

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

JULIE R CLAYTON
Claimant

APPEAL NO. 11A-UI-02069-SWT

**ADMINISTRATIVE LAW JUDGE
DECISION**

IOC SERVICES LLC
Employer

OC: 07/12/09
Claimant: Appellant (2)

Section 96.5-7 - Vacation Pay

STATEMENT OF THE CASE:

The claimant appealed an unemployment insurance decision dated February 11, 2011, reference 03, that concluded she was ineligible for benefits due to the receipt of vacation pay. A telephone hearing was held on March 16, 2011. The parties were properly notified about the hearing. The claimant participated in the hearing. Tammi Kadlec participated in the hearing on behalf of the employer. Exhibits 1 and 2 were 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 through July 10, 2009. The claimant's rate of pay was \$17.30 per hour. The employer provides paid time off (PTO) as a benefit that combines vacation, sick leave, and other forms of leave into one program. Before the establishment of the PTO, the employer had Team Member Personal Leave (TMPL) that was essentially the same as PTO, but PTO was accrued for each pay period. Likewise, TMPL combines vacation, sick leave, and other forms of leave into one program.

On July 20, 2009, the claimant received payment for her unused PTO of \$747.87 and for her unused TMPL of \$1,523.08, for a total of \$2,270.95, representing 131.21 hours, or 16.4 days.

The claimant filed a new claim for unemployment insurance benefits with an effective date July 12, 2009. She reported the vacation pay of \$999.00 on her claimant for the week ending July 18, 2009, because that is the highest amount you can report on the claim system and she received no benefits for the week.

The employer responded to the notice of claim within ten 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 \$2,270.95 and designated the period from July 13 through August 4, 2009, as the period to which the vacation pay was to apply. This was calculated by figuring that the number of days of pay the unused PTO and TMPL represented was 16.4 days.

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 ending July 18, July 24, and August 1, and had \$193.93 in vacation pay attributable to the week ending August 8, 2009.

The real question is whether PTO or TMPL 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 which the law says should be treated differently for unemployment purposes.

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." 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 ending weeks ending July 18, July 24, August 1, and August 8, 2009, because the payment of unused PTO and TMPL is not deductible from her benefits.

DECISION:

The unemployment insurance decision dated February 11, 2011, reference 03, is reversed. The claimant should be awarded full benefits for the weeks ending July 18, July 24, August 1, and August 8, 2009.

Steven A. Wise
Administrative Law Judge

Decision Dated and Mailed

saw/kjw