0016 2670 84 (Jan. 29, 2016) – The employer bears the burden of proving that a claimant had reasonable assurance of re-employment under G.L. c. 151A, § 28A. Here, the employer did not present historical evidence demonstrating a long-term pattern of hiring the adjunct professor to teach 2 courses every fall and 4 courses every spring term. Therefore, its offer of 2 courses for the fall semester did not constitute reasonable assurance.

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Issue ID: 0016 2670 84
Claimant ID: 1601269

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 on May 15, 2015. He reopened a claim for unemployment benefits with the DUA, but was denied for the period May 17, 2015, through September 5, 2015, in a determination issued on June 10, 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 determination and denied benefits in a decision rendered on August 11, 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 term 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, pursuant to G.L. c. 151A, § 28A, is supported by substantial and credible evidence and is free from error of law, where the employer's offer of re-employment was under substantially lower economic terms than in the previous academic term.

Findings of Fact

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

1. The claimant filed a claim with an effective date of November 30, 2014.

2. The claimant worked for two employers, one of which was the employer in this case, during the Base Period of the claim (from October 1, 2013 through September 30, 2014).

3. The claimant reopened his claim for benefits effective May 17, 2015.

4. The employer is an educational institution. The other Base Period employer is not an educational institution.

5. The claimant has worked part time as an adjunct instructor for the employer, a college, since September 2011.

6. The employer customarily runs a fall semester, a shorter winter term (about a month long), a spring semester, and a shorter summer term (from the beginning of June until about mid-August).

7. Adjunct instructors like the claimant complete and submit eligibility forms to the employer indicating their availability to teach in the upcoming semesters and terms.

8. The claimant customarily indicates he is available to teach during each semester or term.

9. In the fall of 2014, the claimant taught two courses.

10. In January 2015, the claimant completed an availability form for the 2015 summer session and the fall 2015 semester. On that form, the claimant indicated he was available to teach any time.

11. The claimant taught four courses in the semester beginning in January 2015 and ending on May 15, 2015.

12. On or about May 15, 2015, the employer offered the claimant a contract to teach two classes in the fall of 2015.

13. On or about May 15, 2015, the claimant accepted the offer to teach two classes in the fall of 2015, beginning on September 8, 2015.

14. The employer did not offer the claimant any classes for the summer of 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. Upon such review, the Board adopts the review examiner's findings of fact and deems them to be supported by substantial and credible evidence. However, as discussed more fully below, we disagree with the review examiner's legal conclusion that the claimant was disqualified from receiving benefits, pursuant to G.L. c. 151A, § 28A.

As an adjunct professor for an educational institution, the claimant's eligibility for unemployment 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; . . .

Before a claimant may be disqualified from receiving benefits, pursuant to G.L. c. 151A, § 28A, there must be sufficient evidence to show that the employer provided reasonable assurance of re-employment. The burden to produce that evidence lies with the employer.[1] Although G.L. c. 151A, § 28A, does not expressly assign the burden of proof to the employer, we do so under principles of statutory construction, as the Supreme Judicial Court did in Cantres v. Dir. of Division of Employment Security, 396 Mass. 226, 230 (1985) (assigning the burden of proof under G.L. c. 151A, § 25(e)(2), to the employer). One such principle dictates that the party raising the exception or defense must bear the burden of proof. Id. at 231 (citations omitted). To qualify for unemployment benefits, the claimant has the initial burden to establish monetary eligibility, under G.L. c. 151A, § 24. *See* Id. at 231. Once monetary eligibility is established, G.L. c. 151A, § 28A, states that benefits shall be paid except where the claimant is a school employee and there is reasonable assurance that the claimant will perform similar services in the following academic term. Thus, in order to deny a school employee unemployment benefits during the period between academic terms, the employer must prove that this circumstance is met.

Additionally, as the Court pointed out in Cantres, the burden of proof should be assigned to the party most likely to have access to the relevant evidence. Id. at 231, *citing* P.J. Liacos,

[1] The Board has previously decided a claimant's eligibility for benefits based on whether the employer established that it provided reasonable assurance of re-employment. *See, e.g.*, Board of Review Decisions 0002 1339 07 (May 12, 2014) and 0013 6586 83 (Oct. 21, 2015). These are unpublished decisions, available upon request. For privacy reasons, identifying information is redacted.

Massachusetts Evidence 41 (5th ed., 1981) ("burden of persuasion is on the party . . . who has freer access to the evidence.") The employer is the party most likely to have access to the information bearing on reasonable assurance, including testimony and business records pertaining to correspondence, employment history, and its practices of communicating to employees that it intends to re-employ them.

In the present case, the review examiner concluded that, because the claimant worked for the employer as an adjunct professor in the spring term, and, as of the week beginning May 15, 2015, the employer had offered the claimant the opportunity to teach courses again in the fall semester, the claimant had been given reasonable assurance of reemployment for the subsequent academic term. We disagree.

Under the federal guidelines, an offer of reemployment constitutes a bona fide offer of reasonable assurance even if there is no contractual guarantee, provided that the economic terms and conditions of the offered position in the second academic period are not substantially less. *See* U.S. Dept. of Labor Unemployment Insurance Program Letter (UIPL) No. 4-87 (Dec. 24, 1986). This federal guidance presupposes that a reduction in the amount of work (courses) offered will translate into a reduction in earnings. In the present case, the claimant taught four courses during the spring, 2015, semester and the employer offered him two courses for the fall 2015 semester. Findings of Fact ## 11 and 12. This was a reduction of 50%. Since nothing in the record suggests otherwise, we believe it is fair to assume that fewer courses meant that the claimant would be earning about 50% less in the fall semester than he had earned teaching for the employer during the previous spring semester. A 50% wage cut is a substantial reduction in the economic terms of employment. For this reason, the employer's offer did not constitute reasonable assurance of re-employment.

We might have reached a different result if the employer had participated in the hearing and presented further evidence about the claimant's employment history. We know from Finding of Fact # 5 that the claimant has been working for the employer since 2011. We also know that, during this time, he taught courses for the employer in every fall and spring semester[2]; and that, in the fall, 2014, semester, he taught only two courses. However, we do not know whether teaching two courses in the fall and four courses in the spring has been the claimant's customary yearly assignment throughout the period of his employment. Courts in other jurisdictions have held that, where an adjunct professor at a college or university is offered courses for the following academic term contingent on enrollment and can show a pattern of re-employment under similar conditions, the claimant will be deemed to have reasonable assurance within the meaning of the law. *See, e.g.*, Archie v. Unemployment Compensation Board of Review, 897 A.2d 1 (Pa. Commw. Ct. 2006) (a part-time adjunct professor with a pattern of offers to teach courses contingent upon enrollment had reasonable assurance of re-employment in light of more than three prior years of consecutive appointments with the employer for similar courses despite the enrollment contingencies). Without the claimant's workload history prior to the fall of 2014, the employer has failed to demonstrate that its offer of only two courses for the fall, 2014,

[2] In response to the review examiner asking whether there had ever been a fall or spring when he had no courses, the claimant testified that there had not. This testimony, 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 of Michigan, Inc. v. Deputy Dir. of Department of Employment and Training, 64 Mass. App. Ct. 370, 371 (2005).

semester is part of a pattern such that the claimant was being re-employed under substantially similar economic terms and conditions as in the prior academic year.

We, therefore, conclude as a matter of law that the employer did not provide reasonable assurance of re-employment to the claimant for the fall, 2015, semester, pursuant to G.L. c. 151A, § 28A.

The review examiner's decision is reversed. The claimant is entitled to receive benefits based upon the wages earned from the employer for the week beginning May 17, 2015, through September 5, 2015, if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - January 29, 2016

Paul T. Fitzgerald, Esq.
Chairman

Judith M. Neumann, Esq.
Member

Member Charlene A. Stawicki, 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