

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

LANNY M PIERCE SR
Claimant

APPEAL NO. 09A-UI-04989-HT

**ADMINISTRATIVE LAW JUDGE
DECISION**

SPLASH I INC
SPLASH
Employer

Original Claim: 07/06/08
Claimant: Respondent (2-R)

Section 96.5(1)a – Quit/Other Employment

STATEMENT OF THE CASE:

The employer, Splash, filed an appeal from a decision dated March 10, 2009, reference 02. The decision allowed benefits to the claimant, Lanny Pierce Sr. After due notice was issued, a hearing was held by telephone conference call on April 27, 2009. The claimant provided a telephone number to the Appeals Section. That number was dialed at 9:01 a.m., and the only response was a voice mail. A message was left indicating the hearing would proceed without the claimant's participation unless he contacted the Appeals Section at the toll-free number prior to the close of the record. By the time the record was closed at 9:10 a.m., the claimant had not responded to the message and did not participate in the hearing or request a postponement of the hearing as required by the hearing notice. The employer participated by Co-Owner Daryl Wickstrom.

ISSUE:

The issue is whether the claimant quit work with good cause attributable to the employer.

FINDINGS OF FACT:

Lanny Pierce Sr. was employed by Splash from December 17, 2008 until February 7, 2009 as a part-time prep-cook. He gave a verbal resignation to Co-Owner Daryl Wickstrom on February 6, 2009, stating he had found another job closer to home. His last day of work was February 7, 2009. It is unknown whether he did, in fact, accept the other job and whether he worked for the new employer. He continued to file a weekly claim for benefits through the week ending March 7, 2009. The records of Iowa Workforce Development do not show any wages reported for the claimant in the first quarter of 2009.

Lanny Pierce Sr. has received unemployment benefits since filing an additional claim with an effective date of February 1, 2009.

The record was closed at 9:10 a.m. At 9:33 a.m., the claimant's wife called and requested to participate. The claimant received the hearing notice prior to the April 27, 2009 hearing and knew a hearing was scheduled. His wife was to participate in the hearing on his behalf but was outdoors at the time the administrative law judge called and did not answer the phone.

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.5-1-a provides:

An individual shall be disqualified for benefits:

1. Voluntary quitting. If the individual has left work voluntarily without good cause attributable to the individual's employer, if so found by the department. But the individual shall not be disqualified if the department finds that:

a. The individual left employment in good faith for the sole purpose of accepting other or better employment, which the individual did accept, and the individual performed services in the new employment. Benefits relating to wage credits earned with the employer that the individual has left shall be charged to the unemployment compensation fund. This paragraph applies to both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

The record establishes the claimant quit work with Splash without good cause attributable to the employer. The reason given to the employer was that he had another job, but the claimant did not participate in the hearing to provide any information regarding this possible other employment. As a result, it cannot be determined he has requalified under the provisions of the above Code section. He is disqualified until such time as he can provide evidence to Iowa Workforce Development of the beginning date of this alleged other employment.

Iowa Code section 96.3-7, as amended in 2008, provides:

7. Recovery of overpayment of benefits.

a. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

b. (1) If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5. However, provided the benefits were not received as the result of fraud or willful misrepresentation by the individual, benefits shall not be recovered from an individual if the employer did not participate in the initial determination to award benefits pursuant to section 96.6, subsection 2, and an overpayment occurred because of a subsequent reversal on appeal regarding the issue of the individual's separation from employment. The employer shall not be charged with the benefits.

(2) An accounting firm, agent, unemployment insurance accounting firm, or other entity that represents an employer in unemployment claim matters and demonstrates a continuous pattern of failing to participate in the initial determinations to award benefits, as determined and defined by rule by the department, shall be denied permission by the department to represent any employers in unemployment insurance matters. This subparagraph does not apply to attorneys or counselors admitted to practice in the courts of this state pursuant to section 602.10101.

The claimant has received unemployment benefits to which he is not entitled. The question of whether the claimant must repay these benefits is remanded to the UIS division.

The next issue is whether the record should be reopened. The judge concludes it should not.

871 IAC 26.14(7) provides:

(7) If a party has not responded to a notice of telephone hearing by providing the appeals section with the names and telephone numbers of its witnesses by the scheduled time of the hearing, the presiding officer may proceed with the hearing.

a. If an absent party responds to the hearing notice while the hearing is in progress, the presiding officer shall pause to admit the party, summarize the hearing to that point, administer the oath, and resume the hearing.

b. If a party responds to the notice of hearing after the record has been closed and any party which has participated is no longer on the telephone line, the presiding officer shall not take the evidence of the late party. Instead, the presiding officer shall inquire as to why the party was late in responding to the notice of hearing. For good cause shown, the presiding officer shall reopen the record and cause further notice of hearing to be issued to all parties of record. The record shall not be reopened if the presiding officer does not find good cause for the party's late response to the notice of hearing.

c. Failure to read or follow the instructions on the notice of hearing shall not constitute good cause for reopening the record.

Although the claimant may have intended to participate in the hearing, the claimant's witness did not answer the phone when the Appeals Section called. The claimant did not establish good cause to reopen the hearing. Therefore, the request to reopen the hearing is denied.

DECISION:

The representative's decision of March 10, 2009, reference 02, is reversed. Lanny Pierce Sr. is disqualified effective February 8, 2009. Benefits are withheld until he has earned ten times his weekly benefit amount, provided he is otherwise eligible. The issue of whether the claimant must repay the unemployment benefits is remanded to UIS division for determination.

Bonny G. Hendricksmeier
Administrative Law Judge

Decision Dated and Mailed

bgh/kjw