

Availability: Active Search for Work*

LOUISE F. FREEMAN†

The employment security program is directed to meeting two needs of unemployed workers by (1) assisting them to find suitable work, and (2) paying them cash benefits during periods of unemployment.¹ To these ends State laws provide for the maintenance of public employment offices through which workers may obtain gainful employment,² and for the payment of unemployment compensation to workers who meet specified conditions. To assure that only individuals who have had an attachment to the labor market within a recent period are eligible for benefits, all State laws require workers to have been employed in covered employment for a given number of weeks or to have earned wages of a given amount in covered employment in a specified past period.³ To assure that only individuals who are unemployed because of a lack of suitable job opportunities receive benefits, all State unemployment compensation laws require that to be eligible an individual must be available for work.⁴ An individual is said to be available for work

* The opinions expressed herein are those of the author and are not intended to reflect the official views of the Federal Security Agency or of the Social Security Administration.

Frequent reference is made in these articles to the UNEMPLOYMENT COMPENSATION INTERPRETATION SERVICE: BENEFIT SERIES, which is a publication of the Federal Security Agency, Social Security Administration, containing precedent unemployment compensation decisions from the various states. The Series began with six issues in 1938 and since then has been issued monthly under an annual volume number. Decisions are cited by case number, State, deciding body, volume and issue number, *e.g.*, Ben. Ser. 13086-N.C. R(V12-1). "R" after a State abbreviation indicates a decision by the highest administrative appeal body; "A," a decision of a lower appeal tribunal, and "CtD," a decision of a court.

The decisions given by the Umpire under the British Unemployment Insurance Acts, cited herein, have been taken from *Selected Decisions Given by the Umpire* respecting claims for unemployment benefit, published by the British Ministry of Labour. Whenever such decisions appear in Benefit Series General Supplement No. 1 (Benefit Decisions of the British Umpire; A Codification and Text of Selected Decisions, 1938), they will be cited thereto in the form, Ben. Ser. (Gen. Supp. 1) BU-100.

† Senior Attorney, Federal Security Agency.

¹ See Wandel, Introduction, *supra*, p. 121.

² Wagner-Peyser Act, 48 STAT. 113, *as amended*, 29 U.S.C. § 49 b (1946).

³ All state laws also require workers to have registered for work with a public employment office, and to have filed a claim for unemployment compensation. See MANUAL OF STATE EMPLOYMENT SECURITY LEGISLATION, §§ 2(i), 2(k), 3(b), and 4(a), (rev. 1949).

⁴ For a general discussion of the availability requirement see Freeman, *Able to Work and Available for Work*, 55 YALE L. J. (1945).

when he is genuinely attached to the labor market,⁵ that is, when he is ready, willing, and able to accept suitable work that he does not have good cause to refuse,⁶ provided, of course, that there is a market for his services. A labor market for an individual has been said to exist "when there is a market for the type of services which he offers in the geographical area in which he offers them. 'Market' in this sense does not mean that job vacancies must exist; the purpose of unemployment compensation is to compensate for the lack of appropriate job vacancies. It means only that the type of services which an individual is offering is generally performed in the geographical area in which he is offering them."⁷ The fact that there is no work available for a worker, however, does not render him unavailable for work.⁸

Whether or not an individual is in fact attached to the labor market depends to a great extent upon his mental attitude.⁹ Indicative of this mental attitude is what the individual does, and the circumstances under which he does it. Thus a worker's having registered for work at a public employment office is an act by which he exposes himself to all of the job opportunities suitable for him listed with such office; it is evidence of his availability.¹⁰ Also, a worker's having on his own initiative sought a job in addition to having registered at a public employment office, is evidence of his availability;¹¹ and in cases where a worker has limited his avail-

⁵ Dwyer v. Appeal Board of Michigan, 321 Mich. 178, 32 N.W. 2d 434 (1948); Bliley Electric Co. v. Unemployment Comp. Bd. of Rev., 158 Pa. Super. 548, 45 A. 2d 898 (1946); Reger v. Administrator, 132 Conn. 647, 46 A. 2d 844 (1946).

⁶ Reger v. Administrator, *supra* note 5; Bliley Electric Co. v. Unemployment Comp. Bd. of Rev., *supra* note 5; Leonard v. Bd. of Rev., 148 Ohio St. 419, 75 N.E. 2d 567 (1947). In the latter case, a significant Ohio decision, the state supreme court held available for work a claimant who could accept only daytime work and not work on any shift. While the court did not mention the case of Brown-Brockmeyer Co. v. Bd. of Rev., 70 Ohio App. 370, 45 N.E. 2d 152 (1942), in which the Ohio Court of Appeals refused to interpret the Ohio law as requiring a claimant to be available only for suitable work, it apparently is no longer following the narrow view there taken, for in the principal case the court said: "In general, the available requirement of the Statute is satisfied where a worker is able or willing to accept suitable work at a point where there is an available labor market for work he does not have good cause to refuse." See Freeman, *op. cit. supra* note 4 at 125.

⁷ Freeman, *op. cit. supra* note 4 at 124. This concept of "labor market" was adopted by the Connecticut court in Reger v. Administrator, 132 Conn. 647, 46 A. 2d 844 (1946).

⁸ Reger v. Administrator, *supra* note 7; Bliley Electric Co. v. Unemployment Comp. Bd. of Rev., 158 Pa. Super. 548, 45 A. 2d 898 (1946).

⁹ Dwyer v. Appeal Bd. of Mich., 321 Mich. 178, 32 N.W. 2d 434 (1948); Brit. Ump. No. 1404/1926, Ben. Ser. (Gen. Supp. 1) BU-288.

¹⁰ Bliley Electric Co. v. Unemployment Comp. Bd. of Rev., *supra* note 8.

¹¹ Ind. Rev. Bd. Dec. No. 48-R-77, Nov. 19, 1948, C.C.H., U.I.Serv., Ind.

ability, it may be decisive for it may establish the good faith of his limitations.¹² It does not necessarily follow, though, that workers who have not made a search for work independent of the public employment office are unavailable.¹³

While it is inherent in the availability requirement that an individual make a reasonable attempt to find work, or as it is more often stated, that he be actively seeking work, there has been, since the end of World War II, an increasing emphasis by tribunals and legislatures on an "active search for work." Twenty-two State unemployment laws expressly require an individual to be, in effect, actively seeking work in each week for which he claims benefits.¹⁴ Seventeen of these laws make this provision a part of the availability requirement, two make it a separate requirement,¹⁵ two others make it a part of the registration for work requirement,^{15a} and one makes it a disqualification.¹⁶

In some States where the legislature has not acted, tribunals have construed the availability provision to include a requirement that claimants be actively seeking work.¹⁷ Whether statutory or administrative, the actively seeking work requirement has only two legitimate purposes: (1) to test the individual's attachment to the labor market; and (2) to increase the number of placements. Insofar as this requirement is construed to require that every worker must, in addition to registering and continuing to report at a public employment office, make a search for work independent of such office¹⁸ (hereinafter called an independent search for work), it seems to undermine the placement function of the public employment service¹⁹ and, moreover, to give little assistance to State agencies in

par. 8161.37; Ill. Bd. of Rev. Dec. No. 48-BRD-1119, C.C.H., U.I. Serv., Ill. par. 8278.11; Brit. Ump. No. 5022/26.

¹² Ben. Ser. 13086-N.C. R(V12-1); 12983-N.J. R(V11-12); 8942-Tex. A(V7-11).

¹³ See Ben. Ser. 13028-Wyo. A(V11-12); 12705-Pa. R(V11-8).

¹⁴ As of August 1, 1949: California, Connecticut, Colorado, Delaware, Idaho, Illinois, Kansas, Maine, Maryland, Michigan, Missouri, Montana, New Jersey, New Mexico, North Carolina, North Dakota, Ohio, Oregon, Vermont, Washington, Wisconsin, and Wyoming.

¹⁵ CAL. GEN. LAWS, act 8780 d, § 57 (1947 Supp.), and Section 4(g) of the Colorado Employment Security Act.

^{15a} MICH. COMP. LAWS, § 17.530 (Mason Cum. Supp. 1947), and Section 108.04 (2) (b) of the Wisconsin Unemployment Reserves and Compensation Act.

¹⁶ Section 5 (ca) of the Maryland Unemployment Compensation Law.

¹⁷ For example, Dep't of Ind. Relations v. Tomlinson, 36 So. 2d 496, Ben. Ser. 12943-Ala. Ct.D(V11-12) (Ala. 1948); Ben. Ser. 8716-S.C. A(V7-8); 12816-Fla. R(V11-10); 11916-Utah A(V10-10); 12021-D.C. A(V10-12).

¹⁸ In Ben. Ser. 9940-Okla. R(V8-10), it was said: "We are compelled to again observe that it is of no importance that claimant made no application for work independently of the employment service."

¹⁹ In Ben. Ser. 9740-Tenn. A(V8-8), the Appeals Examiner said: "We do not believe that the Law requires a claimant to go out and secure work on his

determining whether the reason for a worker's unemployment is a lack of suitable jobs. It could not be reasonably argued, however, that under no circumstances is more required of a worker than that he register at an employment office to be actively seeking work. The most reasonable construction of the requirement is that an individual is actively seeking work when he has done what a reasonable man in the same circumstances would do to attempt to find work suitable for him.²⁰

What a reasonable man who wants a job suitable for him will do to get one depends on the medium by which job openings in his occupation are usually filled and on the condition of the labor market in the locality where he wishes to work or where he can reasonably be expected to seek work.²¹ Thus, in occupations where job openings are normally channeled through public employment offices, a reasonable man would do no more than register for work at such an employment office.²² Such registration is an act by which he exposes himself to more suitable jobs than he could possibly reach through his own unorganized efforts, or through any other medium, and he is thereby effectively attached to the labor market. In such a situation registration at an employment office constitutes an active search for work.

In other occupations more may reasonably be necessary to constitute an active search. Where jobs in a particular occupation in which an individual seeks work are normally channeled through a central hiring agency, such as a union hiring hall, a reasonable man would not rely only on his registration at a public employment office, he would also apply for a job at the central hiring agency.²³ As soon as he has done that, he has exposed himself to the chief sources of potential job opportunities and he should be considered to have satisfied the active search for work requirement. For example, where a free talent-casting agency hires about 96 per cent of all extra players for the major motion picture studios, a reasonable person who wants work as an "extra" would seek work through such agency in addition to registering with a public employment office. An individual who chose to seek employment as an extra on her own initiative and not through the talent-casting agency was

own initiative, since the program provides for an employment service which is supposed to place workers in suitable jobs."

²⁰ Brit. Ump. No. 2337/1925, Ben. Ser. (Gen. Supp. 1) BU-192. See California Regulation No. 209, C.C.H., U.I. Serv., Calif., par. 209.

²¹ Nelson v. Rev. Bd., 82 N.E. 2d 523 (Ind. App. 1948); Ben. Ser. 12955-Conn. R(VII-12); Brit. Ump. No. 820/1926 and 4792/1926; California Regulation No. 209, *supra* note 20.

²² See Nelson v. Rev. Bd., *supra* note 21.

²³ Ben. Ser. 13050-Ill. R(V12-1); 13087-Ohio R(V12-1); 10311-Calif. R(V9-3); Brit. Ump. No. 2287/1925 ord 4337/1926.

held to have so narrowed her field of possible employment as not to be available for work.²⁴ Also where a claimant who has been a hat maker for 33 years reports regularly to her union, the only method of obtaining work in her occupation, she was held to have demonstrated her availability for work.²⁵ Only to get a job in an occupation where jobs are normally filled at the plant, and it is questionable that there are many, would a reasonable man go on a door-to-door search for a job, and he would do it then only when in the condition of the labor market there are jobs to be had.²⁶

To construe the active search for work requirement to compel all claimants to make an independent search for work, in addition to registering at an employment office, regardless of the usual method of obtaining work in their occupations or the specific local labor market situation, not only places an unreasonable burden on claimants, but it neither gets them jobs nor tests their availability, the only legitimate objectives of the requirement. Such objectives are not met by a requirement which is as easily satisfied by persons who do not want to work as by persons who do want to work. For example, an individual who does not want work may apply at establishments where he knows he cannot find work or in a manner not to invite offers of work, but he may, nonetheless, be better prepared to assure the claims deputy that he made a genuine but fruitless search than would an inarticulate claimant or one for whom there is no work and who knows that his efforts are futile.

While it is true that to determine availability in the absence of job offers is difficult, to determine the effect of an independent search for work on an individual's availability is just as difficult. The mere fact that an individual has made an independent search does not of itself establish availability. It is necessary also to consider whether he applied at establishments where he might reasonably expect to find work, whether he applied at enough establishments, whether he avoided or omitted establishments where he might have been able to obtain work, and whether he applied in a manner which invited offers of work. A worker may have established his availability for work notwithstanding that in a particular week he may not have made an independent search for work.²⁷ For example, take a case where a worker over sixty for several weeks

²⁴ Ben. Ser. 10311-Calif. R(V9-3).

²⁵ Ben. Ser. 13050-Ill. R(V12-1).

²⁶ Brit. Ump. No. 820/1926. In this case the Umpire said: "But in this case I think the applicant has shown that she was genuinely seeking work. Her only experience has been as a clerk, and she states that she has been trying to obtain work through her Association [union] and by answering advertisements. That is the usual way of obtaining employment of this kind, and I cannot say that she fails to show that she is genuinely seeking work merely because she has not been round calling on employers who have not notified any vacancies."

²⁷ See *Nelson v. Rev. Bd.*, 82 N.E. 2d 523 (Ind. App. 1948).

applied for work with every employer in his town, and in each case he was told that the age limit for workers to be hired was fifty. After having been told this by all his potential employers, the worker, as would any reasonable man, came to the conclusion that there was nothing further to be gained by continuing to apply for work with these same employers and made no applications in the following week. There seems to be no question that he was available for work for that week, but not having continued to make an independent search for work, he might not be considered to have fulfilled the active search for work requirement.²⁸

Some tribunals have expressed the view that where the legislature has amended the State law to require an active search for work as a condition of eligibility, it intended to add a condition rather than to make express a condition inherent in the availability requirement.²⁹ This is not true of all tribunals. The Michigan Supreme Court, for example, has said that the amendment to its law requiring a claimant to be "seeking work"³⁰ does not indicate a legislative intent to change the law, "but rather that the amendment was enacted for the purpose of clarifying existing legislative intent."³¹ An amendment to a law does not necessarily mean that a change in the law was made; "a change in a statute may be made merely to express more clearly the original intention of the legislature."³² Even if an active search for work is considered to be a separate condition of eligibility, it does not follow that the same evidence which supports a finding with respect to one or more of the other conditions cannot support a finding that an individual has actively sought work.

Some tribunals also have expressed the view that a claimant's statement in connection with his work-registration that "I am able to work and available for work and register for work" is merely a self-serving statement without probative value.³³ This view fails to recognize that a work-registration is more than a verbal statement by the claimant that he is available for work; it is an *act* that

²⁸ See Ben. Ser. 10465 Mo. A(V9-4-5) in which the Referee said: "The proviso [actively seeking work] clearly requires some showing by the claimant of a reasonably diligent search for work in each of the weeks with respect to which benefits are claimed."

²⁹ *Jacobs v. Office of Unemployment Comp.*, 27 Wash. 2d 641, 179 P. 2d 707 (1947); Mo. Ref. Dec. Nos. A 653-45 and 6063-46.

³⁰ MICH. COMP. LAWS § 17,530 (a) (Mason Cum. Supp. 1947).

³¹ *Dwyer v. Appeal Bd. of Mich.*, 321 Mich. 178, 32 N.W. 2d 434 (1948).

³² *School District No. 18 of Pondera County v. Pondera County*, 89 Mont. 342, 350, 297 Pac. 498, 502 (1931); 1 SUTHERLAND, STATUTORY CONSTRUCTION § 1930 (3d ed. Horack 1943).

³³ *Huiet v. Schwob Mfg. Co.*, 196 Ga. 855, 27 S.E. 2d 743 (1943); *Hunter v. Miller*, 148 Neb. 402, 27 N.W. 2d 638 (1947); *Dep't of Ind. Relations v. Tomlinson*, 36 So. 2d 496, Ben. Ser. 12943-Ala. Ct.D(V11-12) (1948).

exposes him to all the job opportunities known to the employment service. His exposure to job opportunities is a consequence of his registration irrespective of his good faith. If he then refuses suitable work offered to him as a result of his registration, there is a specific provision disqualifying him from unemployment compensation for such refusal.³⁴ Statements made in connection with a registration for work are as much part of the act of applying for work as are statements on applications for work with private employers. In both situations the statements are admissible "as a verbal part of the act, i.e., of a 'res gesta.'" ³⁵ Other tribunals, however, have held more reasonably that by registering for work at a public employment office, a claimant makes out a prima facie case of his availability.³⁶

The British experience with their "genuinely seeking work" requirement is significant in an evaluation of the "actively seeking work" concept in this country.³⁷

The requirement that a claimant prove that he was "genuinely seeking work" was first introduced into the British unemployment insurance system in 1921 as an administrative device to test a claimant's availability for work during the period of heavy unemployment which followed World War I. It was not until 1928, that it was made a prerequisite of eligibility by act of Parliament. Only two years thereafter, in 1930, the provision was abandoned after nine years' trial, even though the conditions which originally caused its adoption still existed and even though the British Umpire construed the requirement not to require an independent search for work in all cases.

In a leading case,³⁸ the Umpire set up the following criteria which must be considered in determining whether a claimant's efforts satisfied the genuinely seeking work requirement: (1) the type of work that was suitable for the claimant, (2) the claimant's prospects of obtaining suitable employment, (3) the usual means of obtaining employment suitable to the claimant and that he had

³⁴ All State laws disqualify individuals who refuse suitable work without good cause. See, for example, *Manual of State Employment Security Legislation*, sec. 4(b) (4), (rev. 1949).

³⁵ 6 WIGMORE, EVIDENCE §§ 1768, 1772 (3d ed. 1940).

³⁶ *Bliley Electric Co. v. Unemployment Comp. Bd. of Rev.*, 158 Pa. Super. 548, 45 A. 2d 898 (1946); Ben. Ser. 7042-Okla. A (V5-2); Ind. Ref. Dec. No. 41-A-969, Dec. 17, 1941.

³⁷ Report of the Committee on Procedure and Evidence for the Determination of Claims for Unemployment Insurance Benefit (Presented by the Ministry of Labour to Parliament, 1939); Report of the Committee on Procedure and Evidence for the Determination of Claims for Unemployment Insurance Benefit, Minutes of Evidence (Ministry of Labour, 1939). The British experience is described also in BAKKE, *INSURANCE OR DOLE* 35-43 (1935).

³⁸ Brit. Ump. No. 1404/1926, Ben. Ser. (Gen. Supp. 1) BU-288.

some chance of obtaining, and (4) the diligence and promptness with which the claimant availed himself of the usual and most effective means of obtaining employment that was suitable for him and that he had a reasonable chance of obtaining.

Some claimants sought to satisfy the requirement by presenting lists of employers to whom they had applied as evidence of their genuine search for work. Opinions differed as to the value of such lists. One chairman of a court of referees thought that claimants should be encouraged to prepare such lists and that they had been abused in only a very small proportion of cases; another chairman thought it obvious that these lists were prepared for the purpose because claimants when questioned could not tell where they had been recently without consulting their lists. Trade union representatives criticized the production of lists; they urged that it was easy for the "non-genuine claimant" to present a long list of places to which he had been, even though his effort had not been genuine, while, by contrast, the genuine claimant who had gone to a few well-selected places where he knew he had a chance of obtaining work might be held not to have been genuinely seeking work. Other claimants tried to overcome these difficulties by having employers certify to their application for work. They were confronted by new difficulties. In some areas, many were turned away and were not allowed to see anyone with responsibility for hiring. In others overseers refused to sign or posted notices that no help was wanted. Objections were raised that the law required compulsory tramping around looking for work when there was no work, and also the search required to prove a genuine search for work conflicted with local hiring customs. For example, on the docks employers customarily hired men at hours agreed on with the union and union members were forbidden to look for work on the docks at other times. Nevertheless, claimants, in order to satisfy the genuinely seeking work condition, had to prove that they had used all their time in looking for work.

Although the British have continued since 1930 to seek an effective test of availability, the genuinely seeking work provision has never been re-instated and considerable care has been taken to assure that none of the provisions adopted would be interpreted to require an independent and undirected search for work.

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To summarize, a requirement that claimants make an active search for work (in contrast to an independent search) is inherent in the availability requirement. To establish availability for work a claimant should be expected to do what a reasonable man in the same circumstances would do to obtain work suitable for him. In some occupations where job openings are normally channeled

through the public employment service, registration at an employment office constitutes an active search for work. In other occupations more may be required. To construe "actively seeking work" as requiring that all claimants make an independent search for work, regardless of the usual method of obtaining work in their occupations or the specific local labor market situation, involves many workers in a fruitless search for work which the coordination of the employment service and the unemployment insurance system was designed to avoid.

