

0015 0839 71 (Oct. 29, 2015) – Without employer evidence showing that adjunct professor has been paid substantially similar wages for each course in prior academic terms, claimant’s undisputed testimony that his salary can and has been reduced due to low enrollment raised a question as to whether he would be employed under economic terms that were substantially lower. He did not, therefore, have reasonable assurance.

Board of Review
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Issue ID: 0015 0839 71
Claimant ID: 141687

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The claimant appeals a decision by a review examiner of the Department of Unemployment Assistance (DUA), to deny unemployment benefits. We review, pursuant to our authority under G.L. c. 151A, § 41, and reverse.

The claimant separated from his position with the employer and re-opened an existing claim for benefits, effective December 14, 2014. In a determination issued on February 19, 2015, the DUA disqualified the claimant from receiving benefits during the period of December 14, 2014, through January 17, 2015. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, attended only by the claimant, the review examiner affirmed the agency’s initial determination and denied benefits in a decision rendered on April 14, 2015. We accepted the claimant’s application for review.

Benefits were denied after the review examiner determined that the claimant had reasonable assurance of re-employment in the subsequent academic period and, thus, was disqualified, under G.L. c. 151A, § 28A. After considering the recorded testimony and evidence from the hearing, the review examiner’s decision, and the claimant’s appeal, we afforded the parties an opportunity to submit written reasons for agreeing or disagreeing with the decision. Neither party responded. Our decision is based upon our review of the entire record.

The issue before the Board is whether the review examiner’s conclusion that the claimant had reasonable assurance of re-employment for the spring 2015 semester, since he had taught classes for the employer in each semester since 2005, is supported by substantial and credible evidence and is free from error of law, where the offer of re-employment was subject to a contingency and the record lacks evidence that, despite the contingency, the claimant could reasonably expect to be re-employed under substantially similar economic conditions in the spring 2015 semester.

Findings of Fact

The review examiner's findings of fact and credibility assessments are set forth below in their entirety:

1. On May 15, 2014, the claimant filed an initial claim for unemployment benefits, which was effective on May 11, 2014.
2. The Base Period of the claimant's claim is from April 1, 2013 through March 31, 2014.
3. During the Base Period of his claim, the claimant worked for two employers, one of which is the employer in this case. Both of the employers are educational institutions.
4. The claimant reopened his unemployment claim effective with the week beginning December 14, 2014.
5. The claimant has worked part time as an adjunct faculty member for the employer, a college, since 2005.
6. The claimant typically teaches English courses.
7. As of 2015, the claimant was being paid \$3,573.00 per course.
8. As an adjunct faculty member, the claimant is not guaranteed work from the employer for each semester.
9. The employer's full time faculty members select their courses prior to the adjunct faculty members.
10. Prior to the start of each semester, adjunct faculty members like the claimant are required to fill out a teaching availability form indicating the times the member is available to work and the courses they are open to teaching.
11. The employer offers adjunct faculty members courses for the upcoming semester based on their availability form.
12. The claimant submits the availability form to the Faculty and Instruction Department.
13. The claimant then customarily contacts the Dean who tells the claimant tentatively what courses he will be teaching.
14. Courses can be cancelled a week prior to the start of the semester or after that for several reasons including, but not limited, to low enrollment in the course or for budgetary reasons.

15. The employer does not send the claimant Faculty Contracts for him to sign until after the start of the semester.
16. The claimant has customarily taught about three courses a semester for the employer.
17. There have been no semesters in which the claimant has not taught any classes for the employer.
18. The fall 2014 semester began on September 2, 2014.
19. During the fall 2014 semester, the claimant taught three courses.
20. The fall 2014 semester ended on December 17, 2014.
21. Prior to the start of the Spring 2015 semester, the claimant submitted a Teaching Availability Form for that semester to the employer. The Form indicated that the claimant was available to teach English Composition I and II on Tuesdays from 8:00 AM to 1:45 PM and on Thursdays from 8:00 AM to 1:45 PM.
22. On January 10, 2015, the employer's Dean sent the claimant an email message stating that she would like to offer the claimant three English courses for the Spring (2015).
23. The Spring 2015 semester began during the week ending January 17, 2015.
24. During the Spring 2015 semester, the claimant ended up teaching only two classes because of reasons unrelated to the claimant.
25. On February 11, 2015, the employer e-mailed the claimant a Faculty Contract indicating the two courses he was teaching in the Spring 2015 semester and his salary for each of those courses.
26. Since 2005 and continuing as of the date of the hearing (March 24, 2015), the claimant has also worked part time as an adjunct faculty member for another employer, a college.
27. On February 19, 2015, the Department of Unemployment Assistance (DUA) issued a Notice to Claimant of Disqualification. The Notice stated, "It has been established that you have performed services for an educational institution prior to a customary vacation period of holiday recess, are seeking benefits for one or more weeks commencing during an established and customary vacation period or holiday recess and there is reasonable assurance that you will be returning to work following this customary vacation period or holiday recess. Therefore, you may not receive a benefit based on wages

earned working for an educational institution for weeks commencing during the established and customary vacation period or holiday recess”.

28. The Notice stated, “Inasmuch as you have no wages earned working for other than an educational institution or insufficient such (sic) wages to meet eligibility requirements of M.G.L. chapter 151A, s. 24(a), you are not eligible to receive benefits for the period beginning 12/14/2014 and through 1/17/2015”.

Ruling of the Board

In accordance with our statutory obligation, we review the decision made by the review examiner to determine: (1) whether the findings are supported by substantial and credible evidence; and (2) whether the review examiner’s ultimate conclusion is free from error of law. After such review, the Board adopts the review examiner’s findings of fact and credibility assessment except as follows. We accept Finding of Fact # 7 to the extent that the claimant was being paid \$3,573.00 per course based upon full student enrollment. In adopting the remaining findings, we deem them to be supported by substantial and credible evidence. However, as discussed more fully below, we reject the review examiner’s legal conclusion that the claimant had reasonable assurance of re-employment for the subsequent academic period, pursuant to G.L. c. 151A, § 28A.

Since the claimant’s adjunct instruction services were performed for an educational institution, his eligibility for benefits is subject to G.L. c. 151A, § 28A, which states in relevant part, as follows:

Benefits based on service in employment as defined in subsections (a) and (d) of section four A shall be payable in the same amount, on the same terms and subject to the same conditions as benefits payable on the basis of other service subject to this chapter, except that:

(a) with respect to service performed in an instructional . . . capacity for an educational institution, benefits shall not be paid on the basis of such services for any week commencing during the period between two successive academic years or terms . . . to any individual if such individual performs such services in the first of such academic years or terms and if there is a contract or a reasonable assurance that such individual will perform services in any such capacity for any educational institution in the second of such academic years or terms . . .

The review examiner concluded that the claimant had reasonable assurance of re-employment for the spring, 2015, semester based upon his history of teaching “about three classes” for the employer in every semester since 2005 and the fact that, prior to the spring, 2015, semester, the employer was following its usual routine of having the Dean contact the claimant prior to the beginning of the term with a tentative offer of courses he will be teaching. While we agree that this pattern demonstrates a reasonable likelihood that the claimant would perform adjunct teaching services again in the spring semester, we do not agree that it satisfies the “reasonable assurance” requirement.

As the examiner found, the claimant is not guaranteed work every semester and courses can be cancelled for several reasons, including, but not limited to, low student enrollment. (Findings of Fact # 8 and # 14.) In Board of Review Decision 0002 1339 03 (May 12, 2014)¹, we held that an offer of re-employment as an adjunct professor that included a contingency did not, in and of itself, preclude the possibility of reasonable assurance. Following guidance offered by the U.S. Department of Labor (DOL) in its Unemployment Insurance Program Letter (UIPL) No. 4-87 (Dec. 24, 1986), we stated that such a contingent offer could provide reasonable assurance if the employer showed that the circumstances underlying the contingency are not within its control, and that, despite the contingency, the claimant is likely to perform services in the following academic period under substantially similar economic terms and conditions to those that existed in the prior academic period.

It is self-evident that the circumstance of insufficient student enrollment is not within the employer's control. Findings of Fact # 16 and # 17 further establish that the claimant normally teaches about three courses during the spring semester. However, during the hearing, the claimant testified that his salary can be prorated based upon the number of students enrolled and that his salary can and has been reduced after the week when students are permitted to add or drop courses without penalty.² This testimony and the absence of any employer evidence to the contrary mean that the \$3,573.00 salary per course in Finding of Fact # 7 is qualified. Had the employer participated in the hearing and presented evidence demonstrating that, notwithstanding the possibility of a reduced salary, the claimant's offered salary has historically not been reduced, we may have reached a different result. In the absence of such evidence, we cannot conclude that the economic terms offered to the claimant for the spring, 2015, semester were reasonably likely to materialize; hence, we cannot conclude that the claimant had a reasonable assurance of a job under substantially similar economic terms to those of his prior academic year or term.

We, therefore, conclude as a matter of law that the employer has not established that the claimant had reasonable assurance of re-employment, within the meaning of G.L. c. 151A, § 28A, for the spring, 2015, semester.

¹ Board of Review Decision 0002 1339 03 is an unpublished decision, available upon request. For privacy reasons, identifying information is redacted.

² The claimant's testimony about his salary being contingent upon enrollment, while not explicitly incorporated into the review examiner's findings, is part of the unchallenged evidence introduced at the hearing and placed in the record, and it is thus properly referred to in our decision today. See Bleich v. Maimonides School, 447 Mass. 38, 40 (2006); Allen v. Michigan, Inc. v. Deputy Dir. of Department of Employment and Training, 64 Mass. App. Ct. 370, 371 (2005).

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the period beginning December 14, 2014, through January 17, 2015, if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - October 29, 2015



Paul T. Fitzgerald, Esq.
Chairman



Judith M. Neumann, Esq.
Member

Member Stephen M. Linsky, Esq. did not participate in this decision.

**ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS STATE DISTRICT
COURT OR TO THE BOSTON MUNICIPAL COURT
(See Section 42, Chapter 151A, General Laws Enclosed)**

The last day to appeal this decision to a Massachusetts District Court is thirty days from the mail date on the first page of this decision. If that thirtieth day falls on a Saturday, Sunday, or legal holiday, the last day to appeal this decision is the business day next following the thirtieth day.

To locate the nearest Massachusetts District Court, see:
www.mass.gov/courts/court-info/courthouses

Please be advised that fees for services rendered by an attorney or agent to a claimant in connection with an appeal to the Board of Review are not payable unless submitted to the Board of Review for approval, under G.L. c. 151A, § 37.

AB/rh