

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

SCOTT A TORKELESON
Claimant

APPEAL NO. 06A-UI-09717-H2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

M & D PLUMBING & HEATING
Employer

**OC: 09-03-06 R: 03
Claimant: Appellant (2R)**

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

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the September 28, 2006, reference 02, decision that deducted vacation pay from the claimant's unemployment insurance benefits. After due notice was issued, a hearing was held on October 17, 2006. The claimant did participate. The employer did participate through Joan Decious, Secretary and (representative) Lynn Decious, Owner. Department's Exhibit D-1 was received.

ISSUE:

Was the claimant's vacation pay correctly deducted from his unemployment insurance benefits?

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was separated on September 8, 2006, and received vacation pay in the amount of \$57.75 based upon a rate of pay at \$11.00 per hour. The employer did not designate the period of time to which the vacation pay was to be applied. The gross amount of the claimant's last paycheck was \$426.25 which included pay for 33.5 hours actually worked and pay for 5.25 hours of vacation pay. The claimant reported \$330.00 in wages for the week ending September 9, 2006. The claimant actually received wages in the amount of \$368.50 and \$57.75 in vacation wages. The claimant received no unemployment insurance benefits for the week ending September 9, 2006 due to his report of wages. The claimant had \$58.00 dollars deducted from his weekly unemployment insurance benefits for the week ending September 16, 2006 for unreported vacation benefits.

There has been no initial fact-finding decision made on the claimant's separation from employment.

REASONING AND CONCLUSIONS OF LAW:

For the reasons that follow, the administrative law judge concludes the vacation pay was deducted for the incorrect period.

Iowa Code section 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.

871 IAC 24.16(3) provides:

(3) If the employer fails to properly notify the department within ten days after the notification of the filing of the claim that an amount of vacation pay, either paid or owed, is to be applied to a specific vacation period, the entire amount of the vacation pay shall be applied to the one-week period starting on the first workday following the last day worked as defined in subrule 24.16(4). However, if the individual does not claim benefits after layoff for the normal employer workweek immediately following the last day worked, then the entire amount of the vacation pay shall not be deducted from any week of benefits.

Because the employer did not designate a time period to which the vacation pay is to apply, the entire amount should have been deducted from the claimant's first week of benefits following the separation or the week ending September 9, 2006. The vacation benefits were deducted from the week ending September 16, 2006. The vacation benefits were deducted incorrectly.

Iowa Code section 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 administrative law judge concludes that the claimant has not been overpaid unemployment insurance benefits in the amount of \$58.00 pursuant to Iowa Code section 96.3-7 as the disqualification decision that created the overpayment decision has now been reversed.

DECISION:

The September 28, 2006, reference 02, decision is reversed. The vacation pay was deducted for the incorrect period. The claimant has not been overpaid unemployment insurance benefits

in the amount of \$58.00. This case is remanded for an initial fact-finding decision on the claimant's separation from employment.

Teresa K. Hillary
Administrative Law Judge

Decision Dated and Mailed

tkh/pjs