

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

TRICIA L DRAPER
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SUTHERLAND IA 51058-7625

IOWA WORKFORCE
DEVELOPMENT DEPARTMENT

Appeal Number: 06A-UI-08144-DT
OC: 07/02/06 R: 01
Claimant: Appellant (4/R)

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 96.5-7 – Vacation Pay
Section 96.3-7 – Recovery of Overpayment of Benefits

STATEMENT OF THE CASE:

Tricia L. Draper (claimant) appealed a representative's July 31, 2006 decision (reference 03) that concluded the claimant was overpaid benefits for the week ending July 8, 2006, due to receipt of vacation pay from Sutherland Express, Inc. (employer). Hearing notices were mailed to the claimant's last-known address of record for a telephone hearing to be held on August 29, 2006 in conjunction with one related appeal, 06A-UI-08143-DT. Prior to the hearing the claimant contacted the administrative law judge and requested that the administrative law judge consider the record and the claimant's appeal documentation in lieu of her participation in the hearing. Based on a review of the information in the administrative file, the claimant's appeal documentation, the information provided regarding the related appeal, and the law, the

administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

FINDINGS OF FACT:

The claimant started working for the employer on September 8, 2003. She worked full time as manager of the employer's convenience store at an annual salary of \$23,660.16 (\$985.84 x 24), including ten paid vacation days; the salary was based on an expectation of working up to 55 hours per week on average, but at least 50 hours per week. Her work schedule could fluctuate any of the seven days per week, and the number of hours she worked per week had even been at least up to 63 hours per week, which she could then average against the prior or subsequent week. Her last day of actual work for the employer was June 28, 2006, on which she worked slightly over four hours.

The claimant established an unemployment insurance benefit year effective July 2, 2006. Her weekly benefit amount was calculated to be \$265.00 and her earnings allowance as \$280.00. She filed a weekly claim for the week ending July 8, 2006 for which she reported income in the amount of \$266.00; this may have been her estimate of what vacation pay would be allocated to that week, but it was reported as wages. As a result, the Agency applied the statutory formula for partial deduction of wages earned for determining the amount of partial unemployment insurance benefits to which the claimant was entitled, and she was issued a reduced benefit payment for that week in the amount of \$65.00. The administrative law judge notes that the claimant reported no wages earned for the week ending July 15, 2006, suggesting to the administrative law judge that the claimant in fact might also not had employment from another employer from which she might have earned wages for actual work performed during the week ending July 8, 2006.

A notice of the filing of the claimant's claim was sent to the employer, to which it made a timely response. In that response the employer reported the payment of vacation pay to the claimant in the amount of \$529.06 to be allocated to the period from June 29 through July 7, 2006. In the rendering of the related representative's decision also issued on July 31, 2006 (reference 02), which is the subject of the concurrently issued decision in 06A-UI-08143-DT, the representative made the assumption of a standard five-day, Monday through Friday work week, then divided the \$529.06 reported by seven days (assuming seven work days from June 29 through July 7), and therefore allocated \$151.00 (rounded) to the week ending July 1 and \$378.00 (rounded) to the week ending July 8, resulting in complete disqualification for benefits for the week ending July 8, 2006. The representative decision being reviewed in this case that there was a resulting overpayment is due to this same conclusion.

The employer's pay periods ran from the first to the fifteenth and from the sixteenth to the end of each month, with pay issued typically three days after the end of the pay period. The claimant's final paycheck was issued on or about July 2, 2006. On her final paycheck she was paid her regular bi-monthly salary of \$985.84 (gross). This represented both days actually worked and days to which the employer applied vacation to bring her to the number of work days or hours from June 16 through June 30 so that she would receive her full regular bi-weekly salary payment.

Also included in the claimant's final check was payment of \$345.04 (gross) representing her accrued but unused vacation time as of June 30, 2006. The calculation was made by deducting five vacation days assumed by the employer as used from September 9, 2005 through June 30, 2006 from the annual ten day vacation allowance, leaving five days. The employer multiplied this by an average daily wage of \$92.01 for a total of \$460.05, then reduced this to 75 percent of

that figure due to the fact that the claimant had only completed 75 percent of her year of employment and would not have yet accrued all ten days of vacation. The resulting figure, \$345.04, is what was in fact paid to the claimant with her final paycheck. Divided by the employer's assumed average daily wage of \$92.01, this would be allocated to 3.75 days.

REASONING AND CONCLUSIONS OF LAW:

The issue in this case is whether vacation pay was properly allocated and deducted and whether there was a resulting overpayment.

Iowa Code § 96.5-7 provides:

An individual shall be disqualified for benefits: ...

7. Vacation pay.

a. When an employer makes a payment or becomes obligated to make a payment to an individual for vacation pay, or for vacation pay allowance, or as pay in lieu of vacation, such payment or amount shall be deemed "wages" as defined in section 96.19, subsection 41, and shall be applied as provided in paragraph "c" hereof.

b. When, in connection with a separation or layoff of an individual, the individual's employer makes a payment or payments to the individual, or becomes obligated to make a payment to the individual as, or in the nature of, vacation pay, or vacation pay allowance, or as pay in lieu of vacation, and within ten calendar days after notification of the filing of the individual's claim, designates by notice in writing to the department the period to which the payment shall be allocated; provided, that if such designated period is extended by the employer, the individual may again similarly designate an extended period, by giving notice in writing to the department not later than the beginning of the extension of the period, with the same effect as if the period of extension were included in the original designation. The amount of a payment or obligation to make payment, is deemed "wages" as defined in section 96.19, subsection 41, and shall be applied as provided in paragraph "c" of this subsection 7.

c. Of the wages described in paragraph "a" (whether or not the employer has designated the period therein described), or of the wages described in paragraph "b", if the period therein described has been designated by the employer as therein provided, a sum equal to the wages of such individual for a normal workday shall be attributed to, or deemed to be payable to the individual with respect to, the first and each subsequent workday in such period until such amount so paid or owing is exhausted. Any individual receiving or entitled to receive wages as provided herein shall be ineligible for benefits for any week in which the sums, so designated or attributed to such normal workdays, equal or exceed the individual's weekly benefit amount. If the amount so designated or attributed as wages is less than the weekly benefit amount of such individual, the individual's benefits shall be reduced by such amount.

d. Notwithstanding contrary provisions in paragraphs "a", "b", and "c", if an individual is separated from employment and is scheduled to receive vacation payments during the period of unemployment attributable to the employer and if the employer does not designate the vacation period pursuant to paragraph "b", then payments made by the employer to the individual or an obligation to make a payment by the employer to the individual for vacation pay, vacation pay allowance or pay in lieu of vacation shall not be

deemed wages as defined in section 96.19, subsection 41, for any period in excess of one week and such payments or the value of such obligations shall not be deducted for any period in excess of one week from the unemployment benefits the individual is otherwise entitled to receive under this chapter. However, if the employer designates more than one week as the vacation period pursuant to paragraph "b", the vacation pay, vacation pay allowance, or pay in lieu of vacation shall be considered wages and shall be deducted from benefits.

e. If an employer pays or is obligated to pay a bonus to an individual at the same time the employer pays or is obligated to pay vacation pay, a vacation pay allowance, or pay in lieu of vacation, the bonus shall not be deemed wages for purposes of determining benefit eligibility and amount, and the bonus shall not be deducted from unemployment benefits the individual is otherwise entitled to receive under this chapter.

Iowa Code § 96.3-7 provides:

7. Recovery of overpayment of benefits. 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.

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.

The amount of vacation initially reported by the employer did vary from that actually paid to the claimant, as did the manner in which it was calculated. While there is some confusion as to how the employer calculated the number of vacation days for which the claimant should have been paid after June 30, the only material determination is how much she was actually paid for days after June 30 and how it should be allocated.

It is clear that the claimant received her regular pay including use of some vacation time through June 30, 2006. It is also clear that her actual payment received for vacation time remaining after that date was \$345.00 (rounded), and that the employer was using the figure of \$92.00 (rounded) per day in its calculations. There is a question as to whether all of that amount should be allocated to the week from July 2 through July 8, 2006; however, given the claimant's varying schedule, such that she could be working any of the seven days per week, the vacation pay allocation would begin on the first potential work day after the end of the last pay period, which is Saturday, July 1, 2006. The amount designated by the employer as the average daily pay of \$92.01 would then be allocated to that date. The remainder, \$253.00 (rounded), is then allocated to the week of July 2 through July 8, 2006. This is less than the amount initially allocated to that week by the representative, and is actually even less than that reported by the claimant. Therefore, the claimant is not completely disqualified for any benefits for the week ending July 8, 2006 due to the receipt of vacation pay, and would not be overpaid unemployment insurance benefits for that week strictly due to her receipt of \$253.00 in vacation pay.

However, the amount reported by the claimant for that week was reported as wages, not vacation. If she received both wages and vacation, both must be deducted (on different formulas) from her remaining eligibility; if she received only vacation pay, that should have been deducted on a one-to-one basis rather than on the statutory formula for partial deduction of wages earned. The matter will be remanded to the Claims Section for a determination whether the claimant actually had any wages for work performed during the week ending July 8, or whether the amount she reported was an attempt to report estimated vacation pay. The Claims Section shall then make the necessary recalculation of the claimant's partial unemployment insurance benefit eligibility for that week after the one-to-one deduction of the \$253.00 in vacation pay and any pro-rated deduction for any actual wages earned, as well as any resulting overpayment adjustments.

DECISION:

The representative's July 31, 2006 decision (reference 03) is modified in favor of the claimant. The vacation pay was not correctly allocated or deducted in the representative's decision. Vacation pay only in the amount of \$253.00 applied to the week ending July 8, 2006. Deducted from the claimant's weekly benefit amount, there may be partial unemployment insurance benefits which the claimant was entitled to receive for that week, depending on whether the claimant also had wages earned for that week. Therefore, she is not overpaid unemployment insurance benefits for that week strictly due to receiving vacation pay in excess of her benefit amount. The matter is remanded to the Claims Section for any necessary recalculation of partial benefits payable and any resulting overpayment to the claimant for that week in accordance with this decision.

ld/pjs