

2255.

EMPLOYMENT—WHERE PERSON PERFORMS SERVICE FOR ONE OR MORE PRINCIPALS— COMPENSATED ON AMOUNT OF GOODS SOLD OR RESULTS ACHIEVED — COMMISSION BASIS—WHERE NOT OBLIGATED TO DEVOTE ANY MORE TIME OR EFFORT THAN HE MAY CHOOSE—SUCH SERVICE NOT EMPLOYMENT WITHIN MEANING OF UNEMPLOYMENT COMPENSATION ACT.

SYLLABUS:

Service performed by a person for one or more principals for which service such person is compensated on a commission basis calculated on the amount of goods sold or on the results achieved, is not employment within the meaning of the Unemployment Compensation Act, where such person in the performance of such service is not obligated to devote any more time or effort than he chooses in the rendition of such service.

Columbus, Ohio, May 10, 1940.

Hon. H. C. Atkinson, Administrator,
Bureau of Unemployment Compensation,
Columbus, Ohio.

Dear Sir:

This will acknowledge receipt of your recent communication, which reads as follows:

"In view of the Supreme Court decision in the case of Bowman vs Atkinson, Administrator of Bureau of Unemployment Compensation, I respectfully request your interpretation of Section 1345-1(c) (E) (7), Ohio General Code, which reads:

'The term employment shall not include service performed by an individual for one or more principals who is compensated on a commission basis, and who in the performance of the work is master of his own time and efforts, and whose remuneration is wholly dependent on the amount of effort he chooses to expend.'

The case of Bowman v. Atkinson, to which you refer in your letter, was decided by the Supreme Court of Ohio on April 10, 1940 (136 O. S. 495). In said case a petition was filed alleging, in substance, that the plaintiff in 1936 authorized one D. C. to represent him in the sale of pottery; that D. C. was granted certain territory and was not required to devote any stated amount of time or effort to sell plaintiff's pottery; that under the terms of the agreement between plaintiff and D. C., D. C. was to receive a commission on the goods he chose to sell for plaintiff; that D. C. was not bound to sell anything for plaintiff, or if he did, was not bound to conduct his operations in any particular manner; that plaintiff did not supervise D. C., and that D. C. owed no duty to obey any orders of plaintiff.

The petition further alleged that in April, 1939, D. C. refused to represent plaintiff further and applied for unemployment compensation, thereby precipitating a threat by the defendant, Mr. Atkinson, Administrator of the Bureau of Unemployment Compensation, to levy upon the plaintiff contributions to the said fund with respect to commissions previously paid to D. C. and to charge to the account of plaintiff all unemployment compensation paid to D. C. The petition then concluded with a prayer for a writ prohibiting the levying of such contributions or charging such compensation. To said petition a demurrer was filed which raised the question of whether or not contributions were due the fund from the plaintiff for which the administrator could make a levy.

The provisions of law with respect to contributions to the fund by employers is set forth in section 1345-4 of the General Code, which section reads in part as follows:

"(a) (1) On and after December 21, 1936, contributions shall accrue and become payable by each employer for each calendar year in which he is subject to this act, with respect to wages payable for employment (as defined in section 1345-1) occurring during such calendar year."

It will be noted from the above that contributions to the fund are due only "with respect to wages for employment (as defined in section 1345-1)." The material portion of section 1345-1, General Code, referred to, is quoted in your letter. Therefore, the real question of law raised by the demurrer to the petition was as stated by the court:

"Is a person who sells goods for another and who is compensated therefor by commissions calculated on the amount of goods sold, an employee within the meaning of the Ohio Unemployment Compensation Act, where such person is subject to no direction or control from the person for whom he sells and is not obligated to devote any time to such selling operations unless he so chooses?"

If the court had decided that the answer to the above question should have been in the affirmative, obviously, under the provisions of section 1345-4, *supra*, the plaintiff would have been required to contribute to the fund and the administrator of the Bureau of Unemployment Compensation would likewise have been required to levy such contributions against the plaintiff. Clearly, in such case, the court would have denied the writ of prohibition prayed for. It therefore follows that the court by allowing the writ which prohibits the administrator from levying contributions against the plaintiff must necessarily have determined that D. C. was not an employe within the meaning of the Unemployment Compensation Act.

It is consequently my conclusion that the language of section 1345-1, General Code, which you set forth in your letter, has been definitely interpreted by the Supreme Court of Ohio and that in doing so, said court definitely passed on both the questions of law and fact presented in the above case, any other opinions or statements to the contrary notwithstanding.

Doubt as to the proper interpretation of the language in question may have arisen in your mind due to the misconception in some quarters that section 1345-1c (D), General Code, is in *pari materia* therewith.

The question of whether or not these two subsections should be construed one with the other was answered in an opinion rendered by my predecessor to the then chairman of the Unemployment Compensation Commission, on November 18, 1937 (Opinions of the Attorney General, 1937, page 2469). In said opinion it was held:

"Sub-paragraph (D) of Section 1345-1, General Code, paragraph c, defining services which constitute 'employment' within the meaning of the term as used in the Unemployment Compen-

sation Act, does not qualify the services tabulated under sub-paragraph (E) of such section, which services are not included within the meaning of the term 'employment' as used in such act."

It was further stated therein:

"Examining the various provisions in Section 1345-1, paragraph c, we find in paragraph c and in sub-paragraphs (A) to (D) certain general definitions of what the term 'employment' shall include within the meaning of the Unemployment Compensation Act. Sub-paragraph (D), accordingly, deals with services which are defined as 'employment' and within the act. Such paragraph, however, provides in substance that when 'shown to the satisfaction of the commission' that certain stated conditions prevail, such services, although 'employment' shall nevertheless not be subject to the act. ***

Sub-paragraph (E) of such Section 1345-1, General Code, under paragraph c 'employment,' on the contrary does not deal with services which constitute 'employment' within the meaning of the term as used in the act but which may nevertheless be exempt from its provisions upon your commission being satisfied as to certain phases or conditions of the employment. Such sub-paragraph (E) deals with and defines services which are not 'employment' at all, such as 'agricultural labor, domestic service in a private home, service performed as an officer or member of the crew of a vessel on the navigable waters of the United States,' etc. *In each of these listed kinds of services set forth under sub-paragraph (E), the legislature has expressly said that such services shall not be included in the term 'employment' as used in the act.* They are obviously not employment at all in so far as the Unemployment Compensation Act is concerned." (Emphasis mine.)

In view of the above, you are therefore advised that, in my opinion, service performed by a person for one or more principals for which service such person is compensated on a commission basis calculated on the amount of goods sold or on the results achieved, is not employment within the meaning of the Unemployment Compensation Act, where such person in the performance of such service is not obligated to devote any more time or effort than he chooses in the rendition of such service.

Respectfully,

THOMAS J. HERBERT,
Attorney General.