to the level of misconduct in connection with the employment that would disqualify Ms. Bott for unemployment insurance benefits. The employer's assertion that Ms. Bott admitted to a full understanding of the "gratis product" policy at the time of the February 5, 2015 investigative interview is at odds with the written statements Ms. Bott provided to the employer at the time of that interview. The weight of the evidence indicates that Ms. Bott was negligent in failing to

review the employer's written work rules concerning "gratis product." The employer presented insufficient evidence to rebut Ms. Bott's assertion that she relied upon training from other managers in her handling of "gratis product." The employer presented insufficient evidence to prove by a preponderance of the evidence that Ms. Bott knowingly and intentionally violated the employer's "gratis product" policy. The administrative law judge notes that the employer did not present testimony from the employee who initially complained or from Mr. Starr. Either person could have testified to the store's actual practice concerning "gratis product" and to the particulars of the violation of the written policy that triggered Ms. Bott's discharge.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that the claimant was discharged for no disqualifying reason. Accordingly, the claimant is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged for benefits.

DECISION:

The February 24, 2015, reference 02, decision is affirmed. The claimant was discharged for no disqualifying reason. The claimant is eligible for benefits, provided she is otherwise eligible. The employer's account may be charged.

James E. Timberland
Administrative Law Judge

Decision Dated and Mailed

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