

Verbal offer to student safety escort manager to return to the same position in the fall became reasonable assurance once the employer communicated that the economic terms would not be considerably less.

**Board of Review
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Issue ID: 0018 8570 16

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The claimant appeals a decision by Rachel Zwetchkenbaum, 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 we affirm in part and reverse in part.

The claimant separated from her position with the employer on May 30, 2016. She filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on August 2, 2016. The employer appealed the determination to the DUA hearings department. Following a hearing on the merits, attended by both parties, the review examiner overturned the agency's initial determination and denied benefits for the period May 22, 2016, through September 3, 2016, in a decision rendered on September 8, 2016. 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 year 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 remanded the case to the review examiner to obtain further evidence pertaining to the date on which the employer informed the claimant that she would be returning to work the following academic period and the economic terms that would apply if she returned. Both parties attended the remand hearing. Thereafter, the review examiner issued her consolidated findings of fact. 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 subsequent academic year, based upon her supervisor's verbal communication at the end of May, 2016, is supported by substantial and credible evidence and is free from error of law.

Findings of Fact

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

1. The claimant began working for the instant employer, a University, on April 1, 2015.
2. At hire, the claimant was informed that while the program was still being fully developed, that she would be working an irregular part-time schedule, which would become full-time once the program officially launched.
3. The claimant received her official full-time offer letter on October 12, 2015.
4. The letter stated that the claimant was being offered the position of Academic Commons Night Manager and she would begin with a pay of \$14.50 per hour.
5. The letter also stated that this was a full-time job, which would run approximately thirty-nine weeks per year and that the scheduled period for this position is based on the academic year consisting of approximately August 15 thru May 15 with the summer breaks as time off without pay.
6. The claimant accepted the offer.
7. The last day of the academic year before summer break was to begin was on May 30, 2016.
8. By May 30, 2016, the claimant had informed the employer that she would be moving to the area.
9. By May 30, 2016, the employer told the claimant that they wanted her to come back the next school year and to let them know if she was not going to come back because if she did not come back, then they would need to interview other candidates for the job. The claimant told her employer that before she would commit to coming back, she wanted to know what, if any, pay raise there would be.
10. On July 10, 2016, the claimant's supervisor, Chief [A], sent the claimant an e-mail. The e-mail states, in part, "I'm hearing there is about a 1.7% increase out there. With you moving to Boston I'm wondering what your plans are for the Fall. Certainly AC/SSES manager position is yours if you want it. We would love to have you back."
11. The claimant was in Europe when the employer sent the e-mail and did not get in touch with the employer until weeks later.
12. The claimant had a meeting with her supervisor on August 15, 2016.

13. On August 15, 2016, the claimant and the employer agreed that the best day for the claimant to begin work for the new school year would be on August 22, 2016.
14. The claimant returned to the full-time job on August 23, 2016.
15. The claimant filed for unemployment benefits and received an effective date of May 22, 2016.
16. On August 2, 2016, DUA sent out a Notice of Approval to the claimant and the employer, stating that it was concluded that the claimant did not have reasonable assurance.
17. The employer appealed.

Ruling of the Board

In accordance with our statutory obligation, we review the decision made by the review examiner to determine: (1) whether the consolidated findings are supported by substantial and credible evidence; and (2) whether the review examiner's original conclusion is free from error of law. Upon such review, the Board adopts the review examiner's consolidated findings of fact and deems them to be supported by substantial and credible evidence. However, as discussed more fully below, we do not agree with the review examiner's legal conclusion that the claimant had reasonable assurance of re-employment, pursuant to G.L. c. 151A, § 28A, as early as May 22, 2016.

As a non-instructional employee of an educational institution, the claimant's entitlement to benefits for the period at issue in this case must be analyzed pursuant to G.L. c. 151A, § 28A, which provides, 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, research, or principal administrative capacity for an educational institution, . . .
- (b) with respect to services performed in any other capacity for an educational institution, benefits shall not be paid on the basis of such services to any individual for any week commencing during a period between two successive academic years or terms if such individual performs such services in the first of such academic years or terms and there is a reasonable assurance that such individual will perform such services in the second of such academic years or terms; . . .

In her decision, the review examiner concluded that the claimant had reasonable assurance at the end of the spring, 2016, semester because she knew she would be returning in the fall. However, the phrase “reasonable assurance” requires more. In an advisory issued in 1986, the U.S. Department of Labor (DOL) stated that, in order to constitute a *bona fide* offer of reasonable assurance that would disqualify a claimant for between-term benefits, the economic terms and conditions of the offered position could not be substantially less in the upcoming term than they were in previous term. DOL Unemployment Insurance Program Letter No. (UIPL) 4-87 (Dec. 24, 1986). This is reiterated in the DOL’s newest guidance, issued on December 22, 2016. *See* UIP 5-17, part 4(a), (Dec. 22, 2016).

In the present case, the examiner found that, on May 30, 2016, the employer verbally notified the claimant that she had a job for the next school year. Consolidated Finding # 9. However, the record contains no evidence that this verbal communication included the economic terms of the offer. On July 10, 2016, the claimant’s supervisor sent an email referring to a 1.7% raise from her previous pay rate. *See* Consolidated Finding # 10. Implicit in this email is that the employer’s job offer for the fall included economic conditions that would be better than the prior academic year. Thus, as of July 10, 2016, the employer had provided the claimant with reasonable assurance of re-employment for the subsequent academic year.

During the hearing, the claimant insisted that she did not have a firm offer until she met with her supervisor on August 15, 2016, to confirm her return-to-work date. *See* Consolidated Finding # 13. We disagree. Nothing in G.L. c. 151A, § 28A(b), or in the DOL advisories requires that an employer’s offer include a specific start date or time. Since it is not required by the statute or the DOL, the employer’s failure to notify the claimant of her exact return-to-work date until later in the summer does not affect the claimant’s entitlement to unemployment benefits. *See* Board of Review Decision 0014 1401 37 (Jan. 27, 2016).¹

We, therefore, conclude as a matter of law that, pursuant to G.L. c. 151A, § 28A(b), the employer provided reasonable assurance of reemployment for the 2016–2017 school year as of July 10, 2016.

¹ Board of Review Decision 0014 1401 37 is an unpublished decision, available upon request. For privacy reasons, identifying information is redacted.

The portion of the review examiner's decision that disqualified the claimant from receiving benefits during the period May 22, 2016 through July 9, 2016 is reversed. The portion of the review examiner's decision which disqualified the claimant from receiving benefits during the period beginning July 10, 2016 through September 3, 2016, is affirmed. The claimant is entitled to benefits for the period beginning May 22, 2016 through July 9, 2016, if otherwise eligible.



Paul T. Fitzgerald, Esq.
Chairman

BOSTON, MASSACHUSETTS
DATE OF DECISION - January 19, 2017



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