

**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**

**KRISTY S KIMBER
407 - 9TH ST NW APT 202
WAUKON IA 52172**

**AGRIPROCESSORS INC
PO BOX 920
POSTVILLE IA 52162**

**Appeal Number: 05A-UI-02153-JTT
OC: 01/23/05 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 for Misconduct
871 IAC 24.32-7 – Excessive Unexcused Absences

STATEMENT OF THE CASE:

Kristy Kimber filed a timely appeal from the February 22, 2005, reference 01, decision that denied benefits. After due notice was issued, a hearing was held on March 16, 2005. Ms. Kimber participated in the hearing. Agriprocessors participated through Elizabeth Billmeyer, Human Resources Manager.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: Kristy Kimber was employed by Agriprocessors as a full-time laundry room clerk from March 31, 2004 through January 25, 2005, when Holly Bohr, Purchasing Supervisor, discharged her for leaving

work without permission and excessive absenteeism. Ms. Bohr was Ms. Kimber's immediate supervisor.

The absence that prompted Ms. Kimber's discharge occurred on January 25, 2005. On that date, Ms. Kimber left work to attend a doctor's appointment without permission. Ms. Kimber's supervisor was working in another building on that day. Ms. Kimber went to the office suite where she expected to find her supervisor. Ms. Kimber did not see or hear Ms. Bohr, but heard people speaking in an adjoining room. Ms. Kimber did not wish to make her request to leave in front of a group of people and decided not to venture further into the office suite. Though Ms. Kimber did not make contact with her supervisor, Ms. Bohr had been informed by one of Ms. Kimber's co-worker's earlier in the day that Ms. Kimber would be making a request to leave work for a doctor's appointment. Had Ms. Kimber made contact with her supervisor, the request to leave would have been approved.

Ms. Kimber did not make the doctor's appointment for which she left the workplace on January 25, 2005. Her family had made the appointment for her that day and advised her of it on the same day. The appointment was with a mental health professional and was intended to address Ms. Kimber's mental and physical health. Ms. Kimber believed she was becoming emotionally unable to perform her job and knew she needed to meet with a mental health professional. Ms. Kimber's family had made the appointment because they feared Ms. Kimber would otherwise put off getting help.

Prior to the start of her shift the next day, January 26, 2005, Ms. Kimber called in sick and indicated she had a doctor's excuse for January 25-26 that she would provide the next day.

The employer's written attendance policy is contained in an employee handbook. Ms. Kimber received a copy of the handbook on March 30, 2004. Under the policy, an employee is allowed to have two excused absences during a rolling 90-day period. A third absence during that period results in a warning. A fourth absence during that period may result in suspension or termination. If the employer wishes to maintain a particular employee, it will reduce the employee's pay in lieu of terminating the employee.

Ms. Kimber's absences in 2004 had been as follows. Ms. Kimber was absent on September 30, October 1, November 15 and 23. Neither the employer nor Ms. Kimber recalls the reason for these absences. Ms. Kimber had been tardy on October 20 and December 21. Again, neither the employer nor Ms. Kimber recalls the reason for these tardies. Ms. Kimber was absent on December 22, and indicated that her vehicle would not start.

Ms. Kimber's absences in 2005 had been as follows. On January 10, Ms. Kimber was unable to make it to work due to a snowstorm. On January 10 and 11, Ms. Kimber was absent due to illness or injury and had appointments with a chiropractor on both days.

Ms. Kimber's reprimands for absenteeism were as follows: On December 22, Ms. Kimber was suspended due to excessive absences. On January 10, 2005, Ms. Bohr sent a memo to Ms. Kimber warning her that her next absence could result in her termination. At or before this time, the employer reduced Ms. Kimber's pay from \$7.25 per hour to \$7.00 per hour, in lieu of discharging her.

REASONING AND CONCLUSIONS OF LAW:

The question is whether the evidence in the record establishes that Ms. Kimber was discharged for misconduct in connection with his employment based on excessive unexcused absences.

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(7) provides:

(7) Excessive unexcused absenteeism. Excessive unexcused absenteeism is an intentional disregard of the duty owed by the claimant to the employer and shall be considered misconduct except for illness or other reasonable grounds for which the employee was absent and that were properly reported to the employer.

Because Ms. Kimber was discharged, the employer bears 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).

In order for Mr. Kimber's absences to constitute misconduct that would disqualify her from receiving unemployment insurance benefits, the employer must show that her unexcused absences were excessive. See 871 IAC 24.32-7. The determination of whether absenteeism is excessive necessarily requires consideration of past acts and warnings. However, the employer must first show that the most recent absence that prompted the decision to discharge the employee was unexcused. See 871 IAC 24.32-8. Absences related to issues of personal responsibility such as lack of transportation are considered unexcused. On the other hand, absences related to illness are considered excused, provided the employee has complied with the employer's policy regarding notifying the employer of the absence. See Higgins v. Iowa Department of Job Service, 350 N.W.2d 187 (Iowa 1984).

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that Ms. Kimber's final absence from work on January 25, 2005 was an unexcused absence because she failed to obtain permission to leave for the appointment. In addition, Ms. Kimber's absence on December 22 was also unexcused because it concerned a matter of personal responsibility, lack of reliable transportation. Ms. Kimber's absence on January 5, 2005 was an excused absence because it was caused by weather rather than something under Ms. Kimber's control. Ms. Kimber's absences on January 10 and 11, 2005 were excused absences because they were for health reasons and were apparently approved by the employer. In light of the employer's burden to prove absences were unexcused and the

limits of the evidence presented at the hearing, the administrative law judge is unable to conclude that any other absences or incidents of tardiness were unexcused under Iowa law. In light of the record, the administrative law judge concludes that two absences the employer has proved to be unexcused absences were not excessive. Accordingly, no disqualification will enter and Ms. Kimber is eligible for benefits, provided she is otherwise eligible.

DECISION:

The representative's decision dated February 22, 2005, reference 01, is reversed. The claimant was discharged for no disqualifying reason. The claimant is eligible to receive benefits, provided she meets all other eligibility requirements.

jt/pjs