

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

SUE A BURNS
Claimant

APPEAL NO. 09A-UI-06932-E2T

**ADMINISTRATIVE LAW JUDGE
DECISION**

DUNES EYE CARE
Employer

OC: 04/20/08
Claimant: Appellant (3)

Iowa Code § 96.5(5) – Severance Pay
Iowa Code § 96.5-7, 871 IAC 24.16 – Vacation Pay

STATEMENT OF THE CASE:

The claimant filed a timely appeal from the April 30, 2009, reference 03, decision that deducted severance pay from benefits without having held a fact-finding interview pursuant to 871 IAC 24.9(2)b. After due notice was issued, a telephone conference hearing was held on June 1, 2009. Claimant participated. Employer did not participate. Exhibit D was admitted into the record.

ISSUE:

The issue is whether severance pay or vacation pay was correctly deducted from benefits.

FINDINGS OF FACT:

Having reviewed all of the evidence in the record, the administrative law judge finds: The claimant was separated on January 16, 2009. She was paid her regular pay on January 16, 2009. She received two weeks' vacation pay in the amount of \$1,038.50. While the employer characterized the pay as severance pay there was no convincing evidence to find the pay was severance pay. The evidence supports the fact the claimant received her two weeks' accumulated vacation pay. The copy of the claimant's notification of deposit is the best evidence of the amount the claimant received. While there are work sheets from the employer indicating differing payments, the notification of deposit for the pay date of February 13, 2008 is found to be the correct amount of gross vacation pay the claimant received.

The employer was notified the claimant had re-filed her claim by a Notice of Claim sent to the employer on January 20, 2009. The notice informed the employer it had ten days, until January 30, 2009, to respond. The employer responded on February 4, 2009 indicating the claimant received \$1,384.80 in severance pay. The claimant's weekly benefit amount is \$344.00.

REASONING AND CONCLUSIONS OF LAW:

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.

Vacation pay shall be deducted first when paid in conjunction with other deductible payments. 871 IAC 24.13(1). Even though the employer indicated severance pay should be deducted first, the law requires vacation pay to be deducted first.

When an employer makes a vacation payment or becomes obligated to make a payment, the vacation pay must be deducted from unemployment insurance benefits: (1) if the employer reports the amount of vacation pay and designates the dates to which the vacation pay applies within ten days after receiving the notice of claim form and (2) if the claimant claims benefits during a week the employer designates for vacation pay. If an employer does not designate the dates to which vacation pay applies by the ten-day deadline, the unused vacation pay must be divided by five and applied to the first five working days after the claimant's last day of work. If the amount of vacation pay applied to a week is less than the claimant's weekly benefit amount, the claimant will receive an amount equal to the weekly benefit amount minus the vacation pay applied to the week. Iowa Code § 96.5-7, 871 IAC 24.16.

The employer did not respond within ten days. Therefore the payment is considered for one week. The claimant's last day of work was January 16, 2009. The check issued to the claimant for vacation pay for \$1,038.60 is deemed to be vacation pay for the week ending January 24, 2009. Since the claimant's weekly benefit amount is \$344.00 the claimant was overpaid for this week.

DECISION:

The April 30, 2009, reference 03, decision is modified. The claimant received vacation pay which made her ineligible for the week ending January 24, 2009. The claimant has one week of ineligibility rather than three.

James Elliott
Administrative Law Judge

Decision Dated and Mailed

jfe/pjs