COMMONWEALTH OF VIRGINIA
VIRGINIA EMPLOYMENT COMMISSION

ABLE & AVAILABLE: 235.4
Pregnancy.

DECISION OF COMMISSION

In the Matter of

Janice Charlene Davis, Claimant
Interstate Claim - Illinois
[redacted]

Washington Naval District
Washington Navy Yard
Washington, D. C.

Employer

Date of Appeal To Commission: May 31, 1974

Date of Hearing: June 20, 1974

Decision No.: UCFE-219

Date of Decision: July 23, 1974

Place: Richmond, Virginia

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This is a matter before the Commission on appeal by the claimant from the decision of the Examiner (No. UCFE-74-41) dated May 24, 1974.

ISSUE

Has the claimant been able and available for work for the weeks she claimed benefits within the meaning of § 60.1-52 (g) of the Code of Virginia (1950), as amended?

FINDINGS OF FACT AND OPINION

The findings of fact by the Appeals Examiner are adopted by the Commission.

The record reveals that on November 14, 1973 the claimant made the following statement:

> "I am not able to work at the present time. I am to go to the doctor tomorrow for an examination at which time I will learn if I am physically able to work. I will bring a statement from my doctor when I again report."

Apparently the claimant never submitted the above-mentioned physician's statement prior to herappeal to the Commission. The Commission, by letter

dated June 25, 1974, granted the claimant the opportunity to submit the physician's statement. However, no statement has been received.

Section 60.1-52 of the Virginia Unemployment Compensation Act, among other things, states that "an unemployed individual shall be eligible to receive benefits with respect to any weeks only if the Commission finds that:

> the claimant is (g) . . . able to work, and is available for work."

There is no disqualifying provision in the Virginia Unemployment Compensation Act because of pregnancy.

In numerous cases, state unemployment insurance laws which provided that pregnant women were either disqualified or ineligible for benefits for specified periods before and after childbirth were held to be unconstitutional and void under the equal protection clause of the federal constitution.

The Washington Supreme Court in the case of Linda M. Hanson, et al. v. R. W. Hutt, No. 42826, 12/20/73, held that the provisions of the Washington law which provided that "a pregnant woman shall be disqualified from receiving benefits for any calendar week during the period beginning with the seventeenth calendar week immediately preceding the expected date of confinement, as determined by a doctor, and extending through the sixth calendar week immediately following the week in which childbirth occurs" was unconstitutional. In its opinion the Court noted and refuted the traditional arguments advanced to justify the disqualification of pregnant women.

> "Appellant has attempted to justify the statutory classification by asserting that pregnant women are not genuinely attached to the labor market. To the contrary, however, all five doctors who testified at the Commissioner's hearing concluded that 90 percent of pregnant women do not suffer from medical conditions that would impair their ability to continue working in their normal occupation. They also testified that most women can return to their jobs between 5 days and 4 weeks after delivery, the exact time depending on the individual woman. There is ample evidence to support the trial court's finding that pregnant women are attached to the labor market and that there is no medical basis in fact for their disqualification.
>
> Appellant argues that employers are reluctant to hire women in the latter stages of pregnancy. However, the attitude of potential employers is not

> an appropriate rationale to use as a basis for disqualifying a class of claimant for unemployment insurance. RCW 50.20.010 sets forth the conditions a claimant must meet to be eligible for unemployment compensation. None refers to employer attitude.
>
> Next, appellant urges that pregnant women cause or contribute to their own unemployment by the voluntary act of becoming pregnant. Assuming arguendo that pregnancy is voluntary, this does not mean that unemployment resulting therefrom is necessarily voluntary. While a woman may wish to become pregnant, she may not, and often does not, wish to become unemployed as a result thereof."

Similarly, provisions of the Wisconsin unemployment insurance law that provide that a pregnant woman will be deemed unavailable for work and ineligible for benefits for a period beginning ten weeks before the week of expected date of childbirth and ending four weeks after the week in which the birth takes place were found to be unconstitutional by the court in two cases: Catherine Heier v. DILHR and St. Vincent Hospital; Glenda J. Lathrop v. DILHR and Milwaukee Symphony Orchestra, Inc., Wisconsin Circuit Court, Nos. 139-064, 140-209, 9/4/73 reported in C. C. H. Unemployment Insurance Reporter at page 52,669. In discussing the need to determine the availability of pregnant claimants on an individual case by case method the Court stated:

> ". . . the treatment of pregnancy in other cultures shows that much of our society's views concerning the debilitating effects of pregnancy are more a response to cultural sex-role conditioning than a response to medical fact and necessity . . . Indeed, a realistic look at what women actually do even in our society belies the belief that they cannot generally work throughout pregnancy. . . Nevertheless, the belief that pregnant women are disabled for substantial periods results in their being denied the opportunity to work, unemployment compensation benefits designed to aid those able to work, and—because of the belief that they will submit large claims—disability insurance benefits. . . Thus, the apparently solicitous attitude that pregnant women are in a 'delicate condition' has the effect that they often cannot earn an income or obtain the usual social welfare benefits for the unemployed. The only way to assure that this irrational result is not simply the product of mistaken stereotypical beliefs is to require, as the equal protection clause does, that each pregnant woman be considered individually . . ." (Emphasis added, citations deleted)

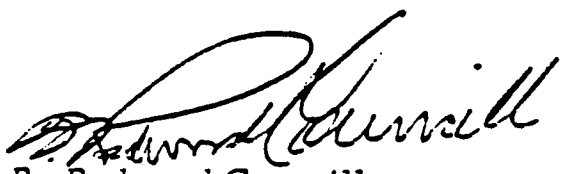
Thus each case and every issue must be determined individually and on its own merits. Pregnancy is a factor to be considered in determining whether a claimant is able to work. In each individual case when pregnancy is involved, the Deputy, the Appeals Examiner, or the Commission must determine on the basis of the facts whether the pregnancy has rendered the individual claimant unable to work. Obviously, medical information relating to the claimant is important. If the facts indicate that the pregnancy is normal and has not rendered the claimant unable to work, it should be determined whether the individual has demonstrated her availability for work by an active and earnest search for work as is required of any claimant.

In the present case, the claimant's own statement raised an issue concerning her ability to work, as distinguished from her availability for work and thus her eligibility for unemployment compensation. The claimant failed to present any statement from her physician. Since the burden is upon the claimant to prove that she was meeting the eligibility requirements of the Act, the Commission can only conclude that the claimant has not met the eligibility requirements of the Act from November 4, 1973, through December 22, 1973. More specifically the claimant failed to show that she was able to work during the weeks claimed.

Although the Commission affirms the Appeals Examiner's decision on the basis of the facts in the present case, the Commission expressly vacates the opinion expressed in Commission Decision No. 3230-C dated June 4, 1958.

DECISION

The decision of the Appeals Examiner is affirmed.



B. Redwood Councill
Assistant Commissioner