

**IOWA WORKFORCE DEVELOPMENT
UNEMPLOYMENT INSURANCE APPEALS**

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

SIGRID D HAREM

Claimant

APPEAL NO. 10A-UI-04418-DT

**ADMINISTRATIVE LAW JUDGE
DECISION**

BABICH GOLDMAN CASHETT & RENZO PC

Employer

Original Claim: 04/19/09

Claimant: Appellant (2)

Section 96.5-7 – Vacation Pay/ Paid Time Off (PTO)
871 IAC 24.13(3)(b) – Excused Personal Leave

STATEMENT OF THE CASE:

Sigrid D. Harem (claimant) appealed a representative's March 10, 2010 decision (reference 02) that concluded the claimant was ineligible for benefits for the four weeks ending May 16, 2009 due to receipt of vacation pay from Babich Goldman Cashatt & Renzo, P.C. (employer). After hearing notices were mailed to the parties' last-known addresses of record, a telephone hearing was held on May 5, 2010. This appeal was consolidated for hearing with one related appeal, 10A-UI-04419-DT. The claimant participated in the hearing. The claimant failed to respond to the hearing notice and provide a telephone number at which a witness or representative could be reached for the hearing and did not participate in the hearing. Based on the evidence, the arguments of the claimant, and the law, the administrative law judge enters the following findings of fact, reasoning and conclusions of law, and decision.

ISSUE:

Should the claimant's PTO payment be considered a vacation payment and deducted from her benefit eligibility?

FINDINGS OF FACT:

The claimant started working for the employer on April 17, 2008. She worked full-time as a paralegal, working a minimum of eight hours per day, Monday through Friday. Her last day of work was April 21, 2009, although she only worked about four hours that day; her position was eliminated as of that date. At that time, her hourly rate of pay was \$21.49. On April 21 the employer gave her a check representing the payout of her accumulated paid time off (PTO); the gross amount of the check was \$2,932.70, apparently representing about 136.5 hours.

The employer does not have distinct vacation and sick time; rather, it has a single paid time off program. Under the program, an employee accrues time that is the sole source of time to be used for sick leave, vacation leave, or other personal time off. There is no ratio or limitation as to what portion of the PTO is to be reserved for sick time as compared to other time off. If an employee is absent for any reason and has insufficient PTO to cover the time, there is no other type of paid time that can be applied, but rather the time would become unpaid time off.

The claimant had earned 60 hours of PTO upon her six-month anniversary October 17, 2009, of which she apparently had a balance of about 16.5 hours. Upon her one-year anniversary, she earned an additional 120 hours. Her total accrued PTO at the time of separation was about 136.5 hours, roughly 16 regular work days.

The claimant established an unemployment insurance benefit year effective April 19, 2009. Her weekly benefit amount was calculated to be \$375.00. A notice of the filing of the claim was sent to the employer, to which the employer made a timely response on May 4, 2009. The employer reported that the claimant had been paid \$2,932.70, which it designated as "vacation," attributed to the period from May 2, 2009 through May 26, 2009. May 2 was a Saturday, so clearly that was in error. Assuming the employer meant May 4, the period identified equates to about 17 days. The employer had also designated that the claimant had received \$1,362.56 in severance pay in lieu of notice allocated from April 22, 2009 through May 1, 2009. However, other than the PTO payout, the employer did not pay the claimant for any days after April 21, 2009 that she did not work. She did receive a final regular paycheck on April 27, but this was for her hours worked from April 13 through April 21. The Claims representative apparently obtained some other information indicating that the severance pay report was incorrect, as there was no separate determination made that the claimant received severance pay attributable to some period. Rather, the Claims representative applied the \$2,932.70 to the 17 normal work days that would have followed April 21, beginning April 22 and ending May 14, hence concluding the claimant was ineligible for benefits through the week ending May 16, 2009.

REASONING AND CONCLUSIONS OF LAW:

If vacation pay was or will be received by the claimant and was properly allocated to a period of unemployment, it must be deducted from the claimant's unemployment insurance benefit eligibility; the vacation pay paid or owed "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." Iowa Code § 96.5-7. If the vacation time would normally cover more than one week and the employer wishes to have the vacation pay distributed evenly throughout the period to which the vacation pay could be allocated, it must make a timely report to the Agency making that designation. 871 IAC 24.16(3).

However, the law specifically states that payment for unused sick leave is not considered wages for unemployment insurance purposes, which means it is not deductible from benefits. 871 IAC 24.13(4) d. The evidence establishes the employer's PTO time is a hybrid or mixture of vacation and sick leave. However, there is no breakdown of the percentage of vacation and sick leave time that has been attributed to the PTO time. Therefore, there is no way to divide the unused "vacation" pay from the unused "sick leave" pay; arguably, it could all have been used as "sick leave."

The closest Agency rule addressing the hybrid "PTO" leave is a rule regarding "excused personal leave." Iowa Administrative Code 871 IAC 24.13(3)(b) provides as follows:

Fully deductible payments from benefits. The following payments are considered as wages; however, such payments are fully deductible from benefits on a dollar-for-dollar basis:

b. Excused personal leave. Excused personal leave, also referred to as casual pay or random pay, is personal leave with pay granted to an employee for absence from the job because of personal reasons. It shall be fully deductible only when taken in conjunction

with a scheduled period of vacation in which case it shall be treated as vacation and be fully deductible in the manner prescribed in rule 24.16(96).

Paid time off (PTO) is at least a close equivalent to “excused personal leave,” essentially paid time that an employee accrues and that can be used for sick leave, vacation leave, or other personal time off. Therefore, under this rule, PTO would only be treated as vacation pay if the time off is taken during the employment. Here also PTO would not be treated as vacation pay if it is paid out in connection with the separation from employment, and therefore would not be deductible from the claimant’s unemployment insurance benefit eligibility. While likely in good faith, the employer erroneously reported the PTO as vacation pay in the employer’s response to the notice of claim.

Based on the evidence in the record and application of the appropriate law, the administrative law judge concludes that the claimant did not receive “vacation pay” that was deductible from her unemployment insurance benefits. Effective April 19, 2009, benefits are allowed without offset for vacation pay, if the claimant is otherwise eligible.

DECISION:

The representative’s March 10, 2010 decision (reference 02) is reversed. The claimant did not receive deductible “vacation pay”; no deduction shall be made for the PTO pay she received. Benefits are allowed, provided the claimant is otherwise eligible, effective April 19, 2009.

Lynette A. F. Donner
Administrative Law Judge

Decision Dated and Mailed

ld/kjw