

0016 5329 77 (Jan. 20, 2016) – An adjunct professor, who was offered 2 classes for the fall semester, did not have reasonable assurance of reemployment in the subsequent academic term, because in the previous spring semester, she actually taught only one of the two offered classes. The employer failed to establish a reasonable likelihood of reemployment under similar economic terms.

Board of Review
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Issue ID: 0016 5329 77
Claimant ID: 1395062

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 her position with the employer on May 6, 2015. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on July 21, 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 during the period June 28, 2015, through August 22, 2015, in a decision rendered on August 28, 2015. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant had reasonable assurance of reemployment in the next 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 reemployment for the fall 2015 semester is supported by substantial and credible evidence and is free from error of law, where the employer failed to demonstrate a pattern showing that the claimant was reasonably likely to teach the number of courses that the employer had offered.

Findings of Fact

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

1. The claimant works as an adjunct professor for [Employer], an educational institution. The claimant's rate of pay is \$2700.00 per class.
2. The claimant has worked for the instant employer since 2012.
3. Since becoming employed with the instant employer, the claimant has been offered classes to teach each semester. The claimant has taught classes each semester since becoming employed. The classes offered to the claimant are contingent on enrollment of six students.
4. In the spring 2015 semester, the claimant was offered two classes and taught one class.
5. In April 2015, the Dean of Academics verbally notified the claimant that she would be returning to her same job at the start of the next school year.
6. On 05/06/15, the spring semester ended and summer vacation commenced.
7. On 07/01/15, the claimant filed a claim for unemployment benefits with an effective date of 06/28/15.
8. On 08/17/15, the claimant was offered and accepted a contract to teach two classes in the fall 2015 semester. Both classes were contingent on student enrollment.
9. On 08/24/15, the fall 2015 semester started and the claimant began teaching the two courses agreed upon.
10. On 07/21/15, the local office mailed the claimant a Notice of Disqualification stating she was not eligible to receive benefits from 06/28/15 through 08/22/15 under Section 28(A) because an offer of reasonable assurance of reemployment existed between the claimant and instant employer.
11. The claimant appealed that determination.

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 reject the review examiner's legal conclusion that the employer had offered the claimant reasonable assurance of reemployment within the meaning of G.L. c. 151A, § 28A.

As an academic employee of an educational institution, the claimant's eligibility for benefits during the relevant period is properly analyzed under 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; . . .

As reflected in Finding of Fact # 8, any courses offered to the claimant were contingent upon student enrollment and could be cancelled due to insufficient enrollment. The Board has previously held that such an enrollment contingency does not, by itself, preclude the possibility of reasonable assurance under G.L. c. 151A, § 28A. *See* Board of Review Decision 0002 1339 07 (May 12, 2014), where we explained that some uncertainty is permissible as long as the employer can establish that “(1) the circumstances under which the claimant would be employed are not within the educational institution’s control, and (2) . . . such claimants normally perform services the following academic year” (quoting from the U.S. Department of Labor Unemployment Insurance Program Letter (UIPL) No. 4-87 (Dec. 24, 1986)).¹ Furthermore, “[reasonable] assurance exists only if the economic terms and conditions of the job offered in the second period are not substantially less (as determined under State law) than the terms and conditions for the job in the first period.” *Id.*

While there is no Massachusetts appellate decision on point, 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).

Here, even though the claimant has worked for the employer as a part-time adjunct professor in each semester since 2012, we are only given her specific workload history since the fall, 2014, semester. Finding of Fact # 4 provides that, during the spring, 2015, semester, the claimant had been offered two classes but taught only one. The claimant testified that she had taught two

¹ Board of Review Decision 0002 1339 07 is an unpublished decision, available upon request. For privacy reasons, identifying information is redacted.

classes during the previous fall, 2014, semester.² This recent history does not establish a pattern of reemployment under similar conditions. The claimant's recent experience in the spring, 2015, term suggests that she may not receive the same number of courses as originally offered. Rather, that experience shows a substantial likelihood that the enrollment contingency would "kick in" and reduce the amount of the claimant's work and compensation. On this record, we conclude that neither the Dean's verbal notice in April or the August 17th contract constituted a sufficient "assurance" of reemployment under substantially similar economic terms, for purposes of G.L. c. 151A, § 28A.

It is also worth commenting on the provision under Finding of Fact # 9, which states that the claimant did begin teaching the two courses originally offered for the fall, 2015, semester. The examiner was able to make this finding only due to the timing of the hearing, which was held on the first day of the fall, 2015, semester. She had the benefit of hindsight. The question presented by G.L. c. 151A, § 28A, is whether the employer provided reasonable assurance for the subsequent school term before the claimant started teaching again in the fall such that, over the summer, the claimant could be reasonably certain of returning to work when classes resumed. In this case, it did not do so.

We, therefore, conclude as a matter of law that the claimant did not have reasonable assurance of reemployment, within the meaning of G.L. c. 151A, § 28A.

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the period June 28, 2015, through August 22, 2015, if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - January 20, 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.

² We have supplemented the findings of fact, as necessary, with the unchallenged evidence before the review examiner. *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).

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