

**IOWA WORKFORCE DEVELOPMENT  
UNEMPLOYMENT INSURANCE APPEALS**

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

**RENEE M WIRTANEN**  
Claimant

**APPEAL NO. 11A-UI-07865-SWT**

**ADMINISTRATIVE LAW JUDGE  
DECISION**

**DAVIS COUNTY HOSPITAL**  
Employer

**OC: 11/28/10  
Claimant: Appellant (2)**

Section 96.5-7 - Vacation Pay

**STATEMENT OF THE CASE:**

The claimant appealed an unemployment insurance decision dated June 7, 2011, reference 04, that concluded she was ineligible for benefits due to the receipt of vacation pay. A telephone hearing was held on July 12, 2011. The parties were properly notified about the hearing. The claimant participated in the hearing. No one participated in the hearing on behalf of the employer. Exhibit A was admitted into evidence at the hearing.

**ISSUE:**

Did the claimant receive deductible vacation pay and was it deducted correctly?

**FINDINGS OF FACT:**

The claimant worked for the employer from November 1999 through November 23, 2011. The claimant's wage rate while employed was \$25.74 per hour. The employer provides paid time off (PTO) as a benefit that combines traditional vacation, sick, holiday, funeral, and other forms of leave into one program. Employees accrue a certain number of hours of paid time off each pay period.

The claimant filed a new claim for unemployment insurance benefits with an effective date of November 28, 2010. She did not file a weekly claim for benefits for the week ending November 27, 2010.

The employer responded to the notice of claim within 10 calendar days of the date that it was mailed to the employer. In its response, the employer stated that the claimant received vacation pay of \$8,199.48 for 318.55 hours of vacation pay and designated the period to which the vacation pay was to apply as November 24, 2010, to January 16, 2011.

On December 10, 2011, the claimant received payment for her unused PTO of \$8,199.48.

## REASONING AND CONCLUSIONS OF LAW:

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. If paid time off is "vacation pay," the Agency's decision was correct and the claimant was ineligible for benefits for the weeks between November 28, 2010, and January 16, 2011.

The real question is whether PTO should be treated as vacation pay under Iowa Code § 96.5-7. The problem is the statute and rule (871 IAC 24.16) requires vacation pay to be deducted, but 871 IAC 24.13(4) states that payments for unused sick leave are not. Employers who set up a PTO program set up a program that merges these two kinds of time off that the law says should be treated differently for unemployment purposes. To complicate things further, ordinary wages are not deducted dollar for dollar, but instead the wage deduction formula of Iowa Code § 96.3-3 is used.

The legislature has made "vacation pay" deductible and neither the statute nor the rules—which identify nearly a dozen different types of payment by name—say a word about PTO. Applying the canon of statutory interpretation that "the expression of one thing is the exclusion of others" and when ambiguous the unemployment insurance law is to be construed liberally to achieve the legislative goals of minimizing the burden of unemployment, I conclude that if the legislature or agency want PTO deducted, they should say so expressly. See *Smith v. Iowa Employment Security Commission*, 212 NW 2d 471, 473 (Iowa 1973), *Brumley v. Iowa Dept. of Job Service*, 292 NW 2d 126, 129 (Iowa 1980).

Finally, I have reviewed 871 IAC 24.13(3)b, which lists "excused personal leave" as item "fully deductible payments from benefits" but find it unhelpful in deciding this case. First, a payment for unused PTO at the time of separation is not "personal leave with pay granted to an employee for an absence due to personal reasons" as the rule defines excused personal leave. Second, I have never heard of PTO being referred to as "casual pay" or "random pay" as the rule calls such a payment. The rule states "excused personal leave" is "fully deductible" (meaning dollar for dollar, rather than using the wage deduction formula of 871 IAC 24.18) only if it is taken during a scheduled vacation. It does not say one way or the other whether excused personal leave is deductible if paid outside of a scheduled vacation.

The claimant should be awarded full benefits for the weeks between November 28, 2010, and January 16, 2011, because the payment of unused PTO is not deductible from her benefits.

**DECISION:**

The unemployment insurance decision dated June 7, 2011, reference 04, is reversed. The claimant should be awarded full benefits for the weeks between November 28, 2010, and January 16, 2011.

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Steven A. Wise  
Administrative Law Judge

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Decision Dated and Mailed

saw/kjw