

**- DECISION -**

Claimant:  
VIVIAN J MUIR

Decision No.: 5853-BR-12

Date: January 28, 2013

Appeal No.: 1227559

S.S. No.:

Employer:

L.O. No.: 65

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.

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**- 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: February 27, 2013

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**REVIEW OF THE RECORD**

After a review of the record, the Board adopts the hearing examiner's findings of fact. However, the Board concludes that these facts warrant different conclusions of law and a reversal of the hearing examiner's decision.

The General Assembly declared that, in its considered judgment, the public good and the general welfare of the citizens of the State required the enactment of the Unemployment Insurance Law, under the police powers of the State, for the compulsory setting aside of unemployment reserves to be used for the benefit of individuals unemployed through no fault of their own. *Md. Code Ann., Lab. & Empl. Art., § 8-102(c)*. Unemployment compensation laws are to be read liberally in favor of eligibility, and disqualification

provisions are to be strictly construed. *Sinai Hosp. of Baltimore v. Dept. of Empl. & Training*, 309 Md. 28 (1987).

The Board reviews the record *de novo* and may affirm, modify, or reverse the findings of fact or conclusions of law of the hearing examiner on the basis of evidence submitted to the hearing examiner or evidence that the Board may direct to be taken. *Md. Code Ann., Lab. & Empl. Art., § 8-510(d)*. The Board fully inquires into the facts of each particular case. *COMAR 09.32.06.03(E)(1)*.

The claimant has the burden of demonstrating by a preponderance of the evidence that he is able, available and actively seeking work. *Md. Code Ann., Lab. & Empl. Art., § 8-903*. A claimant may not impose conditions and limitations on his willingness to work and still be available as the statute requires. *Robinson v. Md. Empl. Sec. Bd*, 202 Md. 515, 519 (1953). A denial of unemployment insurance benefits is warranted if the evidence supports a finding that the claimant was unavailable for work. *Md. Empl. Sec. Bd. v. Poorbaugh*, 195 Md. 197, 198 (1950); compare *Laurel Racing Ass'n Ltd. P'shp v. Babendreier*, 146 Md. App. 1, 21 (2002).

A claimant should actively seek work in those fields in which he is most likely to obtain employment. *Goldman v. Allen's Auto Supply*, 1123-BR-82; also see and compare *Laurel Racing Ass'n Ltd. P'shp v. Babendreier*, 146 Md. App. 1 (2002).

The term "available for work" as used in § 8-903 means, among other things, a general willingness to work demonstrated by an active and reasonable search to obtain work. *Plaugher v. Preston Trucking*, 279-BH-84. A claimant need not make herself available to a specific employer, particularly when the employer cannot guarantee her work, in order to be available as the statute requires. *Laurel Racing Ass'n Ltd. P'shp v. Babendreier*, 146 Md. App. 1, 22 (2002).

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.

In her appeal, the claimant restates much of her testimony from the hearing. She contends her, "...intent has been and will continue to be a full time worker." She further contends that the hearing examiner's decision, "...contradicts the letter that I received from the DLLR encouraging unemployed workers to take advantage of additional education and training." She also contends she is not, "...currently operating as a student who is looking work rather than a full time worker who also attends school" as stated in the hearing examiner's decision.

The Board has conducted a thorough review of the evidence of record from the Lower Appeals Division hearing. That evidence is more in line with the claimant's contentions than with the hearing examiner's ultimate decision. The evidence showed that the claimant was in school 2.5 hours per week. While she certainly spends additional time studying and preparing for her classes, those activities can be conducted at any time. The claimant has demonstrated availability for work the vast majority of the work-week. And, simply because the claimant is taking classes during the day is not an exclusion to full-time work during any other hours. The claimant may need to broaden her work search to include more work in different shifts, but she has been actively seeking employment in which there would be flexibility in

scheduling. A worker does not have to be available to accept all work at all hours of every day to be considered available for work. The Board finds the claimant was able to work, was available for work, and was actively seeking work at all times material to this matter.

The Board notes that the hearing examiner did not offer or admit the *Agency Fact Finding Report* into evidence. The Board did not consider this document when rendering its decision.

The Board finds based upon a preponderance of the credible evidence that the claimant has her burden of demonstrating that she was able, available, and actively seeking work, from July 15, 2012, within the meaning of *Robinson v. Md. Empl. Sec. Bd.*, 202 Md. 515 (1953) and §8-903. The decision shall be reversed for the reasons herein stated.

### 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 July 15, 2012.

The Hearing Examiner's decision is reversed.



Donna Watts-Lamont, Chairperson



Clayton A. Mitchell, Sr., Associate Member

VD

Copies mailed to:

VIVIAN J. MUIR

SUSAN BASS DLLR

Susan Bass, Office of the Assistant Secretary

**UNEMPLOYMENT INSURANCE APPEALS DECISION**

VIVIAN J MUIR

SSN #

vs.

**Claimant**

**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: 1227559

Appellant: Claimant

Local Office : 65 / SALISBURY

CLAIM CENTER

September 06, 2012

**For the Claimant: PRESENT**

**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**

The Claimant filed for unemployment benefits during the week beginning July 15, 2012 with a weekly benefit amount of \$430.00. Since filing for benefits the claimant has made at least two job contacts each week and is actively seeking work in a variety of fields. The claimant, Vivian Muir, was denied benefits from the time she opened her claim because she disclosed future school attendance and told the claim's specialist that she is looking for part time work. Beginning August 27, 2012 the claimant attends classes from 1:00 PM to 2:15 PM on Monday and Wednesdays at Salisbury State University and cannot work full time on those days.

The claimant misunderstood the question from the claim's specialist about her work preferences. She has been looking for full time work but knew she was going to be starting classes in late August so she

indicated that she was only seeking part time work. However, that is not technically true: the claimant was fully able and available for work from the time she opened her claim and is hoping to find a position that will allow a schedule accommodation for her class attendance. However, after the start of her classes the claimant is unwilling to drop her class in nursing and the class is not offered at any other time.

### CONCLUSIONS OF LAW

Md. Code Ann., Labor of Emp. Article, Section 8-903 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 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.

A claimant attending an educational institution does not normally meet the requirements of Md. Code Ann., Labor & Emp. Article, Section 8-903 which provides that a claimant for unemployment insurance benefits must be able, available and actively seeking work. School attendance normally operates as a substantial restriction upon availability for work.

However, a claimant for unemployment insurance benefits who is a student will not be disqualified from the receipt of benefits pursuant to Section 8-903 if he or she can demonstrate that he or she is genuinely attached to the work force, despite attendance at school. Student status is not disqualifying per se, but the claimant must demonstrate that he or she is primarily a worker who also goes to school, rather than a student who works. Drew-Winfield v. Patuxent Medical Group, 87-BH-87.

### EVALUATION OF EVIDENCE

Md. Code Ann., Labor of Emp. Article, Section 8-903 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.

The claimant had the burden to show, by a preponderance of the credible evidence, that he is able, available and actively seeking work within the meaning of the Maryland Unemployment Insurance Law. In the case at bar, that burden has been met.

A claimant attending an educational institution does not normally meet the requirements of Md. Code Ann., Labor & Emp. Article, Section 8-903 which provides that a claimant for unemployment insurance benefits must be able, available and actively seeking work. School attendance normally operates as a substantial restriction upon availability for work.

However, a claimant for unemployment insurance benefits who is a student will not be disqualified from the receipt of benefits pursuant to Section 8-903 if he or she can demonstrate that he or she is genuinely attached to the work force, despite attendance at school. Student status is not disqualifying per se, but the claimant must demonstrate that he or she is primarily a worker who also goes to school, rather than a student who works. Drew-Winfield v. Patuxent Medical Group, 87-BH-87.

A claimant who, although attending school, continues to look for full-time work and would adjust her school schedule or give up school upon receiving permanent full-time work is able, available and actively seeking work. Drew-Winfield v. Patuxent Medical Group, 87-BH-87.

In the present case the claimant credibly testified that she was fully able and available for work from the time she opened her claim through the week ending August 25, 2012. After that date the claimant has a material restriction on her availability for full time work due to class attendance that she is unwilling to modify. Although she is genuinely attached to the work force, she is currently operating as a student who is looking for work rather than a full time worker who also attends school. That situation may change in the future but her current attendance in a class that is in the middle of two work days must be considered as a restriction on her availability for work.

## 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, Section 8-903. Benefits are granted from the week beginning July 15, 2012 through the week ending August 25, 2012. The claimant may contact Claimant Information Service concerning the other eligibility requirements of the law at [ui@dllr.state.md.us](mailto:ui@dllr.state.md.us) or call 410-949-0022 from the Baltimore region, or 1-800-827-4839 from outside the Baltimore area. Deaf claimants with TTY may contact Client Information Service at (410) 767-2727, or outside the Baltimore area at 1-800-827-4400.

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, Section 8-903. Benefits are denied for the week beginning August 26, 2012 and until the claimant is fully able, available and actively seeking work without material restriction.

The Determination of the Claims Examiner is modified.



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P G Randazzo, 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 410-767-2404. 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.**

**Esto es un documento legal importante que decide si usted recibirá los beneficios del seguro del desempleo. Si usted disiente de lo que fue decidido, usted tiene un tiempo limitado a apelar esta decisión. Si usted no entiende cómo apelar, usted puede contactar (301) 313-8000 para una explicación.**

### **Notice of Right of Further Appeal**

Any party may request a further appeal 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 September 21, 2012. 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  
Phone 410-767-2781

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

Date of hearing: August 30, 2012

DW/Specialist ID: USB26

Seq No: 002

Copies mailed on September 06, 2012 to:

VIVIAN J. MUIR

LOCAL OFFICE #65

SUSAN BASS DLLR