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

PAT L BACKES
1206 LOCUST RD #15
DECORAH IA 52101

AASE HAUGEN HOMES INC
ATTN PAYROLL CLERK
PO BOX 510
DECORAH IA 52101 0510

Appeal Number: 04A-UI-08322-H2
OC: 06-20-04 R: 04
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/Misconduct

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the July 29, 2004, reference 01, decision that denied benefits. After due notice was issued, a hearing was held in Decorah, Iowa on December 2, 2004. The claimant did participate. The employer did participate through (representative) Sue Bjelland, Administrator; Jon Aske, Environmental Supervisor; Linda Fretheim, Laundry Aid; Kathy Haugen, Laundry Aid; Carol Hammel, Laundry Aid; Anita Ryan, Laundry Aid; and Jolene Wenthold, Laundry Aid. Employer's Exhibit One was received.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was employed as a laundry aid full time beginning on February 6, 2001 through

June 22, 2004 when she was discharged for allegedly stealing a purple sweater from the unclaimed clothing area. On June 19, 2004, the claimant was working in the laundry area removing clothes from a washer when the sweater she was wearing over her work uniform got wet. The claimant took off her own green sweater and put on a purple sweater that was located in the unclaimed clothing area. The claimant and her coworkers were responsible for laundering the clothing of the residents of the nursing home. Occasionally the nametag or identifying marker would come out of a piece of clothing and the employees would be unable to determine which resident owned that particular article of clothing. The purple sweater the claimant wore on June 19 was one such piece of clothing. Ms. Bjelland made it clear that there was nothing wrong with the claimant borrowing the sweater from the unclaimed clothing area to wear while she worked. The employer takes a number of steps to try and locate which resident owns unclaimed articles of clothing. These measures include having the laundry aids take the clothing out on their carts as they deliver laundered items to the resident to see if the residents recognize an unmarked garment as well as having the laundry aid check with the nursing staff and with the residents families to try and return unmarked garments to the rightful owners. After a number of months pass, the laundry aids under the direction of management, gather up all of the unclaimed items and sort them into items that can be used by another resident or into a pile representing items to be donated to The Depot, a used clothing seller. Once an item has been designated for donation to The Depot, any of the laundry aid may take the item for her own use. Earlier in June, the claimant told another coworker, Linda Fretheim, that she liked the purple sweater and wanted it for herself if that was possible. Linda told the claimant that she could not have it until it was determined that it could be sent to The Depot.

After wearing the sweater on June 19, 2004 the claimant inadvertently wore it home that same evening. The claimant next worked on Monday June 21 and she brought the purple sweater back to the employer's place of business. The claimant forgot to bring her own sweater with her to wear that day; so again all day long on June 21 she wore the purple sweater while she worked. Several of the claimant's coworkers commented to her during the day that she was not to take the sweater home with her and that the sweater was not hers to keep. One of her coworkers who was not even working that day, called the laundry and instructed another worker to remind the claimant that she should not take home the purple sweater. The claimant did not take the purple sweater home with her on Monday night. On Tuesday morning, June 22 Kathy Haugen asked the claimant where the purple sweater was. The claimant did not answer her and ignored the question. The claimant's coworkers complained to their mutual supervisor, Jon Aske that they believed the claimant had taken the sweater home with her. Mr. Aske asked the claimant if she knew where the purple sweater was located. The claimant immediately took Mr. Aske to the location where the unclaimed clothing items are kept, approximately two hundred garments at this time, and showed him that the purple sweater was hanging on the rack, as it should have been. Later, on June 22 the claimant was called to Ms. Bjelland's office where she was discharged for allegedly stealing the purple sweater.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the claimant was discharged from employment for no disqualifying reason.

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 employer has the burden of proof in establishing disqualifying job misconduct. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The employer discharged the claimant and has the burden of proof to show misconduct. Misconduct serious enough to warrant discharge is not necessarily serious enough to warrant a denial of job insurance benefits. Such misconduct must be "substantial." When based on carelessness, the carelessness must actually indicate a "wrongful intent" to be disqualifying in nature. Newman v. Iowa Department of Job Service, 351 N.W.2d 806 (Iowa App. 1984). Poor work performance is not misconduct in the absence of evidence of intent. Miller v. Employment Appeal Board, 423 N.W.2d 211 (Iowa App. 1988).

The evidence is uncontroverted, the claimant did not steal the purple sweater; it was at the employer's place of business in their possession when the claimant was discharged on June 22. While the claimant inadvertently wore it home on June 19, she did not keep it and she returned it to the employer the next day she worked. By the employer's own admission the claimant was not breaking any rules by wearing the sweater while she worked on June 19 or June 22. The employer's evidence does not establish that the claimant deliberately and intentionally acted in a manner she knew to be contrary to the employer's interests or standards. There was no wanton or willful disregard of the employer's standards. In short, substantial misconduct has not been established by the evidence. The employer has not

established theft or any misconduct on the part of the claimant. Thus, benefits are allowed, provided the claimant is otherwise eligible.

DECISION:

The July 29, 2004, reference 01, decision is reversed. The claimant was discharged from employment for no disqualifying reason. Benefits are allowed, provided the claimant is otherwise eligible.

tkh/kjf