ELIGIBILITY - ABLE & AVAILABLE

Section 28(1)(c)

Section 28(1)(c)

AVAILABILITY, Employed, Self employment, Attachment to labor market

CITE AS: Bolles v Employment Security Commission, 361 Mich 378 (1960)

Appeal pending: No

Claimant: Lewis F. Bolles
Employer: Continental Motors Corporation
Docket No: B56 362 18231

SUPREME COURT HOLDING: ... the test properly to be employed is that of genuine attachment to the labor market.

FACTS: Claimants were laid off by the employer. Each had been trained in watch repair work and each had at one time or another engaged in this occupation. Consequently, they pooled their resources, rented a building, remodeled and redecorated, and opened it for business under the name of Muskegon Jewelers. They advertised and they did what work they could get. It wasn't much. Each averaged about a dollar a day over the period in question.

During the period of seven weeks' operation from October 30 through December 17, the period here involved, the claimants reported a total gain each of around $60.00 although some doubt is cast upon the accuracy of such figures as "gain" since additional expenses of almost the same amount had not been included in the computation. During this same period both claimants were actively seeking work in industry; both applied, unsuccessfully, for jobs referred to them by the Employment Security Commission, and both drew their unemployment compensation.

DECISION: Claimants were unemployed within the meaning of Section 48 of the Act.

RATIONALE: ... all courts would undoubtedly agree that the Act was not intended to place a premium on idleness, to stifle initiative, or to penalize a laid-off worker's attempt to make his time economically productive. The claimants before us, subsequent to their lay-off, continued seeking work. Each of them accepted referrals to other industrial employment. Each was ready, willing, able, and anxious to continue work in industry. They were genuinely attached to the labor market, neither casually nor as a matter of transition. There meager efforts to augment their unemployment checks did not break their genuine attachment to the labor market.

Section 28(1)(c)

AVAILABILITY: Burden of proof, Eligibility, Failure to attend Referee hearing

CITE AS: Dow Chemical Company v Quinn, No. 82-001391-AE-G, Midland Circuit Court (June 10, 1985).

Appeal pending: No

Claimant: Wilbur F. Quinn
Employer: Dow Chemical Company
Docket No: B74 5033(4) 65240

CIRCUIT COURT HOLDING: An unemployment claim does not prove itself. Claimant has the burden to prove eligibility for unemployment compensation.

FACTS: Claimant successfully established the termination of his labor dispute disqualification. However, claimant did not appear at the Referee hearing with regard to his eligibility. The determination and redetermination were in favor of the claimant. The Board of Review remanded for testimony, but once again the claimant failed to appear. The employer argued that the burden of proof is in claimant to affirmatively provide beyond the application itself that he is eligible.

DECISION: Claimant, having failed to meet his burden, should be denied benefits.

RATIONALE: Citing Ashford v Unemployment Compensation Commission, 328 Mich 428 (1950), the court placed the responsibility on claimant to move forward in support of his claim for unemployment benefits. Claimant cannot rely on the determination or redetermination where the Commission had found him entitled to benefits.

Section 28(1)(c)

AVAILABILITY, Afternoon shift, Child care, Customary hours, Personal reason, Shift limitation, Twenty-four-hour availability

CITE AS: Ford Motor Co. v UCC, 316 Mich 468 (1947)

Appeal pending: No

Claimant: Drusilla Koski
Employer: Ford Motor Co.
Docket No: B4 3872 1751

SUPREME COURT HOLDING: "There is nothing in the statute to justify the conclusion that the legislature intended a claimant might limit his employment to certain hours of the day where the work he is qualified to perform is not likewise limited."

FACTS: A bench hand on the afternoon shift was laid off for lack of work. She limited her availability to her customary shift, because she wished to be home when her two children prepared for school each day.

DECISION: The claimant is ineligible for benefits.

RATIONALE: "It will be noted that [S.] 28(c) of the statute, quoted above in part, contemplates availability for work of the character that a claimant is qualified to perform and further requires availability for full-time work. The central thought in the subdivision has reference to the character of the labor for which a claimant is available. There is nothing in the statute to justify the conclusion that the legislature intended a claimant might limit his employment to certain hours of the day where the work he is qualified to perform is not likewise limited. It may be assumed that, in a so-called 'around-the-clock' operation, the work on different shifts does not vary in character. When claimant stated she would not accept work except on the afternoon shift, she clearly made herself unavailable for work of the character that she was qualified to perform."

Section 28(1)(c)

AVAILABILITY, Burden of proof, Eligibility, Mental attitude, Seeking work

CITE AS: Dwyer v UCC, 321 Mich 178 (1948)

Appeal pending: No

Claimant: John Dwyer
Employer: Packard Motor Car Co.
Docket No: B6 18326 5058

SUPREME COURT HOLDING: (1) The claimant has the burden of proof as to eligibility. (2) A person who is genuinely attached to the labor market will make a reasonable attempt to find work.

FACTS: The claimant sought work only 3 or 4 times during 19 months of unemployment. He did not seek police work, which he had performed for 25 years.

DECISION: The claimant is ineligible for benefits.

RATIONALE: "(T)o prevail, the claimant must have sufficient proofs offered in his behalf to establish that he meets the conditions of eligibility. To this extent he has the burden of proof."

"Whether or not a claimant is in fact available for work depends to a great extent upon his mental attitude, i.e., whether he wants to go to work or is content to remain idle. Indicative of such mental attitude is evidence as to efforts which the person has made in his own behalf to obtain work. A person who is genuinely attached to the labor market and desires employment will make a reasonable attempt to find work and will not wait for a job to seek him out."

Section 28(1)(c)

AVAILABILITY, Religious conviction, Seventh Day Adventists

CITE AS: Swenson v MESC, 340 Mich 430 (1954)

Appeal pending: No

Claimant: Bessie Swenson
Employer: Battle Creek Food Company
Docket No: B1 1131 13361

SUPREME COURT HOLDING: Claimants are not unavailable for benefits because they cannot work from sundown Friday to sundown Saturday.

FACTS: Claimants, packers for Battle Creek Food Company, were laid off due to lack of work. The Commission denied benefits to Claimants, Seventh Day Adventists, on the basis that they were unavailable for work, since their religion forbid them from working from sundown Friday to sundown Saturday. Claimants had not been offered any employment, and therefore had never refused any.

DECISION: Claimants are eligible for benefits under the availability provision of the MES Act.

RATIONALE: The Supreme Court adopted the reasoning of the trial judge, stating that:

"To exclude such persons would be arbitrary discrimination when there is no sound foundation, in fact, for the distinction, and the purposes of and theory of the act are not thereby served. Seventh Day Adventists, as a matter of fact, do not remove themselves from the labor market by stopping work on sundown Friday and not resuming work until sundown Saturday, as is apparent from the reason that employers do hire them."

Section 28(1)(c)

AVAILABILITY, Non-union work, Supervisory position, Waiver of seeking work, Work history

CITE AS: Hinga v Brown Co., No. 78 3585 (Mich App, January 25, 1980)

Appeal pending: No

Claimant: Edward G. Hinga
Employer: Brown Co.
Docket No: B76 2157 50644

COURT OF APPEALS HOLDING: Where an individual seeks supervisory and non-union work, but is willing to accept non-supervisory and union work, such preferences do not make the claimant unavailable for work.

FACTS: The claimant had previously worked as an unskilled laborer and as a shipping supervisor. He concentrated his work search on supervisory and non-union positions. The claimant contacted four employers in seven months. A waiver of seeking work was in effect.

DECISION: The claimant was available for work.

RATIONALE: "We hold, after reviewing the record as a whole, that the referee's conclusion that plaintiff removed himself from the labor market is not supported by competent, material, and substantial evidence. The undisputed evidence showed that while plain tiff preferred supervisory work, he would take other work and while he preferred non-union work, he would accept union work. The referee erred when he held that this removed plaintiff from the labor market."

"[T]he commission waived the seeking work requirement as to all claimants in Kalamazoo County from 5/25/75 to 7/17/76. Thus, plaintiff was entitled to rely on the representation that he need not seek work in order to be eligible for benefits."

Section 28(1)(c)

AVAILABILITY, Annual salary, Remuneration, Co-owner of golf course, Officer of corporation, Permanent work, Seasonal work, Unemployed, Unpaid service

CITE AS: Mikolaicziak v ESC, 40 Mich App 61 (1972)

Appeal pending: No

Claimant: Leo J. Mikolaicziak, et al
Employer: Twin Oaks Golf Club, Inc.
Docket No: B69 573 37067

COURT OF APPEALS HOLDING: (1) Unpaid service as a corporate officer is not employment. (2) A claimant need not be available for permanent work. (3) Weekly compensation for seasonal work is not an annual salary.

FACTS: Three claimants served as unpaid corporate officers of a golf course. Each owned one-third of the shares of the corporation. All performed manual labor and managerial duties, on a rotating basis, during the ten months of annual operation and maintenance. They were paid weekly for their work during the operating season. The claimants received no compensation in the two remaining months, but were available for temporary work then.

DECISION: The claimants are unemployed and available for work.

RATIONALE: "Since the claimants received absolutely no remuneration or compensation for serving as the corporate officers of the Twin Oaks Golf Club, they were not 'employed' in such capacities within the meaning of Section 42(1) of the Michigan Employment Security Act. See Great Lakes Steel Corporation v Employment Security Commission, 381 Mich 249 (1968)."

"(R)emuneration was paid to them on a 'weekly' basis during the months that the golf course was open to the public." The Act ". . . does not require an unemployed person to be available for and seek 'permanent' full-time work, but rather full-time work."

Section 28(1)(c)

AVAILABILITY, Reasonable restriction, Seeking work, Smoke and dust, Voluntary retirement, Work history

CITE AS: Chrysler Corp. v Sellers, 105 Mich App 715 (1981)

Appeal pending: No

Claimant: Woodrow W. Sellers
Docket No: B76 9783 RM 58420
Employer: Chrysler Corp.

COURT OF APPEALS HOLDING: Where a retired auto worker excludes auto plants from his or her active work search, to avoid further exposure to smoke and dust, but seeks other work which the individual has performed, the claimant is available for work and seeking work.

FACTS: "Prior to working at Chrysler, claimant had acquired work experience as a service station attendant and janitor. After retiring, claimant sought work at service stations, hospitals and small shops or factories, but he did not seek employment in an auto factory because of his previous exposure to smoke and dust at such jobs." He testified to having sought work three or four times each week.

DECISION: "This case is remanded to the Commission for a hearing at which the claimant's eligibility for benefits, in relation to his pension, will be determined under MCL 421.27(f); MSA 17.529(f)."

RATIONALE: The Court cited McKentry v ESC, 99 Mich App 277 (1980). "According to McKentry, claimant's failure to actively seek a job like his last one does not constitute a material restriction of his availability under the Act. Just as the claimant in McKentry did not actively seek employment as a teacher's aide because it aggravated her physical condition, claimant in the instant case did not actively seek work in a large auto factory because he wished to avoid further exposure to smoke. Viewing the evidence as a whole, we do not find the claimant's failure to apply for auto plant work so significantly impaired his availability for work as to permit reversal." "Viewing the evidence in its entirety, we find that the Board of Review's conclusion regarding the claimant's efforts to secure employment was based upon competent, material and substantial evidence."

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Section 28(1)(c)

AVAILABILITY, Civil Service exams, Placement agencies, Placement counselor, Seeking Work

CITE AS: Walls v Career Consultants, No. D 774 00 476 AV, Kalamazoo Circuit Court (April 6, 1978)

Appeal pending: No

Claimant: Sharon Walls
Employer: Career Consultants
Docket No: B76 613 RO 53037

CIRCUIT COURT HOLDING: A seeking work waiver does not excuse a claimant from being available under 28(1)(c).

FACTS: Claimant worked for the employer on commission as a placement counselor, finding work for others. After she became pregnant, she started missing work. She quit her employment although she was still physically able to work. Claimant took several Civil Service exams and had registered at a number of places -- among them, some temporary agencies like Manpower, and at least one placement agency.

DECISION: Claimant is ineligible for benefits.

RATIONALE: "This Court is unable to see the distinction appellant claims between (a) seeking work and (c) available for work. Certainly they are two separate requirements under the statute and if there was a waiver in effect, as the appellant claims, she probably did not have to seek work under 28(1)(a) but the waiver would not excuse her being available under 28(1)(c). Since her mental attitude was in issue, this court feels the referee properly considered her seeking work to determine her credibility in saying she was available for work. We cannot look into her mind to see her mental attitude, but her conduct throws some light on her mental attitude."

Section 28(1)(c)

AVAILABILITY, Ability to work, Seeking work, Sitting, Voluntary retirement

CITE AS: Heikkinen (Ore-Ida Foods, Inc.), 1980 BR 58612 (B77 18316).

Appeal pending: No

Claimant: Mabel B. Heikkinen
Employer: Ore-Ida Foods, Inc.
Docket No: B77 18316 58612

BOARD OF REVIEW HOLDING: (1) Where a redetermination refers only to Section 28(1)(c) of the Act, the Referee may not rule on Section 28(1)(a). (2) Voluntary retirement is not inconsistent with subsequent attachment to the labor market.

FACTS: The Commission found a voluntary retiree ineligible under Section 28(1)(c) of the Act. The claimant testified she would give up her Social Security benefits, and would travel 30-35 miles, for full time work.

"Further, the claimant's testimony indicates that she was not able to perform the job to which she was last assigned (T, p. 5), however, she is able to do work where she could sit down part of the time (T, p. 10)."

DECISION: The claimant is able and available for work. The finding on seeking work is vacated.

RATIONALE: "[I]t is noted that the referee states (page 2 of his decision) that '(I)t is generally conceded that voluntary retirement ... discloses a mental attitude inconsistent with ... attachment to the labor market.' This statement appears to be unsupported by the Act or by authority. McKinney (Chrysler Corp.), 1977 AB 53130 (B76-15034)."

Section 28(1)(c)

AVAILABILITY, College student, Competent proof, Eligibility

CITE AS: Duell (St. Joseph Hospital), 1978 BR 54926 (B76 14767 RO).

Appeal pending: No

Claimant: Keith P. Duell
Employer: St. Joseph Hospital
Docket No: B76 14767 RO 54926

BOARD OF REVIEW HOLDING: A full-time college student's credible testimony of willingness to change courses or quit school, to accept full-time employment, is competent proof of the claimant's eligibility.

FACTS: The claimant resigned his position at a Grand Rapids hospital because he was living, and attending full-time college courses in East Lansing. He testified he would change his class schedule or drop out of school in order to accept permanent full-time work.

DECISION: The claimant is eligible for benefits.

RATIONALE: "The referee, in his reasons for decision, indicated that he tended to believe the claimant's testimony with respect to dropping his classes if he had been offered full-time work. However, the referee stated that it must be established by competent proof that the individual has actually dropped out of school in order to obtain full-time work in the past. The referee indicated that the case In the Matter of the Claim of Robert B. Burandt, Appeal Docket No. B72-9541-RO-44541, stands for this proposition for the reason that otherwise the testimony of the individual that he would drop out of school in order to obtain full-time work is self-serving testimony, and not competent proof to establish the fact without some evidence that this has occurred in the past."

"The majority of the Board of Review believes that the case entitled Michael S. Breshgold v Michigan Employment Security Commission, Civil Action No. 77-708893-AE (Circuit Court for the County of Wayne, 1978), is controlling. The holding in the Breshgold case states that because a claimant is a full-time student does not categorically mean that the student has necessarily placed limitations on his availability so as to remove him from the labor market. Under that case, the testimony of the claimant, to the effect that he would adjust his hours or quit school to accept full-time employment, would be sufficient, if credible."

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Section 28(1)(c)

AVAILABILITY, First Amendment, Religious conviction, United States Constitution, Wednesday night observance, Worship services

CITE AS: Winstead v ESC, No. 79 17067 AE, Washtenaw Circuit Court (February 19, 1980)

Appeal pending: No

Claimant: Mary Winstead
Employer: Michigan Employment Security Commission
Docket No: B76 18265 57846 et al

CIRCUIT COURT HOLDING: Insistence on time off to attend Wednesday night church services does not make a claimant unavailable for work.

FACTS: "In each of these decisions, the Board of Review affirmed decisions of referees which had held, in effect, that Ms. Winstead had not been 'available to perform suitable full-time work' within the meaning of the statute by reason of her insistence on attending Wednesday night worship services held by her church."

DECISION: The claimant is available for work.

RATIONALE: "The MESC decisions below do not square with Sherbert v Vernor, 374 U.S. 398, 83 S. Ct. 1790, 10 L. ed. 2d 965 (1963), and therefore are violative of the First Amendment to the United States Constitution. The decisions are also contrary to Swenson v MESC, 340 Mich 430, 65 NW2d 709 (1954), where the Michigan Supreme Court held that Seventh Day Adventists who could not work from sundown Friday to sundown Saturday were 'available for work' within the meaning of the statute. The decisions are thus contrary to the law of this state as well as the Constitution of the United States."

Section 28(1)(c)

AVAILABILITY, Customary occupation, Geographical area, Long distance move, Relocation while unemployed, Voluntary retirement

CITE AS: Toney (General Motors Corp.), 1979 BR 60610 (B77 19640).

Appeal pending: No

Claimant: Albert Toney
Employer: General Motors Corp.
Docket No: B77 19640 60610

BOARD OF REVIEW HOLDING: Where an individual's principal occupation has been machine operator, and the claimant voluntarily retires and moves to an area in which such work is unavailable, the claimant is not available for work.

FACTS: "The claimant voluntarily retired from his employment as a machine operator with the involved employer on June 30, 1977." He moved to Titusville, in Brevard County, Florida. "Claimant also testified that the area in Florida to which he relocated did not have any machine shops which offered the type of employment in which claimant had former work experience (T. of March 29, 1978 hearing p. 8)."

DECISION: The claimant does not meet the availability requirements of Section 28(1)(c) of the Act.

RATIONALE: "Claimant retired and moved to Florida. In doing so, he took himself out of a labor market which had substantial employment opportunities for persons in claimant's job classification (machinist). He moved from an area of high job concentration in his employment classification to an area of low industrialization and few, if any, opportunities for a machinist. From the record, it is obvious that claimant was not genuinely attached to the labor market and not genuinely desirous of finding work which by previous experience he was qualified to perform."

Section 28(1)(c)

AVAILABILITY, Customary hours, Daytime work, Full-time work, Secretary, Teacher, Weekday work

CITE AS: Meader v Spence, Smith and Forsythe, No. 74-02745-AE-3, Saginaw Circuit Court (November 2, 1978)

Appeal pending: No

Claimant: Carol A. Meader
Employer: Spence, Smith and Forsythe
Docket No: B73 9562 45322

CIRCUIT COURT HOLDING: Where a claimant's occupations are teacher and secretary, the claimant is not required to be available for work at night or on Saturday and Sunday.

FACTS: The claimant held a teaching certificate and had worked as a secretary. She actively sought full-time teaching and secretarial work, but limited her availability to daytime hours for personal reasons. She also ruled out Saturdays and Sundays, "Because jobs in my class are not encountered those days, either teaching or secretarial work, unless it happened to be, you know, some special circumstance."

DECISION: The claimant was available for full-time work.

RATIONALE: "Clearly, the courts today appear to be departing from the traditional belief that 'availability' must be of 24 hour duration. This trend is evidenced by the recent case of UAW v Governor, 50 Mich App 116 (1973), on remand from the Supreme Court of Michigan, 388 Mich 578. In that case, the Court of Appeals was called upon to define the 'fulltime' requirement of members of the Appeal Board of the Michigan Employment Security Commission."

"The decision in UAW v Governor ". . . requires appeal board members to perform their duties during ordinary office hours 'which constitutes an 8 hour day, Monday through Friday, falling within the period of 7:30 a.m. to 6:30 p.m.'" The Court concluded that the claimant cannot be held to a standard of availability for full-time work which is more stringent than the one covering Appeal Board members.

Section 28(1)(c)

AVAILABILITY, Attachment to labor market, Restrictions on availability, Voluntary retirement

CITE AS: Chrysler Corp. v Brown, No. 79 907 580, Wayne Circuit Court (September 26, 1979)

Appeal pending: No

Claimant: Virgil Brown
Employer: Chrysler Corporation
Docket No: B77 9002 56154

CIRCUIT COURT HOLDING: Where a claimant whose customary work has been in heavy manufacturing voluntarily retires and limits availability to light janitorial work, the claimant is not attached to the labor market.

FACTS: The claimant voluntarily retired after working 30 years doing "heavy work" in an auto plant. Claimant began seeking light work in a janitorial capacity. He had experience as a janitor prior to employment with Chrysler Corporation.

DECISION: The claimant does not meet the availability requirements of Section 28(1)(c) of the Act.

RATIONALE: "In the present case, Brown unduly restricted his availability to the single job preference of janitorial work. This constituted availability for about 17% of the jobs he was qualified to perform by past experience or training. This does not constitute genuine attachment to the labor market."

"The fact that Brown had unilaterally determined that he no longer preferred to perform heavy work did not make heavy work legally unsuitable."

"In summary, there is nothing in the statute nor in case law that permits a claimant to define the labor market for his skills based solely on his subjective preference for a particular job as opposed to his objective qualifications for a labor market."

Section 28(1)(c)

AVAILABILITY, Fine imposed by union, Hiring hall, Plumber, Seeking work, Travel, Union work

CITE AS: Doe (Robert Carter Corp.), 1980 BR 61033 (B78 02345).

Appeal pending: No

Claimant: Arvin N. Doe
Employer: Robert Carter Corp.
Docket No: B78 02345 61033

BOARD OF REVIEW HOLDING: (1) A plumber's use of union hiring halls satisfies the availability and seeking work provisions of the Act. (2) Travel to a Florida home on a Sunday and Monday, and return travel to a Michigan home on a Friday and Saturday, does not affect the eligibility of a union plumber who contacts hiring halls in both states.

FACTS: Under penalty of a $500.00 union fine, a plumber limited himself to union work, obtained through union hiring halls. He traveled to his Florida home on a Sunday and Monday, contacted three union locals, and later returned to his Michigan home on a Friday and Saturday.

DECISION: The claimant is eligible for benefits.

RATIONALE: "[I]n Lange v Knight Newspapers, Inc., No. 63387 (Wayne Circuit Court, 1967), the court affirmed a unanimous appeal board decision that a claimant had satisfied the eligibility requirements of the MES Act by awaiting a telephone call from his local union for a work assignment where this was the customary way he had obtained employment in the past."

"Obviously, while Mr. Doe was driving between his two homes he was not instantaneously available for and seeking work. But this is not the end of the analysis. If it were, serious eligibility questions would be posed by sleep, dining out, or going to the movies."

Section 28(1)(c)

AVAILABILITY, Ability to work, Lack of counsel, Late appeal, Medical restriction, Request for reopening, Self employment, Sitting, Work history

CITE AS: Bateman v Jackson Industrial Manufacturing Co., No. 80 29462 AE, Kent Circuit Court (May 5, 1980).

Appeal pending: No

Claimant: Robert L. Bateman
Employer: Jackson Industrial Manufacturing Co.
Docket No: B77 10805 RO2 62489

CIRCUIT COURT HOLDING: (1) Where a medical restriction limits an individual to seated work, which the claimant has never performed for wages, the claimant is not able and available for work. (2) Lack of counsel is not good cause for reopening. (3) A late appeal to the Board may be treated as a request for reopening.

FACTS: An equipment painter became medically restricted to seated work, which he had never performed for wages. He appeared before the referee without an attorney. His late appeal to the Board was treated as a request for reopening.

DECISION: The claimant is ineligible for benefits.

RATIONALE: "The Board of Review was within its authority in rejecting the so-called Delayed Appeal for lack of jurisdiction because of untimely filing and did properly refer it back to the Referee for a rehearing."

"The claimant was fully advised of his rights to counsel.."

"[A]fter May 18, 1977 claimant was released and permitted by his doctor to perform 'seated work only.' Claimant did not meet the test of able and available for work requirements. The claimant's testimony at the hearing indicated that all his work experience training and background has been in heavy work active jobs and not seated work."

Section 28(1)(c)

AVAILABILITY, Definition of labor market, Geographical area, Responsibility for transportation, Walking distance

CITE AS: Ditmore v Terry's Lounge, No. 78-838-555-AE, Wayne Circuit Court (April 20, 1979)

Appeal pending: No

Claimant: Grace Ditmore
Employer: Terry's Lounge
Docket No: B77 6663 55827

CIRCUIT COURT HOLDING: Where a claimant with limited work experience last worked five miles from home, but limits his or her availability to jobs within walking distance, even after 18 consecutive weeks of unemployment, the claimant is not available for work.

FACTS: Claimant was laid off from a job as a pizza cook five miles from her home. Her eligibility was questioned when 18 weeks later, she was referred to but declined a cook's position located seven or eight miles from home. Allegedly because of transportation uncertainties claimant restricted her availability to restaurants within walking distance.

DECISION: The claimant does not meet the availability requirements of Section 28(1)(c) of the Act.

RATIONALE: Transportation is the responsibility of the claimant. "[C]ases cited by the appellee support the position of this Court, namely, In Re Barcomb, 315 A2d 476 (1974), and the conclusions of these jurisdictions appear clear that availability' and hence the applicable 'labor market' in which an applicant must be 'available' is a function of the individual applicant. An individual must offer his services in a market, and that market must be a sufficient geographical area to provide or encompass employers who use the type of services offered by this applicant."

"In brief, for the claimant to restrict her availability for work as a pizza cook to a walking distance from her home was certainly unreasonable. By this restriction, she did not genuinely expose herself to jobs in her labor market. It must be emphasized that the record made before Referee Berk would indicate that the claimant did have transportation, that is the same transportation she possessed when she worked at Terry's."

Section 28(1)(c)

AVAILABILITY, Attachment to labor market, Self-employment

CITE AS: High Scope Educational Research Foundation v Easton, No. 78 15844 AE, Washtenaw Circuit Court (September 25, 1979)

Appeal pending: No

Claimant: Nick J. Easton
Employer: High Scope Educational Research Foundation
Docket No: B77 8 55981

CIRCUIT COURT HOLDING: Where an unemployed person becomes the proprietor of an antique shop, but remains able and available and continues to seek work, the claimant is still attached to the labor market.

FACTS: The claimant was laid off from full-time employment in June, 1976. While still unemployed, he invested $3,500 and opened an antique shop. The claimant continued to look for employment at numerous places, made arrangements to have someone fill in for him if necessary, and was willing to give up the shop if he found suitable employment.

DECISION: The claimant was genuinely attached to the labor market.

RATIONALE: The Court followed the reasoning adopted by the Michigan Supreme Court in Bolles v ESC, 361 Mich 378; 105 NW2d 192 (1960), and concluded: "In the instant case, Mr. Easton was not 'content to remain idle,' and so opened the antique store. During the period in question, he lost money in all but one week. High Scope attempts to distinguish Bolles on the ground that Mr. Easton had a 'large' inventory (approximately $3,500.00) tied up in the store, and so could not ignore his store obligations, making him effectively unavailable for full-time employment. This court does not agree. The claimants in Bolles also had a substantial investment in their jewelry store. No figure is mentioned, but they did pay for the remodeling and redecoration of the building which they rented and paid for advertising. The Bolles court did not mention the investment by claimant as a factor for consideration."

"There was ample evidence in the instant case that Mr. Easton had made arrangements to cover his shop obligations in the event he found a job. Further, this court does not consider $3,500.00 such a substantial inventory investment to preclude Mr. Easton from accepting a full-time job."

Section 28(1)(c)

AVAILABILITY, Acceptance of lower wage, Completion of requalification, Excessive wage demand, Inclusion of overtime pay, Length of unemployment, Prior annual earnings, Reduction of expectations, Rule of reason

CITE AS: Silverstein (Chrysler Corp.), 1979 BR 61400 (B78 04755).

Appeal pending: No

Claimant: Myer M. Silverstein
Employer: Chrysler Corp.
Docket No: B78 04755 61400

BOARD OF REVIEW HOLDING: Where an individual's prior employment involved substantial overtime, and the claimant has requalified for benefits after a disqualifying separation, the claimant's availability can no longer be limited to work which would provide at least as much in annual earnings as the preceding job did.

FACTS: "Here, the claimant testified that he was earning approximately $20,000 per year at Chrysler Corporation prior to his retirement. He added that he was available for employment that paid a similar wage (T, p. 13). A review of the record indicates that claimant did earn wages at a weekly rate that would amount to $20,000 annually (Exhibit No. 2). The claimant earned $7.69 per hour, therefore, it appears that he was including over-time pay in his wage total."

DECISION: The claimant is not eligible for benefits subsequent to the requalification period.

RATIONALE: "Surely the claimant here should not be penalized because he initially expected to find employment at a wage comparable to that which he most recently earned. However, in light of the fact that his wage requirements were somewhat inflated due to the inclusion of over-time pay, and the fact that at some point his wage demands became excessive, we must find that he was required to lower his 'sights' after a reasonable period of time. We find that during the period of requalification, it was not unreasonable that the claimant expected to find employment at his previous rate. However, after requalifying and then being qualified to collect unemployment benefits, he was required to 'lower his sights' and accept a lower wage. By applying this 'rule of reason,' the majority of the Board panel is of the opinion that the claimant was given ample time to test the waters of the market and obtain employment at his previous rate during his requalification period."

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Section 28(1)(c)

AVAILABILITY, Attachment to labor market, Fixed-term layoff, Travel

CITE AS: McCauley (Service Systems Corporation), 1978 BR 55189 (B77 3812).

Appeal pending: No

Claimant: Mary McCauley
Employer: Service Systems Corporation
Docket No: B77 3812 55189

BOARD OF REVIEW HOLDING: A claimant who is placed on a fixed-term layoff of short duration is not required to remain in the employer's locale.

FACTS: "The claimant was placed on a fixed-term layoff due to the Christmas holiday period on December 22, 1976 and personally instructed to return on January 3, 1977. During the layoff period, the claimant visited her ill mother in Louisiana." She reported at a branch office in Louisiana, and returned to work on schedule.

DECISION: The claimant meets the availability requirements of Section 28(1)(c) of the Act.

RATIONALE: This is a 3-2 decision. The majority states: "The purpose of the eligibility requirements of Section 28 of the Act is to insure that the recipient of unemployment benefits is genuinely attached to the labor market. See Dwyer v Michigan Employment Security Commission, 321 Mich 178 (1948). In determining labor market attachment, the law does not require the performance of a useless act. Here, nothing in the record suggests that any work would be (or was) offered by the employer to the claimant at any other site during her fixed-term layoff. As a result, it would have served no purpose for her to have remained in the locality of her employer during this period."

"As a result of unavailable suitable work in the claimant's locality during the period in issue, a waiver by the Commission of seeking work was in effect."

11/90
5, 7, 14, d3 & 15:NA

Section 28 (1)(c)

AVAILABILITY, Ability to work, Heavy lifting, Leave of absence, Maternity leave, Medical restriction, Pregnancy, Reasonable restriction, Unilateral placement on leave

CITE AS: Buczek v Meijer Thrifty Acres, No. 79 928 311 AE, Wayne Circuit Court (December 21, 1979)

Appeal pending: No

Claimant: Catherine Buczek
Employer: Meijer Thrifty Acres
Docket No: B76 19230 55251

CIRCUIT COURT HOLDING: Where a pregnant woman is medically restricted from heavy lifting, and only one of her several assignments is affected, but the employer unilaterally places the claimant on leave, the claimant is unemployed and available for work.

FACTS: The claimant did not request maternity leave, but did submit a doctor's note restricting her from heavy lifting during her pregnancy. Only one of the claimant's several assignments required heavy lifting. The employer put the claimant on leave unilaterally.

DECISION: The claimant was unemployed and available for work during the unilateral leave.

RATIONALE: "[W]here an employer decides to place an employee on a maternity leave of absence for a reason other than one contained in MCLA 421.48, the employee, though on an employer imposed leave of absence, is not on a Section 48 leave of absence for purposes of determining her employment status under the Act."

"She was available for suitable work for which she was qualified except for the heavy lifting limitation. This limitation affected only a portion of one job duty, i.e., lifting groceries into the shopping cart, and neither would have detracted from her ability to perform her other job duties at Meijer nor the office work she was qualified to perform by past experience or training as these jobs did not require heavy lifting within the doctor's restriction."

Section 28(1)(c)

AVAILABILITY, Lack of automobile, Transportation

CITE AS: Van Sloten (Sea Ray Boats), 1979 BR 58611 (B77 19555).

Appeal pending: No

Claimant: Theresa Van Sloten
Employer: Sea Ray Boats
Docket No: B77 19555 58611

BOARD OF REVIEW HOLDING: "Nowhere does it state in the Act that possession of an automobile is a prerequisite for collecting benefits."

FACTS: The referee found the claimant ineligible for benefits for a period during which she did not have an operable automobile. "All the elements necessary for availability and attachment to the labor market were satisfied and found to exist by the referee. Despite all the efforts made by claimant to secure employment, the referee felt the lack of an automobile would preclude her from being eligible for benefits."

DECISION: The claimant meets the availability requirements of Section 28(1)(c) of the Act.

RATIONALE: "Nowhere does it state in the Act that possession of an automobile is a prerequisite for collecting benefits. A claimant had to make a reasonable effort to secure employment and in this case this was done by the claimant."

Sections 28(1)(c), 33

ELIGIBILITY, Burden of proof, Prosecution of appeal

CITE AS: Ashford v Appeal Board, 328 Mich 428 (1950).

Appeal pending: No

Claimant: Violet Ashford
Employer: Kelsey Hayes
Docket No: B8 4320 8947

SUPREME COURT HOLDING: The introduction into evidence of the file materials for a claim for unemployment benefits does not, by itself, operate to prove the claim. The burden of proof is on the party asserting the affirmative of the issue involved.

FACTS: Claimant filed for unemployment benefits and the Commission determined she was entitled. The employer appealed to the Referee. The claimant appeared in person, the employer by counsel. Claimant's file materials were made part of the record over employer's objections. Employer requested the claimant be questioned as to her eligibility. "[T]he Referee held that, because claimant was not represented by counsel, she might not be permitted to testify unless the employer called her for cross examination under the statute and agreed that her testimony should become the employer's testimony, binding upon the latter."

Employer contended claimant had the burden to establish her claim, even if the employer did not offer any evidence in opposition. The Referee held a prima facie case was established by entering claimant's file into the record, and that the employer, by failing to offer evidence in opposition, had failed to prosecute its appeal, which was dismissed.

DECISION: Dismissal for lack of prosecution was error. Remanded for hearing on the merits.

RATIONALE: "The statute does not provide ... a rule that in cases of employer appeals to referee the employer shall be held to have failed to prosecute its appeal unless it assumes the burden of the evidence and proceeds at the very outset to offer proofs in opposition to ... the claimant.... [T]he employer was present by counsel who stated its position on the law, ... and objected to the referee's ruling that plaintiff might testify only as employer's witness. In so doing, the employer did prosecute its appeal."

"Introduction of that claim ... into evidence did not operate to establish it. The claim does not prove itself.... [T]he obligation of the claimants is to establish the truth of their claims by a preponderance of the evidence."

Section 28(1)(c)

AVAILABILITY, College student

CITE AS: Breshgold v MESC, No. 77-708893-AE, Wayne Circuit Court (February 24, 1978).

Appeal pending: No

Claimant: Michael S. Breshgold
Employer: U S Navy
Docket No: UCX75 14953 RO 49887

CIRCUIT COURT HOLDING: In order to be eligible for unemployment benefits, an individual must be unemployed and make reasonable efforts to find work. An individual need not be idle and is not required to look for work daily for 8 hours a day.

FACTS: Claimant was enrolled as a full time student, taking daytime college courses (17 credits). He asserted he was available for full time work and would rearrange his class schedule or quit school if he found full-time employment. He testified that he had worked full-time and attended school full-time in the past. The Referee found, and the Board of Review majority agreed, that claimant was primarily a student and was not genuinely attached to the labor market because he only searched for employment when this did not interfere with his schooling.

DECISION: Remand for hearing on claimant's job seeking efforts.

RATIONALE: Where a claimant asserts he is actively seeking work, it is incumbent on the trier of fact to explore those job seeking efforts. Availability cannot be determined solely by the fact that a claimant is pursuing educational goals while unemployed. Attachment to the labor market is largely a function of the individual's efforts to obtain employment.

Section 28(1)(c)

AVAILABILITY, Union work only, Suitability

CITE AS: Spohn v Appeal Board, 342 Mich 432 (1955).

Appeal pending: No

Claimant: James N. Spohn
Employer: J.A. Utley Co
Docket No: B53 1530 15235

SUPREME COURT HOLDING: Claimant is able and available to perform full time work if the non-union work he rejects would entail the acceptance of substandard wages and conditions.

FACTS: After being laid off, claimant only applied for work at his union hall and the employment security office. Employer's position was that claimant restricted his availability and was ineligible. There was non-union work advertised. Claimant did not apply if job was non-union. Claimant's business agent told him he could not take non-union work. The advertisements referred to by the employer required several carpenters to bid on a job and assume the risk that they would earn substandard rates. Claimant's previous employment had been for fixed wages.

DECISION: Eligibility affirmed.

RATIONALE: The issue was not claimant's refusal to accept non-union work, but the suitability of the work offered in the ads. The type of commission work offered was unsuitable i.e. "the remuneration ... or other conditions ... are substantially less favorable to the individual than those prevailing for similar work in the locality."

Section 28(1)(c)

ABILITY, Evidence, Medical restrictions, Procedure, Waiver of issue

CITE AS: Taylor v United States Postal Service, 163 Mich App 77 (1987).

Appeal pending: No

Claimant: Geneva Taylor
Employer: United States Postal Service
Docket No: UCF84 13552 98942W

COURT OF APPEALS HOLDING: A claimant must establish she is physically capable of performing work of a type for which she has received wages in the past. Claimant's unsubstantiated assertion she could perform work permitted by medical restrictions imposed by her physician is insufficient to establish that she is able to work.

FACTS: Claimant worked as a postal carrier until medical restrictions due to pregnancy made her unable to meet the physical demands of that employment. Claimant worked previously as a salesclerk and asserted that she could perform sales work. However, she was restricted from lifting, pushing or pulling anything over 20-25 pounds, sitting more than 2 hours, standing more than 2 hours, excessive bending, stooping or stretching and could perform inside work only. Claimant acknowledged that salespeople usually stand on their feet all day, but opined she could sit or stand.

DECISION: Claimant is not eligible for benefits because she is not able to perform suitable full time work.

RATIONALE: "In this case, it was factually determined that plaintiff was unable to do the work for which she had previously received wages, including both postal-related employment or any type of sales related employment, because of the restrictions imposed by her physician."

SECONDARY ISSUE: Claimant asserted on appeal that the Referee did not satisfy his duty to assist an unrepresented party. Citing Ackerberg v Grant Community Hospital, 138 Mich App 295 (1984) the Court of Appeals stated: "the failure to raise an issue to the Board of Review precludes raising the issue on review before this court. ...as it has been waived."

Section 28(1)(c)

ABILITY, Physical condition, Prolonged standing, Teacher aide, Work history

CITE AS: McKentry v Employment Security Commission, 99 Mich App 277 (1980)

Appeal pending: No

Claimant: Bessie McKentry, et al
Employer: Muskegon Area Intermediate School District
Docket No. B76 5853 52582

COURT OF APPEALS HOLDING: "A plain reading of the statute does not indicate that a claimant must be able to perform his last job but only that 'he is able and available to perform full-time work for which has previously received wages.'"

FACTS: The claimant, a teacher aide, was treated for knee trouble.

"[P]laintiff testified that she could not return to work for defendant school district because she could not stand on her feet all day. However, she also testified that there was work which she had performed in the past which she could still do, such as working for the telephone company or for Misco Corporation."

DECISION: The claimant is eligible for benefits.

RATIONALE: "The lower court and the administrative agency focused on the fact that the plaintiff could not perform the job she last held with defendant school district in determining that plaintiff was not able and available to perform full-time work. A plain reading of the statute does not indicate that a claimant must be able to perform his last job but only that 'he is able and available to perform full-time work for which he has previously received wages.'"

Sections 28(1)(c), 48

UNEMPLOYED, Availability, Self-employment, Attachment to labor market, Fraud

CITE AS: Koehler v General Motors, Oakland Circuit Court No. 96-532329-AE (May 6, 1997).

Appeal pending: No

Claimant: Carl Koehler
Employer: General Motors Corporation
Docket No. B94-10946-134361W and FSC94-00569-134392W

CIRCUIT COURT HOLDING: Where a claimant worked full-time for a self-owned business he was not unemployed within the meaning of Section 48 of the MES Act. Moreover, where a claimant is preoccupied with developing his own business, putting in hours equivalent to full-time work, he is not available within the meaning of Section 28(1)(c).

FACTS: The claimant was a part-owner of an irrigation company. While collecting unemployment benefits, the claimant worked for his company in excess of 40 hours per week and received distributions from profits. During this period the claimant sought other work but his efforts were infrequent and indifferent. Claimant did not receive a paycheck from this company but did pay personal expenses out of the business' account.

DECISION: The claimant was not unemployed within the meaning of Section 48 and was not available within the meaning of Section 28(1)(c). Claimant was properly subject to the penalties for fraud.

RATIONALE: Where the claimant is not ready, willing, able and anxious to resume work in industry, his efforts should be considered startup as opposed to self-help. With respect to availability, the claimant's indifferent job search efforts established he was not truly attached to the labor market and therefore not available within the meaning of Section 28(1)(c). Claimant's testimony was inconsistent and self-serving and therefore unreliable. In light of his representations to the Agency that he was not employed and his failure to disclose his connection to or responsibilities with his business, the assessment of penalties and sanctions was correct.

7/99
12, 24: H

Sections 28, 54(b)

AVAILABILITY, Attachment to labor market, Seeking work, Self employment, Intentional misrepresentation

CITE AS: Postema v Grand Rapids Diecraft Inc., Ottawa Circuit Court, No. 95-23141-AA (September 19, 1996).

Appeal pending: No

Claimant: James Postema
Employer: Grand Rapids Diecraft Inc.
Docket No. B93-06258-127231W

CIRCUIT COURT HOLDING: Where claimant was primarily engaged in establishing his own business, his mental attitude was not one of genuine attachment to the labor market. Where the claimant only sought work via networking with potential customers and other industry contacts, he was not "seeking work" and was not "available to work."

FACTS: Claimant was laid off from an executive position in February, 1992. He received regular benefits then extended benefits until December 12, 1992. Claimant started his own tool and die business on August 15 as 51% owner. Corporate status was established week of August 9, 1992. During the first week the business grossed $24,000. After that, expenses exceeded profits. Claimant received no wages. For weeks ending August 29, 1992, and September 5, 1992, claimant failed to report self employment. Thereafter, he reported self employment but zero earnings. For week ending September 12, 1992, claimant reported 70+ hours at his business, but thereafter reported only 20 hours. Claimant sought work primarily through "networking" with contacts who were also potential customers. He never actually filled out any job applications.

DECISION: Claimant ineligible for benefits for period August 9, 1992, through December 12, 1992. Claimant must pay restitution and penalties only for some of the weeks in question as for the most part claimant disclosed his interest in self employment and the nature of his job seeking efforts.

RATIONALE: Claimant's own testimony demonstrated that he was not diligently searching for employment or truly available for work. "His 'mental attitude' was not that of someone attached to the labor market; rather, it was that of an entrepreneur spending his time and energy trying to make his business successful."

7/99
21, 16, d12: B

Section 28(1)(c)

AVAILABILITY, Attachment to labor market, Full time work, College student

CITE AS: Schontala v Engine Power Components, Ottawa Circuit Court, No. 86-8221-AE (October 27, 1987).

Appeal pending: No

Claimant: Timothy Schontala
Employer: Engine Power Components
Docket No. B85-11974-101743W

CIRCUIT COURT HOLDING: Where claimant asserted he was available for full time work but showed by his actions that, in fact, he was not, he did not meet the availability requirement for eligibility under Section 28(1)(c).

FACTS: After working full time for the employer for over a year, claimant requested reduction to part-time work so he could return to school. Claimant was granted part-time status but shortly thereafter was laid off due to lack of work for part-time employees. Claimant was attending school and placed numerous applications for part-time work. He applied for benefits while still in school when he could not find any part-time work. Claimant asserted that he would accept full-time employment but Referee did not find his testimony credible.

DECISION: Claimant is ineligible for benefits.

RATIONALE: Determination of genuine attachment to the labor market is made by means of a subjective test which looks at the actions of the individual. In this case, claimant quit his full time employment, requested part-time status, enrolled in school nearly full-time, and subsequently applied for part-time work. See test enunciated in Dwyer v UCC, 321 Mich 178, 189 (1948).

7/99
14, 3: N/A

Section 28(1)(c)

AVAILABILITY, Attachment to labor market, Self employment, Unpaid Service

CITE AS: Anulli v Easy Cut Tool Corp., Macomb Circuit Court, No. 89-3688-AE (November 8, 1990).

Appeal pending: No

Claimant: Ettore Anulli
Employer: Easy Cut Tool Corp.
Docket No. B87-15460-107554W

CIRCUIT COURT HOLDING: Where claimant spent time answering phones and giving quotes for 20 hours a week for a company in which he had substantial investment, and also was unable to show he was seeking work, he did not establish he was available for full time work.

FACTS: Claimant had a 51 percent ownership interest in the involved employer. It was decided to dissolve the business. Claimant filed for benefits. While collecting benefits claimant spent 20 hours per week at Vance, Inc., another business in which he had a substantial investment.

DECISION: Claimant is ineligible under Section 28(1)(c).

RATIONALE: Court cites Dwyer v. UCC, 321 Mich 178 (1948). Claimant spent substantial amount of time at Vance, Inc. while drawing benefits, although he wasn't paid. He also failed to demonstrate that he was seeking work and therefore was unable to show a genuine attachment to labor market.

7/99
3, 11: N/A

Section 28(1)(c)

AVAILABILITY, Attachment to Labor Market, Geographical area, Agoraphobia, Customary occupation

CITE AS: Gallant v W.B. Doner Co., Oakland Circuit Court, No. 94-476350-AE (January 4, 1995).

Appeal pending: No

Claimant: Jeri Gallant
Employer: W.B. Doner Co.
Docket No. B92-02016-122380W

CIRCUIT COURT HOLDING: Where claimant placed undue restrictions on where she would work and what type of work she would do, she made herself unavailable within the meaning of the statute.

FACTS: Claimant suffers from agoraphobia (fear of being in open or public places) and advised the MESC that there were limitations on where she would seek or accept employment. She was held ineligible due to her failure to establish unrestricted availability. She had a "comfort zone" of locations she was willing to work in and that zone did not include the Detroit metropolitan area. Furthermore, claimant was qualified to do advertising work but was only seeking work in retail because she wanted to make a career change.

DECISION: Claimant is ineligible for benefits under Section 28(1)(c).

RATIONALE: Claimant was desirous of obtaining employment but restricted her availability for certain types of work which she was qualified to perform and restricted the geographical locations to which she was willing to travel. She only wanted to work in communities that were familiar to her. She did not seek advertising work for which she was qualified and limited her job search to certain Detroit suburbs.

7/99
24, 17, d12: N/A

Section 28(1)(c)

AVAILABILITY, Full-time work

CITE AS: Allessio v Quasarano, Macomb Circuit Court, No. 97-1083-AE (August 1, 1997).

Appeal pending: No

Claimant: Marie Allessio
Employer: Laura Quasarano & Nancy Lucido
Docket No. B96-10527-142392W

CIRCUIT COURT HOLDING: Where claimant testified before the Referee that she would work a maximum of 30 hours per week and this was consistent with her pre-hearing statements that she did not want full-time work, she did not meet the eligibility requirements of the Act.

FACTS: Claimant quit her job because her employer cut her hours. She told the Agency and the Referee she was able to work 20 - 25 hours per week and no more than 30 hours per week. The Referee reversed a disqualification under Section 29(1)(a) but held claimant ineligible because not available for full-time work. When claimant appealed to the Board of Review, she asserted she misunderstood the question regarding availability and that she was available for full time work.

DECISION: Claimant is ineligible for benefits under Section 28(1)(c).

RATIONALE: Claimant consistently made statements she was not available to work full-time. Therefore, the Board of Review was justified in concluding she was ineligible for benefits under Section 28(1)(c).

7/99
22, 21: N/A