

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

NATHAN A FOGUE
Claimant

APPEAL NO. 07A-UI-00764-CT

**ADMINISTRATIVE LAW JUDGE
DECISION**

HOME DEPOT USA INC
Employer

**OC: 12/17/06 R: 02
Claimant: Respondent (1)**

Section 96.5(2)a – Discharge for Misconduct

STATEMENT OF THE CASE:

Home Depot USA, Inc. filed an appeal from a representative's decision dated January 12, 2007, reference 01, which held that no disqualification would be imposed regarding Nathan Fogue's separation from employment. After due notice was issued, a hearing was held by telephone on February 7, 2007. The employer participated by Lisa Negus, Human Resources Manager. Exhibits One through Seven were admitted on the employer's behalf. Mr. Fogue did not respond to the notice of hearing.

ISSUE:

At issue in this matter is whether Mr. Fogue was separated from employment for any disqualifying reason.

FINDINGS OF FACT:

Having heard the testimony of the witness and having reviewed all of the evidence in the record, the administrative law judge finds: Mr. Fogue was employed by Home Depot from March 16 until December 12, 2006. He worked full time in the garden department as a sales associate. The decision to discharge was prompted by an incident that occurred on November 26. Mr. Fogue was observed giving a back rub to another associate, Heather. Apparently her shirt was pulled up in back as he did so. Another associate observed the conduct and reported it to management. Heather received only a written warning for her part in the incident, as she had not been disciplined previously.

Mr. Fogue was discharged after the November 26 incident because he had received a warning on November 11, 2006 for engaging in horseplay on October 28. He used a garden hose to spray water on another associate. The incident resulted in damage to a cash register keyboard.

REASONING AND CONCLUSIONS OF LAW:

An individual who was discharged from employment is disqualified from receiving job insurance benefits if the discharge was for misconduct. Iowa Code section 96.5(2)a. The employer had the burden of proving disqualifying misconduct. Cosper v. Iowa Department of Job Service, 321

N.W.2d 6 (Iowa 1982). Mr. Fogue was discharged as a result of incidents that occurred on October 28 and November 26. His horseplay on October 28 constituted misconduct. He knew or should have known that spraying water on a coworker was contrary to the standards expected by the employer. Moreover, his actions resulted in damage to the employer's property.

Mr. Fogue's conduct on November 26 did not constitute an act of intentional misconduct. He was rubbing the back of a female coworker with her consent. His actions were apparently in response to the coworker's complaint of pain in her neck. Although Mr. Fogue used poor judgment in giving the back rub on the sales floor, it does not appear that the incident took place in an open area in the presence of customers. The administrative law judge is inclined to view the conduct as an isolated instance of poor judgment and not a deliberate disregard of the employer's standards.

The conduct that prompted Mr. Fogue's discharge was not misconduct within the meaning of the law. The misconduct that occurred on October 28 was not a current act in relation to the December 12 discharge date. For the reasons stated herein, the administrative law judge concludes that the employer has failed to establish a basis on which to disqualify Mr. Fogue from receiving benefits. While the employer may have had good cause to discharge, conduct that might warrant a discharge from employment will not necessarily support a disqualification from job insurance benefits. Budding v. Iowa Department of Job Service, 337 N.W.2d 219 (Iowa 1983). Benefits are allowed.

DECISION:

The representative's decision dated January 12, 2007, reference 01, is hereby affirmed. Mr. Fogue was discharged but misconduct has not been established. Benefits are allowed, provided he satisfies all other conditions of eligibility.

Carolyn F. Coleman
Administrative Law Judge

Decision Dated and Mailed

cfc/kjw