DEPARTMENT OF HUMAN RESOURCES

EMPLOYMENT SECURITY ADMINISTRATION

1100 NORTH EUTAW STREET
BALTIMORE, MARYLAND 21201
383-5032

– DECISION –

STATE OF MARYLAND
HARRY HUGHES
Governor
KALMAN R. HETTLEMAN
Secretary

BOARD OF APPEALS
THOMAS W. KEECH
Chairman
HAZEL A. WARNICK
MAURICE E. DILL
Associate Members
SEVERN E. LANIER
Appeals Counsel

DECISION NO.: 144-BH-83

DATE: February 3, 1983

CLAIMANT: Dorothy Muller

APPEAL NO.: 05517

S. S. NO.:

EMPLOYER: Board of Education

L. O NO.: 1

APPELLANT: EMPLOYER

ISSUE: Whether the claimant was able to work, available for work, and actively seeking work within the meaning of Section 4(c) of the Law, and whether the Claimant is eligible for benefits within the meaning of Section 4(f)(3) of the Law.

NOTICE OF RIGHT OF APPEAL TO COURT

YOU MAY FILE AN APPEAL FROM THIS DECISION IN ACCORDANCE WITH THE LAWS OF MARYLAND. THE APPEAL MAY BE TAKEN IN PERSON OR THROUGH AN ATTORNEY IN THE CIRCUIT COURT OF BALTIMORE CITY, OR THE CIRCUIT COURT OF THE COUNTY IN MARYLAND IN WHICH YOU RESIDE.

THE PERIOD FOR FILING AN APPEAL EXPIRES AT MIDNIGHT March 5, 1983

– APPEARANCES –

FOR THE CLAIMANT:

Dorothy Muller - Claimant
Harriet Cooperman - Attorney

FOR THE EMPLOYER:

Charlie Spinner - Personnel Technician IV
James Phillips - Attorney
Raymond E. Banks - Personnel Division

EVIDENCE CONSIDERED

The Board of Appeals has considered all of the evidence presented, including the testimony offered at the hearings. The Board has also considered all of the documentary evidence introduced in this case, as well as Employment Security Admistration's documents in the appeal file.

FINDINGS OF FACT

The Claimant was employed as an Elementary Teacher by the Baltimore City Public Schools on November 5, 1975, Her last day of work was June 16, 1981. Prior to her last day of work, the Claimant requested and was granted a maternity leave of absence from March 16, 1981 through May 22, 1981. Her baby was born on April 9, 1981, she returned to work on May 25, 1981, and worked until June 16, 1981, which was the last day in the academic year.

On June 24, 1981, the Claimant requested another leave of absence for the period from September, 1981 through June, 1982, for the purpose of nurturing her baby. On August 21, 1981, a "Personal Business Leave of Absence" was granted in Writing effective from September 1, 1981 through June 30, 1982. The Claimant requested and was granted a leave of absence without pay. Whereupon, the employer replaced the Claimant with another teacher for the entire period of the leave of absence.

By letter dated March 9, 1982, to the employer, the Claimant sought to revoke the leave of absence and return to work prior to its expiration. She also requested to be transferred to a school in "the Northeast region" which was a school other than where she last worked. The employer had no work available for the Claimant at that time because her position had been filled for the balance of the unexpired leave of absence, and because of a subsequent freeze in hiring. To accomodate the Claimant nevertheless , the employer placed her name on the eligibility list in her area of certification, and she was assured that she would be allowed to revoke her leave prior to its expiration, when and if the need arose.

With this, the Claimant applied for unemployment insurance benefits claiming that she returned from a leave of absence and found that no work was available to her. (It is interesting to note that the Claimant's interview for unemployment benefits was conducted on March 8, 1982, while her letter seeking to revoke her leave was dated March 9, 1982.)

Be that as it may, the Claimant sought work with various employers as a teacher and in other fields. In her search for work, the Claimant informed prospective employers that she was presently on an unexpired leave of absence, and that she contemplated. returning to her teaching position at the expiration of the leave. The Claimant was unable to find work.

The leave of absence expired on June 30, 1982, which was during the summer recess when the Claimant customarily did not work However, in September, 1982, when the academic year began, the Claimant was not reinstated and her position was lost due to a reduction in force.

CONCLUSIONS OF LAW

Ordinarily when an individual leaves work voluntarily without a good cause attributable to the employer, and without valid circumstances , that individual is disqualified from receiving unemployment insurance benefits until the individual has become reemployed, has earnings equal to at least ten times her weekly benefit amount, and thereafter becomes unemployed through no fault of her own. However, the Board concludes that the Claimant's leave of absence did not constitute a sufficient act of "leaving work" to bring it within the disqualifying provisions of Section 6(a) of the Law. It has 'been said that the term "leaving work" refers only to an actual severance of the employment relation and does not include a temporary interruption in the performance of services . Kempfer, Disqualification for Voluntary Leaving and Misconduct, 55 Yale L. J. 142, 154. See also, Employment Security Administration v. Browning-Ferris , Inc., 292 Md. 515, 438 A2d 1356 (1982), holding that striking employees have not "left work" within the meaning of Section 6(a), Moreover, the requisite intent to leave work is lacking. Allen v. Core Target City Youth Program, 275 Md. 69, 383 A 2d 237 (1975).Thus, by requesting a leave of absence , the Board concludes that the Claimant aid not "leave work" and did not show an intent to "leave work" as that term has come to be defined in the Law.

As a condition for the receipt of unemployment insurance benefits nevertheless, an unemployed individual must be able to work and available for work in accordance with Section 4(c) of tire Law. That section of the Law provides that "the term available for work' shall mean, among other things that a claimant is actively seeking work." "(emphasis supplied) Thus , the Board concludes that there are additional factors to consider other than an active search for work, in determining whether a claimant is "available for work" within the meaning of Section 4(c) , The Board concludes further, that one such factor which should be considered is whether the claimant is presently on "a leave of absence from her usual position. It is also apparent to the Board that the question of whether one is "available for work" is not only a mere question of fact, but is also a question of law.

The Board has been unable to find authority from the Maryland Courts precisely on point on the question of whether a claimant is "available for work" where that claimant is denied reemployment prior to the expiration of a leave of absence. However, the weight of authority in other jurisdictions appears to answer the question in the negative. "A Claimant who takes a leave of absence without pay . . . under such circumstances that the employer and employee maintain a nominal relationship, with the employee contemplating re-employment at his old job, may be considered to be unavailable for work." 81 C.J.S., social

Security $259. In Southern Bell Telephone & Telegraph Company v. Department of Industrial Relations, 42 Ala. App. 351, 165 So 2d 128 (1964),—a Claimant requested and was granted a one year leave of absence and sought to return to work before the expiration of the leave, but the employer had no work available for her. She filed a claim for unemployment insurance benefits. The Court held that by voluntarily removing herself from the labor force for a specific period of time of her own choosing the claimant was not "available for work" within the meaning of the unemployment statute. See also, 51 A.L.R. 3d Unemployment Compensation, 254, 288.

The Board will adopt that attitude in this case. Although the Claimant was actively seeking work, the Board rejects her contention that she was "available for work" within the meaning of Section 4(c) prior to the expiration of the leave of absence. The Board feels that this result is especially appropriate where, as was the case here, the employer changed position in reasonable reliance on the leave of absence and replaced the Claimant with another employee. Having induced the employer to fill her job by voluntarily removing herself therefrom, the Claimant will not be heard to complain that she is "available for work" but simply can't find a job.

We hold that the Claimant, who voluntarily, and of her own choosing, removed herself from the work force, for a specific period of time, pursuant to a leave of absence, granted at her request was not "available for -work" within the meaning of Section 4(c) , prior to the expiration of the leave, where the employer has filled the Claimant's position.

Our holding is broader than the unavailability of the Claimant for work, for we hold that, during the summer recess after the expiration of the leave of absence there was a contract or a reasonable assurance within the meaning of Section 4(f)(3) of the Law, that the Claimant would perform services as a teacher at the start of the academic year. It is true that the written leave of absence does not promise, in so many words, that the Claimant would be reemployed after the leave. We think", however, that such a promise is fairly to be implied. It is settled law that "A promise may be lacking, and yet the whole writing may be instinct with an obligation imperfectly expressed. If that is so, there is a contract." See Simpson Contracts 2d Ed., p. 94 citing the seminal case Wood v. Lucy Lady Duff Gordon 222 N.Y. 88, 118 N.E. 214 (1917). Under the circumstances we hold that the granting of a written and requested leave of absence, for a specific period of time ipso facto, was a promise to reemploy at the next regular work day. It makes no difference that the Claimant's efforts to revoke the leave prior to its expiration were unsuccessful. we hold that there was a contract, a promise, or at least, "reasonable assurance" (which need not be a guarantee) 'between two academic years that the Claimant would perform services at the beginning of the next academic year. Indeed, we note, the Claimant herself was assured of her position for in her search for work, she told prospective employers that she contemplated a return to her teaching position at the expiration of her leave.

Nevertheless , despite assurances and promises, the Claimant was not reemployed at the start of the next academic year and she lost her job. We conclude that, at that time, the Claimant became entitled to unemployment insurance benefits. Benefits will be allowed as of that date.

DECISION

The Claimant was not available for work within the meaning of Section 4(c) from September 1, 1981, through June 30, 1982. Benefits are denied during that period of time.

The Claimant had a contract or reasonable assurance , under Section 4(f)(3) of the Maryland Unemployment Insurance Law of performing services for an educational institution in the academic year beginning September, 1982. She is disqualified from receiving benefits based on service with the Baltimore City Board of Education from June 30, 1982 and until the beginning of the academic year in September, 1982.

The Claimant was discharged, but not for gross misconduct or misconduct connected with the work within the meaning of Section 6(b) or 6(c) of the Law. Benefits are allowed from the week beginning September 5, 1982.

The decision of the Appeals Referee is reversed.

Maurice E. Dill
Associate Member

Hazel A. Warnick
Associate Member

W:D
kmb
DATE OF HEARING: November 30, 1982

COPIES MAILED TO:

CLAIMANT

EMPLOYER

Harriet E. Cooperman, Esquire

James N. Phillips, Esquire

UNEMPLOYMENT INSURANCE - BALTIMORE