

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

MICHAEL G O'BLENESS
Claimant

APPEAL NO: 11A-UI-03261-DWT

**ADMINISTRATIVE LAW JUDGE
DECISION**

ROQUETTE AMERICA INC
Employer

OC: 09/26/10
Claimant: Appellant (4)

Iowa Code § 96.5(7) – Vacation Pay
Iowa Code § 96.6(2) – Timeliness of Appeal

PROCEDURAL STATEMENT OF THE CASE:

The claimant appealed a representative's March 3, 2011 determination (reference 02) that held him ineligible to receive benefits for the weeks ending November 27, 2010, because he received vacation pay that should be attributed to this week. The claimant participated in the hearing. Hiliary Carter, a human resource staffing specialist, appeared on the employer's behalf. Based on the evidence, the arguments of the parties, and the law, the administrative law judge concludes the claimant's vacation pay is attributed to only week. While this should be the week ending November 27, the claimant reported the vacation pay during the week ending December 25.

ISSUES:

Did the claimant file a timely appeal or establish a legal excuse for filing a late appeal?

Did the claimant receive vacation pay, and if he did to what week or weeks should it be attributed?

FINDINGS OF FACT:

As the result of a labor dispute, the claimant became unemployed when he was locked out of work on September 28, 2010. He established a claim for benefits during the week of September 26, 2010. In accordance with the union contract the claimant receives holiday pay even when he is locked out. In the contract, Thanksgiving Day is noted as a holiday.

Months before the lockout occurred, the claimant requested time off as vacation for the week of Thanksgiving or the week ending November 27. On December 3, the employer issued the claimant a check for a gross payment of \$1,079.52. This check paid the claimant for eight hours of holiday pay for Thanksgiving and 40 hours of vacation pay. The claimant did not know he received the holiday and vacation payment until the week of December 25. The check was sent to the union and the claimant did not know he had actually received any money for vacation or holiday pay until this week. The claimant does not have his checks directly deposited into his bank account. When the claimant filed his weekly claim, he reported the December 3 check

payment for the week ending December 25. His local Workforce office told the claimant to report the payment in the week he received the payment.

On March 3, a representative's determination was mailed to the claimant and employer indicating the claimant was not eligible to receive benefits for the week ending November 27, 2010, because he received vacation pay that should be attributed to this week. The claimant received the representative's determination on March 4, 2011. He went to his local Workforce office before March 14. The representative told the claimant that the Des Moines office would be contacted about the discrepancy in what he had been told to do and the decision stated. If there was a problem, the representative would call the claimant. The representative did not contact the claimant again until March 16. On March 16, the representative reported that Des Moines personnel had not contacted the local Workforce about resolving the claimant's issues. The representative then advised the claimant to file an appeal, which he did on March 16, 2011.

REASONING AND CONCLUSIONS OF LAW:

Unless the claimant or other interested party, after notification or within ten calendar days after a representative's determination is mailed to the parties' last-known address, files an appeal from the determination; it is final. Benefits shall then be paid or denied in accordance with the representative's determination. Iowa Code § 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 determinations must be filed within the time limit set by statute and the administrative law judge has no authority to review a determination 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 claimant's appeal was filed after the March 14 deadline for appealing expired.

The next question is whether the claimant 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 claimant had a reasonable opportunity to file a timely appeal. He understood he had to file an appeal on or before March 14 and went to his local Workforce office before March 14 to find out why he received the decision when he followed the directions to report payments when he received them. The claimant relied on the representative to let him know if there was a problem. The representative did not contact him until March 16 and advised him to appeal because Des Moines personnel had not responded to the representative's questions about the claimant's determination.

The claimant's failure to file a timely appeal was due to an Agency error or misinformation, which under 871 IAC 24.35(2) excuses the delay in filing an appeal. The claimant established a legal excuse for filing a late appeal. The Appeals Section has jurisdiction to make a decision on the merits of the appeal.

The easy question to address in this case is when holiday pay should be reported or attributed to. 871 IAC 24.13(2)a provides that holiday pay is considered a wage and is deductible from a claimant's weekly benefit amount just as wages are in 871 IAC 24.18. Since the union contract specifically states employees receive holiday pay for Thanksgiving Day and various other days, the claimant knew or should have known he would receive this holiday payment. Therefore, he is required to report holiday pay during the week in which the holiday occurred, not when paid. Holiday pay is treated no differently than wages. Wages are to be reported during the week

earned, not paid. If holiday pay is not paid by the employer, the claimant may request an underpayment adjustment from the department. 871 IAC 24.13(2).

The harder question to answer is what week or weeks should a vacation payment be attributed when there is a labor dispute and the employer has not timely notified the Department that the employer may be obligated to make a vacation payment. The vacation payment law is confusing and in this case does not address the situation presented. To illustrate how confusing the vacation pay law and regulations are, the employer in this case submitted weekly reports as to what weeks the employer wanted a vacation payment of more than 40 hours attributed to. The employer, however, knew months before the lockout occurred that the claimant requested a week of vacation during the week of Thanksgiving. After the claimant established his claim for benefits, he was told to report money paid by the employer during the week in which he actually received the payment. As indicated already, the law does not address this specific situation in this case. The law presumes the employer knows what vacation pay would be paid or owed at the time the employer receives the notice of claim. Iowa Code § 96.5(7) and 871 IAC 24.16(1).

The employer receives a notice of claim shortly after the claimant establishes a claim for benefits. When an employer notifies the department within ten days of receiving a notice of claim that an amount of vacation pay, either paid or owed, is to be applied to a specific period, a sum equal to the wage of the individual for a normal workday shall be applied to the first and each subsequent workday of the designated vacation until the amount of the vacation pay is exhausted. 871 IAC 16(1). If the employer makes the original designation of the vacation period in a timely manner, the employer may extend the vacation period by designating the period of extension before the extension period begins. 871 IAC 24.16(2). The employer could have reported on the initial notice of claim that the claimant would receive vacation pay the week of Thanksgiving because this claimant made that request months before the lockout occurred.

The law that is most on point for this case is Iowa Code § 96.5(7)d. This statute states that if the employer has not timely designated the vacation period after receiving the notice of claim, the payment made by the employer to the claimant or an obligation to make a payment shall not be deemed wages for any period in excess of one week and such payment shall not be deducted from unemployment benefits for more than one week.

So in plain English what does this mean? When an employer does not timely indicate on a notice of claim potential vacation pay obligations, the fact the employer pays the claimant more than 40 hours of vacation pay can only be attributed to one week. Since the employer has no control on when a claimant receives a vacation payment when the payment is not directly deposited into a bank account, the week the claimant requested the vacation hours should be paid is the week the vacation pay should be attributed. Just as wages are to be reported when they are earned, vacation pay should be reported for the time period the employer becomes obligated to pay out the vacation pay.

The administrative law judge recognizes that the labor dispute put the employer in a difficult situation. However; in this case the employer knew when the lockout occurred that the claimant had previously requested vacation the week of Thanksgiving. In completing the notice of claim, the employer could have timely reported vacation pay the employer was obligated to pay for this claimant.

The claimant should have reported his Thanksgiving Day holiday pay during the week ending November 27, 2010. The vacation payment the claimant received is to be reported in one week. While this payment should have been reported during the week ending November 27,

the claimant has already reported both his holiday and vacation pay this during the week ending December 25. It is senseless to change the week in which the vacation pay and holiday pay is attributed since payments have been reported for one week, just not the correct week. The two weeks in question, November 27 and December 25 cancel out one another. Iowa Code § 96.5(7)d.

DECISION:

The representative's March 3, 2011 (reference 02) is modified in the claimant's favor. The claimant filed a late appeal, but established a legal excuse for filing a late appeal. Therefore, the Appeals Section has jurisdiction to address the merits of the claimant's appeal. The claimant should have reported the Thanksgiving holiday pay during the week ending November 27, 2010. The vacation payment issued on December 3 should have been reported during the week ending November 27, 2010, because it must all be attributed to one week. Even though the claimant did not report the payments during the correct week, he reported it all in one week. Therefore, it is not necessary to change the week the holiday and vacation pay should be attributed to in this case.

Debra L. Wise
Administrative Law Judge

Decision Dated and Mailed

dlw/css