

Diligent Search for Work

Shaun M. Aulita, M.A., CRC, CLCP
Certified Rehabilitation Counselor
Certified Life Care Planner



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MANAGEMENT SERVICES INC.

www.lmscorp.net
(888) 348-7398

Before the Search: Disability Defined

“Disability” means incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment; but such term shall mean permanent impairment, determined (to the extent covered thereby) under the guides to the evaluation of permanent impairment promulgated and modified from time to time by the American Medical Association, in the case of an individual whose claim is described in section 910(d)(2) of this title.”

33 USC § 902 (10)

Following Disability: The Search for Work

Once the claimant establishes that (s)he is unable to perform usual work, the burden shifts to the employer to demonstrate the availability of realistic job opportunities within the geographic area where the claimant resides, which the claimant, by virtue of their age, education, work experience, and physical restrictions, is capable of performing.

An employer may meet this burden by the submission of expert vocational report and testimony that suitable alternative employment is available in the geographic region where the claimant resides, and overseas if the claimant was working as a defense contractor at the time of injury.

The burden returns to the claimant to establish that (s)he has diligently sought jobs such as those identified by the employer without success. **If the claimant has diligently sought such work without success, the claimant may establish entitlement to benefits.**

New Orleans (Gulfwide) Stevedores, Inc. v. Turner, [661 F.2d 1031](#), 1038, 14 BRBS 156 (5th Cir. 1981); *Odom Construction Co. v. U.S. Dept. of Labor*, [622 F.2d 110](#), 115, 12 BRBS 396 (5th Cir. 1980), *cert. denied*, [450 U.S. 966](#), 67 L. Ed. 2d 614, 101 S. Ct. 1482 (1981), *Elliott v. C&P Telephone Co.*, 16 BRBS 89 (1984).

Diligent Defined

The Fifth Circuit defined a diligent job search as when a claimant seeks employment "...in a manner normally pursued by a person genuinely seeking work with his determined capabilities."

New Orleans (Gulfwide) Stevedores v. Turner

Black's Law Dictionary defines "diligent" as "attentive and persistent in doing a thing; steadily applied; active; sedulous; laborious; unremitting; untiring."

Black's Law Dictionary (5th Ed. 1979)

What is NOT Diligent?

- **Refusing a lower paying job**, *Dove v. Southwest Marine of San Francisco*
- **Refusal to cooperate with employer's vocational rehabilitation consultant**, *Vogle v. Sealand Terminal, Inc.*
- **Exhibiting a negative and abrasive attitude to post-injury employers**, *Wilson v. Dravo Corp.*
- **Routinely applying for jobs for which one is not qualified, exaggerating medical weaknesses such as using crutches when none were required, not emphasizing strong skills or points, unwillingness to work weekends/mornings, failure to follow up on applications**, *Wilson v. Virginia International Terminals*
- **Reluctance to accept employment outside one's craft for fear of forfeiting fringe union benefits**, *New Orleans (Gulfwide) Stevedores v. Turner*
- **Failing to submit applications to employers contacted**, *M.A. v. Northrop Grumman*
- **Contacting employers only to meet search requirements for unemployment, failing to list relevant information in job search log, sending applications to incorrect addresses, seeking jobs outside of physical limitations, lack of follow up with employers**. *Harrell v. Newport News Shipbuilding & Dry Dock Co.*

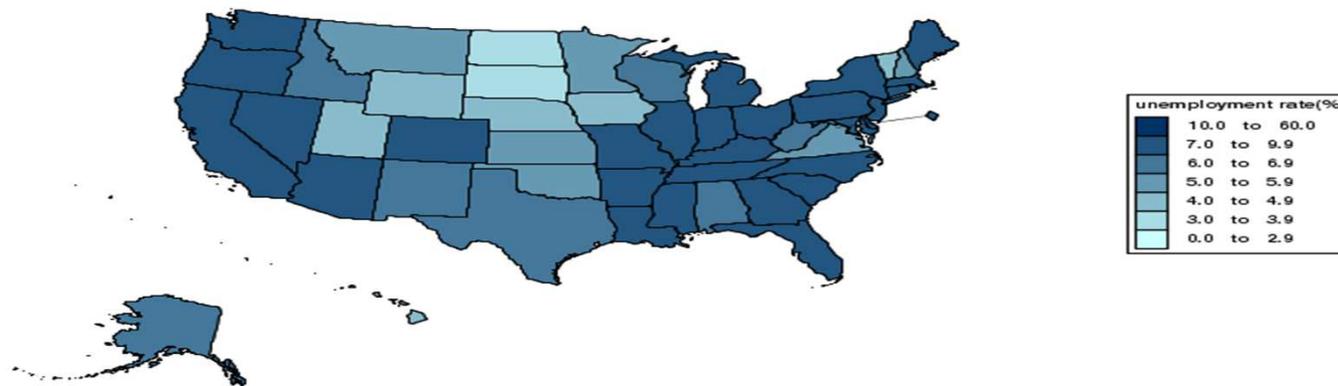
What is NOT Diligent (cont.)?

- **Diligently seeking skilled positions but not applying for unskilled positions**, *Jackson v. Christina Service Co.*
- **Failure to file employment applications, emphasizing restrictions to prospective employers, failure to follow medical advice to make more employable**, *Stuart v. Ingalls Shipbuilding, Inc.*
- **Failure to promptly respond to job opportunities when presented, displaying an offensive attitude - refusal to interview on day after a holiday, lack of proactivity to pursue additional adult education/GED**, *Simmons v. ITO Corp.*
- **Only applying for one job through the union**, *Blackwell v. Ingalls Shipbuilding, Inc.*
- **Limiting the job search to a small geographic area**, *Darden v. Newport News Shipbuilding & Dry Dock Co.*
- **Failure to apply for jobs in employer's labor market survey**, *LaRosa v. King & Co.*
- **Refusal to consider jobs that could result in loss of longshoreman status**, *Rhine v. Stevedoring Services of America*
- **No effort to contact potential employers until receipt of labor market surveys shortly before trial**,
Christian v. Service Employers International, Inc.
- **Seeking four jobs in four years**, *Brown v. Marine Terminals*

Diligent Search for Work or Just Diddling Around By Paul B. Howell, Franke & Salloum

Challenges: Unemployment

Unemployment rates by State, seasonally adjusted, August 2013



LONG-TERM UNEMPLOYMENT IN THE US *In millions*

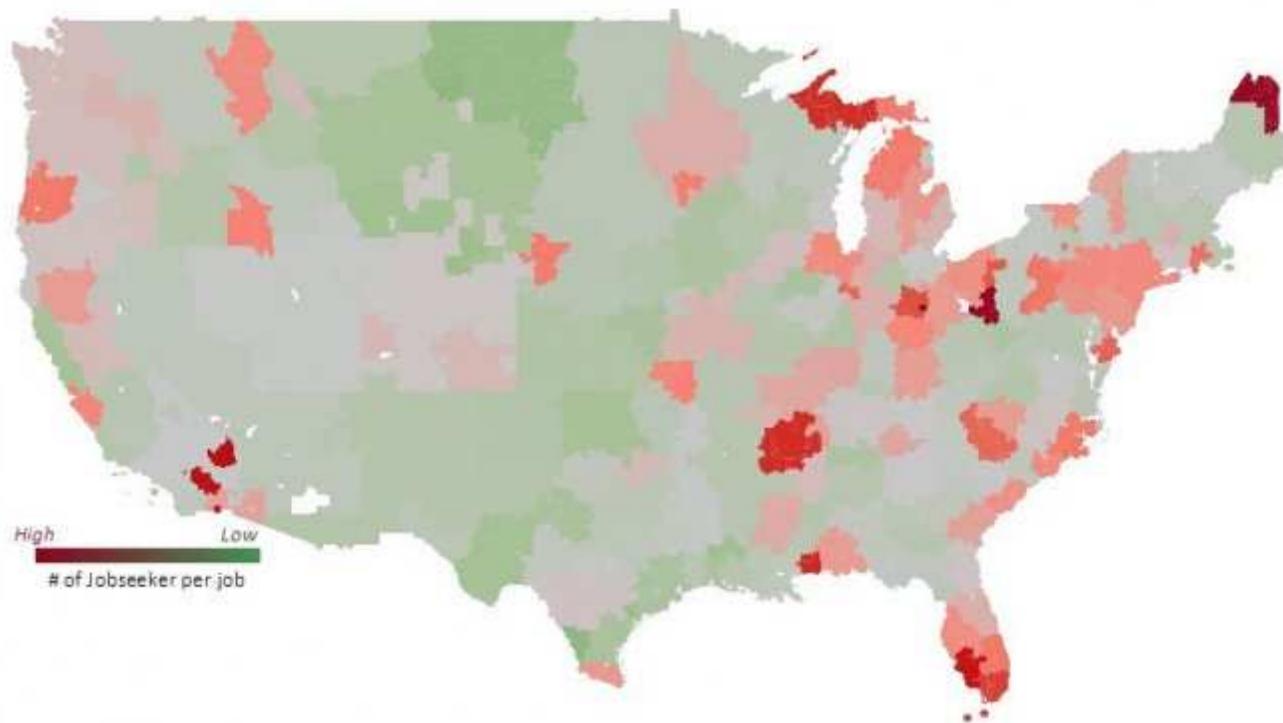


SOURCE: Labor Department.

PATRICK GARVIN/GLOBE STAFF

Challenges: Location, Location, Location

Red areas indicate a high number of people looking relative to jobs available. Green areas have plenty of jobs but fewer candidates. Moving just a short distance can make a difference.



More Challenges & Information

- Challenges include gaps in employment as a result of injury. With the present labor market, gaps are more common than in the past.
- Many employers have a long hiring process, particularly defense contractors. Patience is important.
- Opiate drugs and tobacco use may be red flags for prospective employers.
- Baby boomers (those born between 1946 and 1964) are completely redefining the meaning of age in the workplace and thus older workers should theoretically have a lot fewer problems finding new jobs than in the past. The critical issues are that the applicant has the skills, education, and experience that the employer seeks, and whether all those are current. Attitude is important. Employers want team players, not one who knows all the answers and is unwilling to change.
- Every job search is different. Variables that influence job availability include the demand for a particular skill set and geographical location.

Proactivity is Key in Labor Market Search

- Resumes and applications are primarily electronic. It is important for claimants to tailor applications to individual jobs posted and not send out a mass email (which may be several hundred in one email). These rarely result in an interview and is not a diligent search. This is the lazy labor market search.
- Question methods used in job search. Applicants should go directly to a company's web site to present application. Job ads are not the only link to employment.
- Question if a claimant uses social media such as LinkedIn (with 240 million users around the world). It is important that individuals not place unfavorable pictures on Facebook or other social media that could influence employment.
- Question if a claimant uses networking functions such as job fairs.
- When an individual obtains an interview, question if there was follow up with an employer after the interview. This is an important function to remain "at the top of the list" of viable applicants.
- Question if the individual has taken time to update skills such as Microsoft Office applications, or obtained additional education. These services are often offered at no cost.
- Question if the claimant takes advantage of community services to assist in resume preparation and interviewing, such as that offered at no charge at many libraries.
- Question if the claimant has checked job boards or contacted head hunters/recruiters.

Finding a job is a full time job. Applicants should put as much time as possible in job search.

References

- Quintessential Careers: 15 Myths and Misconceptions About Job-Hunting http://www.quintcareers.com/job-hunting_myths.html
- Bureau of Labor Statistics <http://www.bls.gov/>
- Diligent Search for Work or Just Diddling Around <http://www.lexisnexis.com/legalnewsroom/workers-compensation/b/recent-cases-news-trends-developments/archive/2011/10/14/diligent-search-for-work-or-just-diddling-around.aspx>
- *Black's Law Dictionary* (5th Ed. 1979)
- Improving Unemployment By Leveraging “Adjacencies” <http://info.theladders.com/our-team/improving-unemployment-by-leveraging-adjacencies>

Thank You!

Shaun Aulita, M.A., CRC, CLCP

Labor Management Services

954-597-6600 (Direct)

888-348-7398 (Referrals)