BEFORE THE
EMPLOYMENT APPEAL BOARD
Lucas State Office Building
Fourth floor
Des Moines, Iowa 50319

AUDREY L MILLER	:	
	:	**HEARING NUMBER:** 14B-UI-09432
Claimant,	:	
	:	
and	:	**EMPLOYMENT APPEAL BOARD DECISION**
	:	
HY-VEE INC	:	
Employer.		

N O T I C E

THIS DECISION BECOMES FINAL unless (1) a **request for a REHEARING** is filed with the Employment Appeal Board within **20 days** of the date of the Board's decision or, (2) a **PETITION TO DISTRICT COURT** IS FILED WITHIN **30 days** of the date of the Board's decision.

A REHEARING REQUEST shall state the specific grounds and relief sought. If the rehearing request is denied, a petition may be filed in **DISTRICT COURT** within **30 days** of the date of the denial.

SECTION: 96.5-2-A, 96.3-7

D E C I S I O N

UNEMPLOYMENT BENEFITS ARE ALLOWED IF OTHERWISE ELIGIBLE

The Claimant appealed this case to the Employment Appeal Board. Two members of the Employment Appeal Board reviewed the entire record. The Appeal Board finds it cannot affirm the administrative law judge's decision. The Employment Appeal Board **REVERSES** as set forth below.

FINDINGS OF FACT:

The Claimant, Audrey Miller, worked for Hy-Vee, Inc. from December 1, 2008 through January 2, 2013 at the Indianola store until she was promoted to a full-time floral manager and moved to the Chariton store until her separation on August 14, 2014 as a full-time floral manager. (11:21-11:54; 31:12-31:55) Phil Hammermeister was her immediate supervisor. (12:02-12:05)

In March of 2014, the Claimant attended a Spring Show along with several other Hy-Vee stores who ordered product. (39:05-39:30) The Claimant orders two large 6-foot wreaths, which she had permission from Phil to order that cost $4500. (36:54-37:00; 39:31-39:57; 56:40-57:04) On or about April 11, 2014, Robin Critchlow (Manager of Store Operations) advised the Claimant to refrain from ordering any hard items in order get the Employer's inventory under control. (39:40-40:10)

On March 28, 2014, the Claimant punched in prior to the start of her shift in violation of a work rule. That same day, she held back a couple items for purchase while on the clock in violation of another company rule, which had been a common practice when she worked at the Indianola store. (17:52-18:08) The Employer issued a warning to Ms. Miller for these violations. (17:22-17:47; 18:50; 48:10-50:04)

Ms. Miller went on medical leave for a nonwork-related issue for which she received short-term disability payments while off work. (15:25-15:40; 16:34; 38:00-38:15) Her medical restrictions prevented her from working at the store (16:52-17:04), but her FMLA papers did not specify that she couldn't 'do anything' for the store. (20:48-21:10; 37:12-37:34; 56:04-56:18) While she was on FMLA, Robin oversaw operation of the floral shop. (23:22-23:28)

During her leave of absence, Ms. Miller went to one of the Employer's subsidiaries (FDI) on July 24, 2014 to attend an Open House she learned about in an e-mail sent to her. She purchased several sale items she thought the floral shop needed. (40:15-43:03) She forgot to consider Robin's prior directive not to make any hard purchases because "[she] was thinking if [she] could get a good deal for Christmas, this would be something [she] wouldn't have to order later on…" (43:08-43:33)

The Claimant had never been on FMLA before and 'had no clue' that she wasn't allowed to perform any of her duties, or come into the workplace until she called one day to check on the progress of a funeral arrangement to make sure things were on schedule. (38:22-38:53) The Employer explained to her the parameters of her medical leave, i.e., she was not allowed 'to work off the clock'.

Ms. Miller returned from her leave of absence on August 13, 2014. She noted the one-week schedule Robin had previously put together had to be changed because Ms. Miller had a part-time employee who couldn't work on Saturdays. (32:57- 36:20) Because the Claimant had an early appointment the following day, and had to rearrange her own schedule, she did not have the opportunity to discuss the schedule changes with Robin. (35:05-36:10; 44:16)

There was an argument about whether she could change the schedule which led Ms. Miller to state that she was the person hired to run the floral shop, not Robin. An employee reported that Ms. Miller referred to Robin as a b-tch, which she denied when the Employer questioned her. (13:40-14:23; 24:00-24:27; 36:24-36:45; 44:31-45:23; 46:24-46:58) The Employer had never heard the Claimant speak profanely during her employment at Hy-Vee. (28:33-28:48)

The Employer discharged the Claimant when she returned from her medical leave because she violated her medical leave when she performed duties while off the clock and changed the schedule without Robin's prior authorization.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code Section 96.5(2)(a) (2013) provides:

> *Discharge for Misconduct*. If the department finds the individual has been discharged for misconduct in connection with the individual's employment:
>
> The individual shall be disqualified for benefits until the individual has worked in and been paid wages for the insured work equal to ten times the individual's weekly benefit amount, provided the individual is otherwise eligible.

The Division of Job Service defines misconduct at 871 IAC 24.32(1)(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 the 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.

The Iowa Supreme court has accepted this definition as reflecting the intent of the legislature. Lee v. Employment Appeal Board, 616 N.W.2d 661, 665, (Iowa 2000) (quoting Reigelsberger v. Employment Appeal Board, 500 N.W.2d 64, 66 (Iowa 1993).

The employer has the burden to prove the claimant was discharged for work-connected misconduct as defined by the unemployment insurance law. Cosper v. Iowa Department of Job Service, 321 N.W.2d 6 (Iowa 1982). The propriety of a discharge is not at issue in an unemployment insurance case. An employer may be justified in discharging an employee, but the employee's conduct may not amount to misconduct precluding the payment of unemployment compensation. The law limits disqualifying misconduct to substantial and willful wrongdoing or repeated carelessness or negligence that equals willful misconduct in culpability. Lee v. Employment Appeal Board, 616 NW2d 661 (Iowa 2000).

The findings of fact show how we have resolved the disputed factual issues in this case. We have carefully weighed the credibility of the witnesses and the reliability of the evidence. We attribute more weight to the Claimant's version of events.

DECISION:

The administrative law judge's decision dated October 10, 2014 is **REVERSED**. The Employment Appeal Board concludes that the Claimant was discharged for no disqualifying reason. Accordingly, she is allowed benefits provided she is otherwise eligible.

A portion of the Claimant's appeal to the Employment Appeal Board consisted of additional evidence which was not contained in the administrative file and which was not submitted to the administrative

law judge. While the appeal and additional evidence were reviewed, the Employment Appeal Board, in its discretion, finds that the admission of the additional evidence is not warranted in reaching today's decision.

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Kim D. Schmett

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Ashley R. Koopmans

AMG/fnv