

**IN THE SUPERIOR COURT OF THE STATE OF DELAWARE
IN AND FOR NEW CASTLE COUNTY**

WILLIAM BACHMAN,)	
)	
Appellant,)	
)	
v.)	
)	C.A. No. 09A-08-005 DCS
BACHMAN & ASSOCIATES, INC.,)	
and UNEMPLOYMENT)	
INSURANCE APPEAL BOARD,)	
)	
Appellees.)	

Submitted: June 4, 2010
Decided: September 30, 2010

Appellee's Motion for Reargument
DENIED

ORDER

Appearances:

William Bachman, Pro Se Litigant

Philip G. Johnson, Deputy Attorney General, Wilmington Delaware
Attorney for Appellee Unemployment Insurance Appeal Board

STRETT, J.

On this 30th day of September, 2010, upon consideration of Appellee's Motion for Reargument, the Court finds that:

1. On May 26, 2010, the Court reversed in part the Unemployment Insurance Appeal Board's decision denying benefits to Appellant, a corporate officer performing unremunerated minimal duties for a defunct corporation. This Court found Appellant to be neither disqualified nor ineligible to receive unemployment benefits.

2. Appellee seeks reargument based on the theory that the Court should construe 19 *Del. C.* § 3302(17) to require both that (1) no compensation be received and (2) no work be performed in order for an individual to be considered unemployed.¹ Appellee asserts that this construction is more consistent with the plain meaning of the statute, gives effect to the legislature's intent to avoid ambiguity, and allows for "consistency and predictability" in practice.²

3. The law is clear that "on a motion for reargument the *only* issue is whether the court overlooked something that would have changed the outcome of the underlying decision."³ Absent a showing that the Court has overlooked a controlling precedent or principle of law or has

¹ Appellee's Motion for Reargument at p. 1-2.

² Appellee's Motion for Reargument at p. 1, 4.

³ *Bernhardt v. Ford Motor Co.*, 2010 WL 3005580, at *2 (Del. Super. July 30, 2010) (citing *McElroy v. Shell Petroleum, Inc.*, 618 A.2d 91 (Del. 1992) (emphasis added)).

misinterpreted the law or facts in a manner that affects the outcome of the decision, the motion will be denied.⁴

4. In its decision on this appeal, the Court found that a corporate officer who was helping the closed business by providing approximately two hours of uncompensated assistance per week to wrap up the closed business meets the statutory definition of an unemployed individual. Because the statute states, in pertinent part, that

“ . . . an individual is “unemployed” in any week during which the individual performs no services and with respect to which no wages are payable to the individual”⁵

Appellee argues that the phrase “with respect to which” modifies “services” rather than the Court’s interpretation that it modifies “week.”

5. Nevertheless, even accepting Appellee’s contention, construing the statute to require that Appellant neither receive compensation nor perform services in order to be considered unemployed would not change the outcome of the Court’s underlying decision that Appellant was unemployed. A Delaware Court previously addressed this issue in *Miller v. Herschmann*.⁶ In that case, the Court stated that a

⁴ *Bernhardt* at 2 (citing *Cummings v. Jimmy’s Grille, Inc.*, 2000 WL 1211167, at *2 (Del. Super. Aug. 9, 2000)).

⁵ 19 *Del. C.* § 3302(17).

⁶ 2007 WL 4577373 (Del. Super. Dec. 12, 2007).

person who provides minimal assistance for no remuneration is unemployed.⁷ There, the Court reasoned that because the claimant “worked fewer than full time hours *and received no wages* at all ... it must be said that [he] was unemployed.”⁸ In the instant case, Appellant is similarly situated. Appellant worked fewer than full time hours and received no wages at all.

6. Other jurisdictions with similar statutes, including New York⁹, Pennsylvania¹⁰ and New Jersey¹¹, have reached similar

⁷ *Miller*, at *2.

⁸ *Miller*, at *2 (emphasis added). Ultimately, however, the Court found claimant ineligible for benefits because he was self-employed as operator of an on-line computer consulting business.

⁹ N.Y. Labor Law § 522 (McKinney 2010) provides, in pertinent part: “‘Total unemployment’ means the total lack of any employment on any day. The term ‘employment’ as used in this section means any employment including that not defined in this title. The term “employment” as used in § 522 means “any work for profit or remuneration.” *Claim of Emery*, 120 N.Y.S.2d 142, 144 (N.Y. App. Div. 1953).

Several recent New York cases have held that a corporate officer who performs minimal services for a corporation or activities in connection with the winding up of a corporation will be considered totally unemployed, unless the person stands to benefit financially from doing so. *In the Matter of Salomone*, 826 N.Y.S.2d 757, 759 (N.Y. App. Div. 2006)(finding that claimant’s status as 50% partner and president of a corporation that had ceased operations did not preclude finding that he was unemployed where there was no evidence to show that the corporation continued to function, that claimant continued to perform corporate activities, or that he would profit from the corporation); *but see also In the Matter of Hinds*, 851 N.Y.S.2d 286 (N.Y. App. Div. 2008)(finding that a corporate officer was not unemployed where he performed activities to wind up corporation but still gained financially from the business) *and In the Matter of Bigelow*, 786 N.Y.S.2d 665, 666 (N.Y. App. Div. 2004)(finding that a corporate officer who performed activities to wind up a corporation and would apply proceeds from the eventual sale of company’s assets to his outstanding bank loan was not unemployed).

¹⁰ 43 Pa. Stat. Ann. § 753(4)(u) (West 2010) provides, in pertinent part: “An individual shall be deemed unemployed (I) with respect to any week (i) during which *he performs no services for which remuneration is paid or payable to him and (ii) with respect to which no remuneration is paid or payable to him*, or (II) with respect to any week of less than his full-time work if the remuneration paid or payable to him with respect to such week is less than his weekly benefit rate plus his partial benefit credit.” (emphasis added).

The term “remuneration” as used in § 753(4)(u) has been interpreted to apply not only to wages, but also to the expectation of some future payment, such as work performed on a commission basis, and to the receipt of significant professional benefits, such as access to business cards, work facilities, active participation in a profession, the ability to retain clientele, etc. *See Kelly v. Unemployment Comp. Bd. Of Review of Pennsylvania*, 840 A.2d 469, 472 (Pa. Commw. Ct. 2004)(finding that a claimant who worked in real estate for commission was not unemployed even during months where he had not yet made any sales because he performed services with the expectation of future payment); *See also Unemployment Comp. Bd. Of Review of*

conclusions. Generally, these states agree that in the absence of remuneration, the expectation of future financial gain, or the receipt of some other significant professional benefit, a person performing minimal services is unemployed.¹²

7. Moreover, Oregon’s statute mirrors Delaware’s statute.¹³ In *Taylor v. Employment Division*¹⁴, the Oregon court reasoned that interpreting “services” to mean services for compensation allows the two sections of the unemployment definition to be read consistently.¹⁵ Applying this construction to the identical Delaware statute creates consistency with its definition as well, particularly where the unpaid

Pennsylvania v. Miedama, 365 A.2d 900, 902 (Pa. Commw. Ct. 1976)(finding that a claimant who volunteered at a travel agency without pay was not unemployed because that position allowed her to continue serving clients from her previous travel agent job and continue participating in her profession, and afforded her business cards and access to the agency’s facilities).

¹¹ N.J. Stat. Ann. § 43:21-7a (West 2010) provides, in pertinent part: “‘Employee’ means a person who performs services *for remuneration* for an employer.” Although, it should be noted that the New Jersey code makes a specific exception for corporate personnel, who may be deemed “employed” if the corporation has not been formally dissolved and they remain an officer or more than 5% owner of a corporation in any week during which they claim benefits. *See* N.J. Stat. Ann. § 43:21-19(m) (West 2010).

¹² *N.J. Stat. Ann.* § 43:21-7a (West 2010); *Hinds*, *supra* note 8, at 286; *Salomone*, *supra* note 8, at 759; *Bigelow*, *supra* note 8, at 666; *Kelly*, *supra* note 9, at 472; *Miedama*, *supra* note 9, at 902.

¹³ Or. Rev. Stat. § 657.100(1) (2010) provides, in pertinent part: “An individual is deemed “unemployed” in any week during which the individual performs no services and with respect to which no remuneration for services performed is paid or payable to the individual, or in any week of less than full-time work if the remuneration paid or payable to the individual for services performed during the week is less than the individual's weekly benefit amount.”

¹⁴ 597 P.2d 780, 782 (Ore. 1979).

¹⁵ *Taylor* at 784.

minimal assistance is of a different nature from the paid service previously supplied by the former employee.

8. The *Taylor* court also noted that the definition of unemployment refers to services for compensation based in part on the court's policy of liberally construing the statute to allow claimants to receive the intended benefits.¹⁶ So too, Delaware has also interpreted the unemployment statute liberally to eliminate economic insecurity due to involuntary cessation of work and in favor of the claimant, and does so in this case.¹⁷ As recognized by the Delaware Supreme Court, "[t]he Unemployment Compensation Act 'is intended to serve as social insurance for persons unemployed through no fault of their own' and, therefore, '[t]he Act is liberally construed in favor of the employee.'"¹⁸

9. Moreover, the rigid interpretation advocated by Appellee would lead to the denial of benefits to an *unpaid* volunteer, yet, in other cases, the granting of benefits to nonworking persons who were receiving

¹⁶ *Taylor* at 783 (citing *Puget Sound Bridge & Dredging Co. v. State Unemployment Comp. Comm'n.*, 126 P.2d 37, 40 (Or. 1942)).

¹⁷ 19 Del. C. § 3301; *Snead v. Unemployment Ins. Appeal Bd.*, 486 A.2d 676, 678 (Del. 1984)(citing *Haskon, Inc. v. Coleman*, 310 A.2d 657, 659 (Del. Super. 1973)); see also *Sann v. Renal Care Centers Corp.*, 1995 WL 161458, at *6 (Del. Super. Mar 28, 1995).

¹⁸ *State Dept. of Labor, Div. of Unemployment Ins. v. Reynolds*, 669 A.2d 90, 92 (Del. 1995)(citing *Snead*, *supra* note 16, at 678).

at least \$2.01 per week¹⁹ or were *still receiving pay*.²⁰ It is unlikely that this is the result contemplated by the legislature.²¹

10. Furthermore, 11 *Del. C.* 3302(17) and the Delaware Administrative Code contemplate, recognize, and allow for the concept of unemployment compensation in some circumstances where service is rendered. The Code specifically directs the Department to prescribe regulations concerning “part-total unemployment and partial unemployment ... and other forms of short term work”²² Appellee’s own regulation, Section 1200-UNEMP 15 of the Delaware Administrative Code,²³ also serves to undermine Appellee’s position that any service, however slight, disqualifies an individual from receiving unemployment benefits.²⁴ This provision allows benefits to be granted to

¹⁹ 19 DE ADC 1200-UNEMP 15 (defining a “partially unemployed individual” as “one who, during a particular week. (I) earned less than his weekly benefit amount plus two dollars, (II) was employed by a regular employee, (III) worked less than his normal customary full-time hours for such regular employer because of lack of full-time work”).

²⁰ See generally *Gen. Motors Corp. v. Local 435 of Int’l Union, United Auto., Aerospace & Agr. Implement Workers of Am.*, 546 A.2d 974 (Del. 1988)(granting unemployment compensation to hourly employees who were laid off for Christmas holiday and were entitled to receive holiday pay from their employer).

²¹ *Newtowne Village Service Corp. v. Newtowne Rd. Dev. Co., Inc.*, 772 A.2d 172, 175 (Del. 2001)(citing *Snyder v. Andrews*, 708 A.2d 237, 241 (Del. 1998), and *Coastal Barge Corp. v. Coastal Zone Indus. Control Bd.*, 492 A.2d 1242, 1246 (Del. 1985)).

²² See 19 *Del. C.* § 3302(17)(“The Department shall prescribe regulations applicable to unemployed individuals, making such distinctions in the procedures as to total unemployment, part-total unemployment, partial unemployment of individuals attached to their regular jobs and other forms of short-time work ...”).

²³ See 19 DE ADC 1200-UNEMP 15, *supra* note 20.

²⁴ The Court recognizes that there may be distinct circumstances or procedures for implementing part-total and partial unemployment.

individuals who are providing partial employment services, which tends to contradict Appellee's all-or-nothing interpretation of Section 3302(17).

11. Finally, public policy cannot be ignored. Construing the statute to apply to the instant case in the manner insisted by Appellee would discourage honesty, volunteerism, and conscientiousness. It would penalize an applicant for following through and volunteering two-hours per week of unpaid assistance to wrapping up a corporation and would instead reward those who abandon a business altogether or were deceitful about tying up loose ends.

12. For these reasons and because Appellant has neither received wages nor performed any services for compensation which would make him ineligible for benefits within the meaning of the unemployment statute, Appellant meets the statutory definition of an unemployed individual.

13. Accordingly, Appellee's motion for reargument is denied.

It Is So ORDERED.

/s/ Diane Clarke Streett
Diane Clarke Streett
Judge