

REASONING AND CONCLUSIONS OF LAW:

Iowa Code section 96.5-7(a)-(d) 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.

The Iowa Supreme Court has held that when a vacation period is not "in connection with a separation or layoff of an individual" then the designation provision of Iowa Code §95.5(7)(b) does not apply. *LeFebure Corp. v. ISJS*, 341 N.W.2d 768 (Iowa 1983).

Vacation pay offsets under paragraph (a) is governed by the following:

Deductions from unemployment insurance payments are on a "when earned" basis rather than on a "when paid" basis. Deferred wages currently paid which are based on earnings from a prior period are not deductible on a current week claimed pursuant to Iowa Code section 96.19(9)"b" and paragraph 24.13(2)"o."

871 IAC 24.52(8); *see also Hartmann v. IWD*, 10-IWDUI-061 <http://decisions.iowaworkforce.org/ui/2010/01198.X.PDF>; Claimant Handbook, A Guide to Unemployment Insurance Benefits p. 4 ("report all wages...when they are earned, not when payment is received"). This is in contrast to calculation based on monetary eligibility, and this difference often causes confusion. 871 IAC 23.2(2) ("[w]ages earned but not paid during the calendar quarter shall be considered as wages for employment in the quarter paid."). But, again, the rule is that when employers report wages for the purposes of determining monetary issues, including employer taxes, the focus is on when the check is cut, that is, "when paid," but when employees report wages they have earned the focus is on when the work was performed, i.e., "when earned."

Here the vacation preceded the layoff period. In fact, the Claimant worked following the vacation day as the exhibits show he worked on December 30, 31, January 2 and January 3. Thus the vacation period is not "in connection with a separation of layoff of an individual" rather it was just earned vacation taken a little over a week before layoff commenced. That being the case, then under *LeFebure* the designation procedure does not apply. Instead, we ask when was the vacation pay "earned" per rule 24.52(8). The answer is December 27, 2014. This being the case, no set off applies.

First of all, a vacation period which is **complete** before a period of layoff and before the claimant even files his initial claim for benefits can never be a set off through the application of 96.5(7). This is so even if the check is cut later, as set offs are performed on a "when earned" basis.

Second, even applying the paragraph (c) calculation there can be no set off. As we noted, the Employer's designation is beside the point where the vacation was not in connection with the layoff. So what we are directed to do, even assuming we somehow follow this process *before* the claim year starts, is to allocate the vacation day from the first day of vacation going forward. In this

allocation we put into each calendar day “a sum equal to the wages of the individual for a normal workday...” 871 IAC 24.16(1); Iowa Code §96.5(7)(c). The Claimant worked five days a week, Tuesday through Saturday. So looking to the base period the Claimant’s wages in a normal workday can be determined by taking total base period wages and dividing by 260 (52x5). Using these figures the Claimant still made on average about \$354 a day. So starting on the 27th of December we allocate \$354 dollars of the \$386, leaving \$32. That \$32 is then allocated to the next working day, call it Tuesday, December 30, 2014. So the vacation pay was exhausted the week before the Claimant even started his claim year. Thus under no circumstances is a set off possible here. The Claimant was not overpaid, and there should have been no vacation pay set off.

DECISION:

The administrative law judge’s decision dated May 11, 2015 [erroneously stamped “2014”] is **REVERSED**. The Employment Appeal Board concludes that the Claimant was **not** made ineligible for benefits due to vacation pay during his claim week ending January 10, 2015. Accordingly, the Claimant is allowed benefits during this period provided the Claimant is otherwise eligible. The overpayment entered against Claimant is vacated and set aside.

A portion of the Claimant’s appeal to the Employment Appeal Board consisted of additional evidence which was not contained in the administrative file and which was not submitted to the administrative law judge. While the appeal and additional evidence (records) were reviewed, the Employment Appeal Board, in its discretion, finds that the admission of the additional evidence is not warranted in reaching today’s decision.

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