

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

RICHARD E MOORE
Claimant

APPEAL NO: 11A-UI-03258-DWT

**ADMINISTRATIVE LAW JUDGE
DECISION**

ROQUETTE AMERICA INC
Employer

OC: 09/026/10
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 4, 2011 determination (reference 04) that held him ineligible to receive benefits for the weeks ending November 20 through December 11, 2010, because he received vacation pay that should be attributed to these weeks. 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.

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. The claimant requested 136 hours of vacation and a floating holiday for the week of November 21. On November 26, the employer issued the claimant a check for these hours for a gross payment of \$3,238.48. The claimant did not know he received the vacation pay until March. He reported the payment the week in which he personally received the check, the week ending March 19, 2011. The check was sent to the union and the claimant did not know he had actually received any money for vacation pay until this week. The claimant does not have his checks directly deposited into his bank account.

On March 4, a representative's determination was mailed to the claimant and employer indicating the claimant was not eligible to receive benefits for the weeks ending November 20 through December 11 because he received vacation pay that should be attributed to these weeks. The claimant was out of state in early March and did not return until March 12. The claimant did not read the determination until March 13 or 14, Sunday or Monday.

On March 14, the claimant went to visit his nephew who was in the hospital in Iowa City. While at the hospital, the claimant called his union representative to find out what the determination was about. At this time, the claimant did not even know he had the vacation check waiting for him to cash. The union representative advised him to contact his local Workforce office. The claimant called his Workforce office that same day. The local Workforce representative understood the claimant was visiting his nephew at the hospital and told him to come to the office as soon as possible. The claimant went to his local Workforce office on March 16 and filed his appeal.

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 did not have a reasonable opportunity to file a timely appeal because he did not know about the determination until March 13 or 14. Since he contacted his local Workforce office on March 14 and was not advised to file an appeal immediately, the claimant established a legal excuse for filing a late appeal. 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. Since 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.

A difficult question to answer is what week or weeks should a vacation payment be attributed when the employer has not timely notified the Department when there is a labor dispute and 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 submitted weekly reports as to what weeks the employer wanted a vacation payment of more than 40 hours attributed to. The claimant, however, did not know he had received the vacation payment until the week of March 14. He understood he was to report money paid by the employer during the week in which he actually received the payment.

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). In a typical case, 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 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 pay 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 that 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 vacation payment the claimant received was reported in one week. While this payment should have been reported during the week ending November 27, the claimant has already reported the vacation pay during the week ending March 19, 2011. It is senseless to change the week in which the vacation pay is attributed to in this case since the vacation hours have been reported for one week. The two weeks in question, November 27 and March 19 basically cancel out one another. Iowa Code § 96.5(7)d.

DECISION:

The representative's March 4, 2011 (reference 04) 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 vacation pay he requested for the week of November 21 during the week ending November 27, 2010. The vacation payment the claimant received is attributed to one week. Even though the claimant did not report the payment during the correct week, he reported it all in one week. Since he reported in one week, the week ending March 19, it is not necessary in this case to change the week the vacation pay is applied.

Debra L. Wise
Administrative Law Judge

Decision Dated and Mailed

dlw/css