

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JAMES SIMS
Claimant

APPEAL NO: 06A-UI-10815-DWT

**ADMINISTRATIVE LAW JUDGE
DECISION**

GREG'S LAWN SERVICE INC
Employer

**OC: 10/30/05 R: 03
Claimant: Respondent (1)**

Section 96.6-2 – Timeliness of Appeal

STATEMENT OF THE CASE:

Greg's Lawn Service, Inc. (employer) appealed a representative's October 25, 2006 decision (reference 04) that concluded James Sims (claimant) was qualified receive unemployment insurance benefits, and the employer's account was subject to charge because the claimant had been discharged for nondisqualifying reasons. After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on November 27, 2006. The claimant participated in the hearing. Greg Scharf, the president, Justin Harris, a manager, and Mike Hebert, a manager, appeared on the employer's behalf. During the hearing, Employer's Exhibit One was offered and admitted as evidence. Based on the evidence, the arguments of the parties, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

Did the employer file a timely appeal or have a legal excuse for filing a late appeal?

FINDINGS OF FACT:

The claimant started working for the employer on August 9, 2006. The claimant worked full time as a chemical applicator. During his employment, the employer talked to the claimant several times about his job performance issues that related to the application of chemicals on customers' lawns.

Even though the employer talked to the claimant several times and the claimant had not completed his first 90 days of employment, the claimant's job was not in jeopardy prior to October 6, 2006. On October 6, the claimant applied fertilizer to a customer's lawn. The customer's neighbor became upset when he saw some fertilizer on his driveway. The customer confronted the claimant about this. (This was the second time the neighbor confronted the claimant about the way in which he treated the customer's lawn.) The claimant became frustrated because he had blown off the fertilizer that was on the neighbor's driveway and did not know what more he could do. Even though the neighbor "got into the claimant's face," the claimant walked away and called Harris on a two-way radio.

While venting his frustration on the two-way radio, the claimant used some profanity and also indicated his hourly wage. Harris directed Hebert to the location. The customer told Hebert that the claimant swore at him. Harris and Hebert reported the incident to Scharf. The claimant was told to report to the office.

On October 6, the employer discharged the claimant. The employer told the claimant he was discharged because he revealed his hourly wage over the two-way radio while talking to Harris. The employer also discharged the claimant because he swore while talking on the two-way radio and for the confrontation he had with a customer's neighbor.

The claimant reopened his claim for benefits during the week of October 1. On October 25, 2006, a representative's decision was mailed to the claimant and employer. The decision indicated the claimant was qualified to receive unemployment insurance benefits as of October 1, 2006. The decision also informed the parties that the decision was final unless an appeal was filed on or before November 4, 2006.

The employer's business received the decision on October 31, 2006. Scharf and his wife were out of town until November 4. Even though the decision indicated an appeal had to be filed on or before November 4, Scharf's wife concluded the employer had ten days from the date the decision was received or until November 10, 2006. The employer mailed an appeal on November 8, 2006.

REASONING AND CONCLUSIONS OF LAW:

Unless the claimant or other interested party, after notification or within ten calendar days after a representative's decision is **mailed** to the parties' last-known address, files an appeal from the decision, the decision is final. Benefits shall then be paid or denied in accordance with the representative's decision. Iowa Code section 96.6-2. Pursuant to rules 871 IAC 26.2(96)(1) and 871 IAC 24.35(96)(1), appeals are considered filed when postmarked, if mailed. Messina v. IDJS, 341 N.W.2d 52 (Iowa 1983).

The Iowa Supreme Court has ruled that appeals from unemployment insurance decisions **must be filed** within the time limit set by statute and the administrative law judge has no authority to review a decision if a timely appeal is not filed. Franklin v. IDJS, 277 N.W.2d 877, 881 (Iowa 1979); Beardslee v. IDJS, 276 N.W.2d 373 (Iowa 1979). In this case, the employer's appeal was filed after the November 6, 2006 deadline for appealing expired. (The employer had until November 6 to file an appeal because November 4 fell on a Saturday.)

The next question is whether the employer had a reasonable opportunity to file an appeal in a timely fashion. Hendren v. IESC, 217 N.W.2d 255 (Iowa 1974); Smith v. IESC, 212 N.W.2d 471, 472 (Iowa 1973). The evidence establishes the employer had a reasonable opportunity to file a timely appeal, but did not.

The employer's failure to file a timely appeal was not due to any Agency error or misinformation or delay or other action of the United States Postal Service, which under 871 IAC 24.35(2) would excuse the delay in filing an appeal. Since the employer did not file a timely appeal or establish a legal excuse for filing a late appeal, the Appeals Section has no legal jurisdiction to make a decision on the merits of the appeal.

The employer is not one of the claimant's base period employers. During the claimant's current benefit year, the employer's account will not be charged.

DECISION:

The representative's October 25, 2006 decision (reference 04) is affirmed. The employer did not file a timely appeal or establish a legal excuse for filing a late appeal. The Appeals Section has no jurisdiction to address the merits of the employer's appeal. This means the claimant remains qualified to receive unemployment insurance benefits, provided he meets all other eligibility requirements. During the claimant's current benefit year, the employer's account will not be charged.

Debra L. Wise
Administrative Law Judge

Decision Dated and Mailed

dlw/pjs