-DECISION-

Claimant:
DONALD E CANNETI

Employer:

Decision No.: 977-BH-02

Date: April 25, 2002

Appeal No.: 0119389

S.S. No.:

L.O. No.: 60

Appellant: Claimant

Issue: Whether the claimant was able, available and actively seeking work within the meaning of the Maryland Code, Labor and Employment Article, Title 8 Section 903.

- NOTICE OF RIGHT OF APPEAL TO COURT -

You may file an appeal from this decision in the Circuit Court for Baltimore City or one of the Circuit Courts in a county in Maryland. The court rules about how to file the appeal can be found in many public libraries, in the *Maryland Rules of Procedure, Title 7, Chapter 200.*

The period for filing an appeal expires: May 25, 2002

- APPEARANCES -

FOR THE CLAIMANT:
Present
Susan Tannenbaum - Legal Aid Bureau

FOR THE EMPLOYER:

AGENCY
Not Present

EVALUATION OF THE EVIDENCE

The Board of Appeals has considered all of the evidence presented, including the testimony offered at the hearing. The Board has also considered all of the documentary evidence introduced in this case, as well as the Department of Labor, Licensing and Regulation's documents in the appeal file.

The claimant presented substantial, competent and relevant evidence as well as persuasive legal argument before the Board of Appeals that the claimant has been available for full time work, even in the face of his school attendance. The Agency did not appear either before the Hearing Examiner or the Board of Appeals.

FINDINGS OF FACT

The claimant filed for unemployment insurance benefits, with a benefit year beginning August 26, 2001. The claimant has been a full time student at the University of Maryland Baltimore County (UMBC) and has been working and or seeking full time work at the same time.

The claimant has had a varied work history. He is a graduate of the Broadcast Institute of Maryland and his main career is that of an actor. While attending school he has worked as an actor, a substitute teacher, drama teacher and director of after-school care. He has worked as a restaurant manager and in retail sales. He has been emancipated from his parents and has been supporting himself since his senior year in high school. Therefore, he necessarily has had to maintain full time work to support himself at the same time he has been attending school.

Since March 1, 2002, he has been working 38 hours per week at the YUBI Head Start Program as a teacher's assistant. It is understood, anticipated and even expected by this employer that employees will be continuing their college studies while working full time for the employer.

CONCLUSIONS OF LAW

Section 8-903 provides that a claimant must be able to work available to work and actively seeking work in each week for which benefits are claimed.

The claimant argues in this case that, in view of the changing nature of the job market and workforce, including more flexible work hours, telecommuting, four day work weeks and working on Sunday, the strict denial of benefits to full time students needs to be revisited and decisions should be made on a case by case basis. The claimant further argues that in this case, he has shown that there is no material restriction on his availability to work, despite his status as a full time student.

In support of these arguments, the claimant submitted journal and magazine articles that discuss the changing workplace. As one article stated there has been a "dramatic change that has taken place in the workplace since the middle of the century and which continues today at a faster and faster pace."

["Changing the Way We Work" by Sherri Alms, The Synergist, November 2000, Vol. 11 No.11.][1] Two of the three major changes discussed in the article are: telecommuting and nontraditional hours.

The claimant submitted documentation that the number of full time college students who also work full time tripled between 1970 and 1994.

The shift away from traditional work hours and shifts is also having an impact on Human Resource professionals. A recent article in HR Magazine, "Don't Forget Your Shift Workers" by Carla Johnson, was subtitled: "With a 24-hour work force, HR can't be caught napping on the job." [HR Magazine, February 1999.] The first paragraph of this article asserts: "Although the night shift has a less than enviable reputation, almost 17 percent of employees work shifts other than the daytime and another 27 percent work flexible hours, according to the U.S. Bureau of Labor Statistics."

The Board finds these arguments persuasive. The Board takes judicial notice that the State of Maryland has, in the last ten years, instituted and even encouraged flex time and telecommuting for state employees.

Claimant argues that the two seminal cases, cited by the Hearing Examiner, **Idaho Dept. of Employment v. Smith**, 434 U.S. 100, 98 S. Ct. 327 (1977) and **Robinson v. Maryland Employment Security Board**, 202 Md. 515, 97 A.2d 300 (1953) are not necessarily legal impediments to finding in the claimant's favor. After a review of those decisions, the Board agrees.

In **Idaho Dept. of Empl. v. Smith, supra**, the U.S. Supreme Court held that Idaho did not violate the Equal Protection Clause of the 14th Amendment by concluding that attending school during the day was a greater restriction upon obtaining full time work than attending school at night. The Court noted that the distinction served as "a predictable and convenient means for distinguishing between those who are likely to be students primarily and part-time workers only secondarily and thus ineligible for unemployment compensation and those who are primarily full–time workers and students only secondarily." However, the Court did not rule that a state was required to make such a distinction, only that it did not violate the 14th Amendment of the U.S. Constitution.

In **Robinson v. Empl. Sec. Bd., supra**, the issue before the Maryland Court of Appeals was: "...whether the general purpose and intent of the statute...permits a holding that one who will accept work only for substantially fewer hours per day than the customary number of working hours, and then only at the time of the day chosen by her, 'is available for work...' and so entitled to benefits if she cannot secure work." The Court upheld the Board's conclusion that the claimant, who was restricting her availability to work only between the hours of 11:00 am and 3:00 pm was not available within the meaning of the Maryland Unemployment Insurance Law. Ms. Robinson, unlike the claimant in this case, was not available for full time work.

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[1] This is an online publication of the American Industrial Hygiene Association.

It is noted that these two cases are, respectively, 25 and 49 years old. Clearly there have been major social and economic changes in the workplace and workforce since they were written. **Robinson supra**, was issued prior to the influx of women into the workforce as well as the other changes discussed above.

The Board has held that a claimant who, although attending school, continues to look for full time work and would adjust her schedule or give up school upon receiving permanent full-time work is able, available and actively seeking work within the meaning of the Maryland statute. **Drew-Winfield v. Patuxent Medical Group**, 87-BH-87. **See also Mallett**, 1132-BR-92, where the Board held that there is no reason to disqualify a claimant under the availability provisions when his part time classes have been arranged to be flexible enough to accommodate any work schedule.

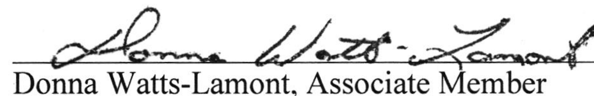
Here, the claimant's school schedule is not as flexible as those in the above cited cases. He argues, however, that the variety, flexibility and ultimate success of his work search, in light of the variety and flexibility of today's marketplace, proves that he is meeting the intention and spirit of the unemployment insurance law. Based on all of the above, the Board agrees.

DECISION

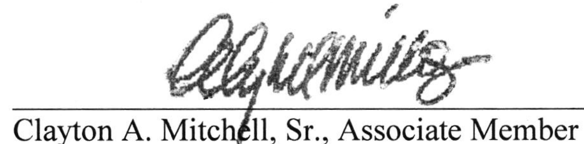
The claimant is able to work, available for work and actively seeking work within the meaning of Maryland Code Annotated, Labor and Employment Article, Title 8, Section 903. Benefits are allowed from the week beginning August 26, 2001.

The decision of the Hearing Examiner is reversed.

Hazel A. Warnick, Chairperson



Donna Watts-Lamont, Associate Member



Clayton A. Mitchell, Sr., Associate Member

Date of hearing: March 12, 2002
Copies mailed to:
DONALD E. CANNETI
SUSAN TANNENBAUM, ESQ.
Michael Taylor, Agency Representative

UNEMPLOYMENT INSURANCE APPEALS DECISION

DONALD E CANNETI

SSN #

Claimant

vs.

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Employer/Agency

Before the:
Maryland Department of Labor, Licensing and Regulation
Division of Appeals
1100 North Eutaw Street
Room 511
Baltimore, MD 21201
(410) 767-2421

Appeal Number: 0119389
Appellant: Claimant
Local Office : 60 / TOWSON CALL CENTER

November 02, 2001

For the Claimant : PRESENT , SUSAN TANNENBAUM

For the Employer :

For the Agency:

ISSUE(S)

Whether the claimant is able, available for work and actively seeking work within the meaning of the MD Code Annotated, Labor and Employment Article, Title 8 Sections 903 and 904; and/or whether the claimant is entitled to sick claim benefits within the meaning of Section 8-907.

FINDINGS OF FACT

Since filing for unemployment insurance benefits, the claimant has been in school. He attends the University of Maryland Baltimore County full time, and is in class on Monday, Wednesday, and Friday from 10:00 a.m. to 11:00 a.m., Tuesdays and Thursdays from 8:00 a.m. to 11:00 a.m. and Tuesdays and Thursdays from 11:00 a.m. to 2:30 p.m. The claimant cannot work any jobs during the morning hours after 9:00 a.m. The claimant is willing to work prior to 9:00 a.m., and after classes, in order to secure full-time employment.

CONCLUSIONS OF LAW

Md. Code Ann., Labor & Emp. Article, Section 8-903 (Supp. 1996) provides that a claimant for unemployment insurance benefits shall be (1) able to work (2) available for work; and (3) actively seeking work. In Robinson v. Maryland Employment Sec. Bd., 202 Md. 515, 97 A.2d 300 (1953), the Court of Appeals held that a claimant may not impose restrictions upon his or her willingness to work and still be available as the statute requires.

Normally, a claimant attending day school does not meet the basic requirement of Md. Code Ann., Labor & Emp. Article, Section 8-903 (Supp. 1996) that a claimant for unemployment insurance benefits must be available for work, without restriction. In the case of Idaho Dept. of Employment v. Smith, 434 U.S. 100, 98 S.Ct. 327 (1977), the U.S. Supreme Court held that "...attending school during daytime hours imposes a greater restriction upon obtaining full-time employment than does attending school at night. In a world of limited resources, a state may legitimately extend unemployment benefits only to those who are willing to maximize their employment potential by not restricting their availability during the day by attending school."

In Robinson v. Maryland Employment Sec. Bd., 202 Md. 515, 97 A.2d 300 (1953), the Court of Appeals held that a claimant for unemployment insurance benefits may not impose restrictions upon availability and still meet the standard of the statute. Attending day school is a material restriction upon one's availability for work and is thus disqualifying.

EVALUATION OF EVIDENCE

In the case at bar, the standard is not whether there are some jobs available when the claimant can work. Instead, the standard is whether school placed a material restriction upon the claimant's availability to work. The Hearing Examiner finds that it clearly does in this matter. The claimant cannot work any jobs during the morning hours after 9:00 a.m. The Hearing Examiner finds that this is a material restriction upon the claimant's availability for work, and he is therefore not eligible for unemployment insurance benefits.

DECISION

IT IS HELD THAT the claimant is not fully able, available and actively seeking work within the meaning of Md. Code Ann., Labor & Emp. Article, Sections 8-903 and 8-907 (Supp. 1996). The claimant is disqualified from receiving benefits for week beginning August 26, 2001, and until the claimant is fully able, available and actively seeking work.

The determination of the Claim Specialist is affirmed.

B Sapp, Esq.
Hearing Examiner

Notice of Right to Request Waiver of Overpayment

The Department of Labor, Licensing and Regulation may seek recovery of any overpayment received by the Claimant. Pursuant to Section 8-809 of the Labor and Employment Article of the Annotated Code of Maryland, and Code of Maryland Regulations 09.32.07.01 through 09.32.07.09, the Claimant has a right to request a waiver of recovery of this overpayment. This request may be made by contacting Overpayment Recoveries Unit at 410-949-0022 or 1-800-827-4839. If this request is made, the Claimant is entitled to a hearing on this issue.

A request for waiver of recovery of overpayment does not act as an appeal of this decision.

Notice of Right to Petition for Review

Any party may request a review either in person, by facsimile or by mail with the Board of Appeals. Under COMAR 09.32.06.01A(1) appeals may not be filed by e-mail. Your appeal must be filed by November 17, 2001. You may file your request for further appeal in person at or by mail to the following address:

Board of Appeals
1100 North Eutaw Street
Room 515
Baltimore, Maryland 21201
Fax 410-767-2787

NOTE: Appeals filed by mail are considered timely on the date of the U.S. Postal Service postmark.

Date of hearing : October 30,2001
RM/Specialist ID: UTW35
Seq No: 001
Copies mailed on November 02, 2001 to:

DONALD E. CANNETI
LOCAL OFFICE #60