

IOWA WORKFORCE DEVELOPMENT
Unemployment Insurance Appeals Section
1000 East Grand—Des Moines, Iowa 50319
DECISION OF THE ADMINISTRATIVE LAW JUDGE
68-0157 (7-97) – 3091078 - EI

BETTY S LUTTON
550 – 6TH AVE
CLINTON IA 52732

LODGING ENTERPRISES INC
OAK TREE INN
C/O ADP-UCM TALX
PO BOX 66744
ST LOUIS MO 63166-6744

Appeal Number: 06A-UI-05647-HT
OC: 04/23/06 R: 04
Claimant: Respondent (2)

This Decision Shall Become Final, unless within fifteen (15) days from the date below, you or any interested party appeal to the Employment Appeal Board by submitting either a signed letter or a signed written Notice of Appeal, directly to the **Employment Appeal Board, 4th Floor—Lucas Building, Des Moines, Iowa 50319.**

The appeal period will be extended to the next business day if the last day to appeal falls on a weekend or a legal holiday.

STATE CLEARLY

1. The name, address and social security number of the claimant.
2. A reference to the decision from which the appeal is taken.
3. That an appeal from such decision is being made and such appeal is signed.
4. The grounds upon which such appeal is based.

YOU MAY REPRESENT yourself in this appeal or you may obtain a lawyer or other interested party to do so provided there is no expense to Workforce Development. If you wish to be represented by a lawyer, you may obtain the services of either a private attorney or one whose services are paid for with public funds. It is important that you file your claim as directed, while this appeal is pending, to protect your continuing right to benefits.

(Administrative Law Judge)

(Decision Dated & Mailed)

Section 96.4(3) – Able and Available
Section 96.3(7) – Overpayment

STATEMENT OF THE CASE:

The employer, Lodging Enterprises, filed an appeal from a decision dated May 19, 2006, reference 02. The decision allowed benefits to the claimant, Betty Lutton. After due notice was issued, a hearing was held by telephone conference call on June 19, 2006. The claimant did not provide a telephone number where she could be contacted and did not participate. The employer participated by General Manager Heather Waldorf and was represented by TALX in the person of Gregory Anello.

FINDINGS OF FACT:

Having heard the testimony of the witness and having examined all of the evidence in the record, the administrative law judge finds: Betty Lutton was employed by Oak Tree Inn beginning July 22, 2005. She was hired as a full-time housekeeper working 40 hours per week. At her own request she went to part time status on October 3, 2005. She was not able to work third shift and could not work the full first shift because she had to take her children to school and then pick them up.

The employer agreed to the part-time status which was from 20 to 30 hours per week on the first shift. In April 2006, Ms. Lutton asked to have more hours once her children were out of school. General Manager Heather Waldorf said no full-time hours were available since her full time shift had already been covered.

Betty Lutton has received unemployment benefits since filing a claim with an effective date of April 23, 2006.

The record was closed at 8:18 a.m. At 1:44 p.m. the claimant called and requested to participate. She had received the notice of the hearing but had not read and followed the instructions to provide a telephone number where she could be reached for the hearing.

REASONING AND CONCLUSIONS OF LAW:

The issue is whether the claimant is able and available for work. The judge concludes she is not.

Iowa Code section 96.4-3 provides:

An unemployed individual shall be eligible to receive benefits with respect to any week only if the department finds that:

3. The individual is able to work, is available for work, and is earnestly and actively seeking work. This subsection is waived if the individual is deemed partially unemployed, while employed at the individual's regular job, as defined in section 96.19, subsection 38, paragraph "b", unnumbered paragraph 1, or temporarily unemployed as defined in section 96.19, subsection 38, paragraph "c". The work search requirements of this subsection and the disqualification requirement for failure to apply for, or to accept suitable work of section 96.5, subsection 3 are waived if the individual is not disqualified for benefits under section 96.5, subsection 1, paragraph "h".

871 IAC 24.23(26) provides:

Availability disqualifications. The following are reasons for a claimant being disqualified for being unavailable for work.

(26) Where a claimant is still employed in a part-time job at the same hours and wages as contemplated in the original contract for hire and is not working on a reduced workweek basis different from the contract for hire, such claimant cannot be considered partially unemployed.

Betty Lutton filed for unemployment benefits because the employer was not able to return her to full time status once her children were out of school. The claimant had requested, and granted, a change in status to part time and the employer agreed, but Oak Tree Inn is not obliged to modify the work contract on a seasonal basis to meet the claimant's child care needs. Ms. Lutton is still working part time as agreed upon in October 2006, and is not working on a reduced work-week basis. Under the provisions of the above Administrative Code section she is not able and available for work.

Iowa Code section 96.3-7 provides:

7. Recovery of overpayment of benefits. If an individual receives benefits for which the individual is subsequently determined to be ineligible, even though the individual acts in good faith and is not otherwise at fault, the benefits shall be recovered. The department in its discretion may recover the overpayment of benefits either by having a sum equal to the overpayment deducted from any future benefits payable to the individual or by having the individual pay to the department a sum equal to the overpayment.

If the department determines that an overpayment has been made, the charge for the overpayment against the employer's account shall be removed and the account shall be credited with an amount equal to the overpayment from the unemployment compensation trust fund and this credit shall include both contributory and reimbursable employers, notwithstanding section 96.8, subsection 5.

The claimant has received unemployment benefits to which she is not entitled. These must be recovered in accordance with the provisions of Iowa law.

The next issue is whether the record should be reopened. The judge concludes it should not.

871 IAC 26.14(7) provides:

(7) If a party has not responded to a notice of telephone hearing by providing the appeals section with the names and telephone numbers of its witnesses by the scheduled time of the hearing, the presiding officer may proceed with the hearing.

a. If an absent party responds to the hearing notice while the hearing is in progress, the presiding officer shall pause to admit the party, summarize the hearing to that point, administer the oath, and resume the hearing.

b. If a party responds to the notice of hearing after the record has been closed and any party which has participated is no longer on the telephone line, the presiding officer shall not take the evidence of the late party. Instead, the presiding officer shall inquire as to why the party was late in responding to the notice of hearing. For good cause shown, the presiding officer shall reopen the record and cause further notice of hearing to be issued to all parties of record. The record shall not be reopened if the presiding officer does not find good cause for the party's late response to the notice of hearing.

c. Failure to read or follow the instructions on the notice of hearing shall not constitute good cause for reopening the record.

The first time the claimant called the Appeals Section for the June 19, 2006 hearing was after the hearing had been closed. Although the claimant may have intended to participate in the

hearing, she failed to read or follow the hearing notice instructions and did not contact the Appeals Section as directed prior to the hearing. The rule specifically states that failure to read or follow the instructions on the hearing notice does not constitute good cause to reopen the hearing. The claimant did not establish good cause to reopen the hearing. Therefore, her request to reopen the hearing is denied.

DECISION:

The representative's decision of May 19, 2006, reference 02, is reversed. Betty Lutton is ineligible for unemployment benefits because she is not able and available for work. She is overpaid in the amount of \$507.00.

bgh/kkf