

COMMONWEALTH OF VIRGINIA
VIRGINIA EMPLOYMENT COMMISSION

ABLE & AVAILABLE: 160.1
Effort to Secure Employment or Willingness to Work — Application for Work.



DECISION OF COMMISSION

In the Matter of:

Mark Baron
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Commonwealth of Virginia
Richmond, Virginia

Date of Appeal
to Commission: March 3, 1988
Date of Review: April 19, 1988
Place: RICHMOND, VIRGINIA
Decision No.: 29924-C
Date of Mailing: April 19, 1988
Final Date to File Appeal
with Circuit Court: May 9, 1988

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This is a matter before the Commission on appeal by the claimant from a Decision of Appeals Examiner (UI-8801922), mailed February 22, 1988.

ISSUE

Is the claimant able to work, available for work, and actively seeking and unable to obtain suitable work as provided in Section 60.2-612.7.a of the Code of Virginia (1950), as amended?

FINDINGS OF FACT

On March 5, 1988, the claimant filed a timely appeal from the Appeals Examiner's decision which held that he was ineligible for benefits for the period of January 3, 1988 through January 16, 1988. The basis for the Appeals Examiner's decision was his finding that the claimant was not available for work and actively seeking and unable to obtain suitable work as required by the statute.

The claimant is an attorney who has been duly licensed to practice law in the Commonwealth of Virginia. After his separation from work with the Commonwealth of Virginia, Department of Rights of the Disabled, the claimant elected to set up his own private practice. To accomplish this, he rented office space, had a telephone installed, established a bank account for the business, obtained office equipment and supplies, had business cards printed, and mailed announcements to prospective clients. These announcements were mailed to 70 individuals and organizations. The claimant, by mailing these announcements, was soliciting clients or referrals for his new law practice. During the claim weeks in question, the claimant did not contact any employers in an effort to obtain employment.

OPINION

This case presents a relatively novel issue for the Commission to determine. That issue is whether a self-employed attorney's efforts to build his law practice through contacting prospective clients satisfy the eligibility requirements of Section 60.2-612.7.a of the Code of Virginia. In order to decide the issue, it will be necessary to carefully examine the language of the statute and how it has been interpreted by the Courts in previous decisions.

Section 60.2-612.7.a of the Code of Virginia provides, in pertinent part, that an unemployed individual shall be eligible to receive benefits with respect to any week only if the Commission finds that:

He is able to work, is available for work, and is actively seeking and unable to obtain suitable work. Every claimant who is totally unemployed shall report to the Commission the names of employers contacted each week in his effort to obtain work. . . . This information may be subject to employer verification by the Commission through a program designed for that purpose. (Emphasis added)

The Virginia Supreme Court has had several opportunities to interpret this statute. In the case of Virginia Employment Commission v. Meredith, 206 Va. 206, 142 S.E.2d 579 (1965), the Court stated that:

The phrase "available for work," as used in the statute, requires a claimant to actively and unrestrictively endeavor to obtain suitable employment in the market where he resides. Stated in another way, a claimant must actively seek employment and be willing to accept any suitable work which may be offered him, without attaching conditions not usual and customary in that occupation in which he may desire because of his particular needs or circumstances. (Emphasis added)

In the statute, the term "employer" is used while the Supreme Court in the Meredith case used the term "employment." Within the context of Virginia's unemployment insurance law, these terms are specifically defined by statute. Section 60.2-210.A of the Code of Virginia defines an employer as any employing unit which:

1. In any calendar quarter in either the current or preceding calendar year paid for some service in employment wages of \$1,500 or more or such other amount as provided by federal law pursuant to 26 U.S.C. Section 3306; or
2. For some portion of a day in each of twenty different weeks, whether or not such weeks were consecutive, in either the current or the preceding calendar year, has or had in its employment at least one individual, irrespective of whether the same individual was in employment in each such day.

The term "employment" is defined under Section 60.2-212.A as meaning any service including service in interstate commerce, performed for remuneration or under any contract of hire, written or oral, express or implied. However, Section 60.2-212.C of the Code of Virginia exempts from "employment" any services performed by an individual for remuneration where:

1. Such individual has been and will continue to be free from control or direction over the performance of such services, both under his contract of service and in fact; and

2. Such service is either outside the usual course of the business for which such service is performed, or such service is performed outside of all the places of business of the enterprise for which such service is performed; or such individual, in the performance of such service, is engaged in an independently established trade, occupation, profession or business.

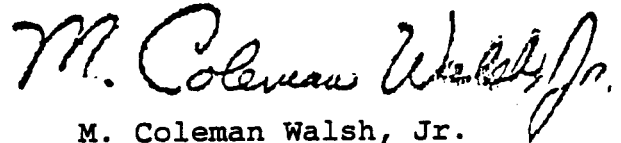
The significance of these terms becomes readily apparent when the claimant's job search efforts are reviewed in light of their statutory definitions. The vast majority of the individuals to whom the claimant mailed announcements are apparently individuals and not "employers" as defined by statute. Accordingly, since the provisions of Section 60.2-612.7.a of the Code of Virginia clearly contemplates job contacts with employers, announcements mailed to these individuals cannot be considered as proving the claimant's availability for work or that he was actively seeking employment. (Underscoring supplied)

Furthermore, given the Supreme Court's analysis in the Meredith case, it is readily apparent that a claimant's search for work must be a bona fide effort to obtain "employment," as that term is defined under the statute. The claimant, by his own admission, was attempting to solicit clients and referrals in order to build his law practice. The services rendered by a self-employed attorney to his clients do not constitute "employment" since the attorney is free from the client's direction and control over the performance of the services. Furthermore, the claimant has established himself in an independently established profession. Not only is he a licensed attorney, but he has established a law office and done all of those things which a self-employed attorney must do in order to establish and build a law practice. Accordingly, the solicitation of clients does not represent an attempt to find or obtain "employment" since the services rendered by an attorney to his clients do not meet the statutory definition of "employment." (Underscoring supplied)

Therefore, in light of this analysis of the statute and the guidance provided by the Virginia Supreme Court in the Meredith case, the claimant's solicitation of prospective clients during the claim weeks in question is insufficient to satisfy the eligibility requirements of Section 60.2-612.7.a of the Code of Virginia. Accordingly, the claimant is not eligible to receive benefits with respect to those claim weeks.

DECISION

The Decision of Appeals Examiner is hereby affirmed. It is held that the clamant is ineligible to receive benefits for the period of January 3, 1988 through January 16, 1988, the claim weeks before the Commission.



M. Coleman Walsh, Jr.
Special Examiner