0022 1445 55 (Apr. 27, 2018) – Where a full-time, 12-month ABA technician was required to work part-time for six weeks over the summer, G.L. c. 151A, § 28A(b) does not preclude her from receiving partial unemployment benefits during that time. However, she cannot collect benefits in the weeks immediately before and after the six-week summer program due to G.L. c. 151A, § 28A(c). Such weeks were a customary vacation period, the claimant worked immediately before, and she had reasonable assurance that she would work immediately after such period.

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Issue ID: 0022 1445 55

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 we affirm in part and reverse in part.

The claimant filed a claim for unemployment benefits with the DUA, effective June 18, 2017, and was approved for partial unemployment benefits in a determination issued on July 12, 2017. 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 in a decision rendered on October 6, 2017. 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, she was disqualified under G.L. c. 151A, § 28A. Our decision is based upon our review of the entire record, including the recorded testimony and evidence from the hearing, the review examiner's decision, and the claimant's appeal.

The issue before the Board is whether the review examiner's conclusion that the claimant is not eligible for benefits under G.L. c. 151A, §§ 29(a) or (b), because she is disqualified under G.L. c. 151A, § 28A, is supported by substantial and credible evidence and is free from error of law.

Findings of Fact

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

1. The claimant worked for the employer, a town, as a full-time Applied Behavioral Analyst Technician from September 2016 until 6/20/2017. The claimant works with special needs students.

2. On 6/21/2017, the employer's academic year ended and the new school year was scheduled to resume on 8/29/2017.

3. The claimant filed an unemployment claim on 6/22/2017, which was established with an effective date of 6/18/2017.

4. Approximately 4 weeks prior to 6/20/2017, the employer informed the claimant in writing that she would be returning to work on 8/29/2017, in the same position as an Applied Behavioral Analyst.

5. The [claimant] also worked for the employer during the summer from 7/10/2017 through 8/17/2017, however she worked part-time hours.

6. The claimant returned to work in the same position at the beginning of the fall academic [year,] which started on 8/29/2017.

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 G.L. c. 151A, § 28A, renders the claimant ineligible to receive unemployment benefits throughout the summer.

The DUA originally determined that the claimant was eligible for benefits pursuant to G.L. c. 151A, § 29, which authorizes benefits to be paid only to those in "total unemployment" or "partial unemployment." These terms are, in turn, defined by G.L. c. 151A, § 1(r), which provides, in relevant part, as follows:

> (1) "Partial unemployment", an individual shall be deemed to be in partial unemployment if in any week of less than full-time weekly schedule of work he has earned or has received aggregate remuneration in an amount which is less than the weekly benefit rate to which he would be entitled if totally unemployed during said week . . . .
>
> (2) "Total unemployment", an individual shall be deemed to be in total unemployment in any week in which he performs no wage-earning services whatever, and for which he receives no remuneration, and in which, though capable and available for work, he is unable to obtain any suitable work.

During the hearing, the parties agreed that the claimant, an Applied Behavioral Technician (ABA technician), is a 12-month employee.[1] She worked full-time for the employer from September, 2016, through June 20, 2017, and then part-time hours during the summer. Findings of Fact ## 1 and 5. This reduction to part-time hours for ABA technicians is not optional. They are required to work a reduced number of hours in the summer.[2] If the claimant were, instead, a retail or factory worker forced to work fewer hours during the summer due to a partial slowdown in business, there would be no question that she would be entitled to partial unemployment benefits during any week in which she did not work full-time hours, was not refusing any hours, and earned less than her weekly benefit rate plus earnings disregard. It is only because the claimant is an educational employee that we must consider whether, notwithstanding her partial unemployment status, she is nonetheless ineligible for benefits pursuant to G.L. c. 151A, § 28A.

Since the claimant is a non-instructional employee of an educational institution, we turn to the portions of G.L. c. 151A, § 28A, which state, 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: . . .
>
> > (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;
> >
> > (c) with respect to services described in subsections (a) and (b), benefits shall not be paid to any individual on the basis of such services for any week commencing during an established and customary vacation period or holiday recess if such individual performs such services in the period immediately before such vacation period or holiday recess, and there is a reasonable assurance that such individual will perform such services in the period immediately following such vacation period or holiday recess; . . .

In rendering his decision, the review examiner relied upon the fact that several weeks before the regular school year ended in June, the employer notified the claimant that she would be returning to her same ABA technician position on August 29, 2017. *See* Finding of Fact # 4. On this

[1] While not explicitly incorporated into the review examiner's findings, the claimant's status as a 12-month employee 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).

[2] The parties' collective bargaining agreement, found in Exhibit # 7, states under Article XI, "During the summer months (when school is not normally in session) the ABA techs will work a reduced number of hours from the regular school year schedule based on the needs of the current student population." *See also* the ABA Tech job description, included in Exhibit # 7, which states, "Required to work summer program modified schedule." The collective bargaining agreement and job description are also part of the undisputed evidence in the record.

basis, he concluded that she had reasonable assurance of re-employment and was ineligible for benefits under the above provision. We would agree with the review examiner's analysis if the claimant were a typical 10-month academic year school employee who had the option to take the summer off or to find alternate full-time work during that break between school years. However, she is not a 10-month employee, and she does not have that option.

In Scotland School for Veterans' Children v. Unemployment Compensation Board of Review, the Commonwealth Court of Pennsylvania refused to apply the between terms exclusion to a year-round full-time employee who was not routinely separated during the summer months. 579 A.2d 1026, 1027 (Pa. Commw. Ct. 1990) (Scotland School # 2) (full-time houseparent entitled to partial benefits while working less than full-time over five weeks in the summer on an as-needed basis, including 32 hours per week in July and 8 and 11 hours in the first two weeks of August). The court reached the same result for the houseparent who, the summer before, was placed on a schedule of full-time work in some weeks with little or no work the following week. Scotland School for Veterans' Children v. Unemployment Compensation Board of Review, 578 A.2d 78 (Pa. Commw. Ct. 1990) (Scotland School # 1). Like the houseparent in these Pennsylvania cases, the claimant in the present appeal is a year-round full-time employee, who is required to continue working for the employer during each summer but is only scheduled part-time based upon the needs of its students.

During the hearing, the employer presented cases from other jurisdictions in support of its argument to disqualify the claimant under G.L. c. 151A, § 28A. *See* Exhibit # 7. In United Educators of San Francisco AFT/CFT v. California Unemployment Insurance, a California Court of Appeal ruled that paraprofessionals were not entitled to benefits over the summer, whether or not they worked in the summer session. 247 Cal. App. 4th 1235, 1250 (Cal. Ct. App. 2016), *review granted*, 384 P.3d 1241 (Cal. 2016). The court observed that the summer session is not part of the academic year or term in a traditional school year, and the court declined to make an exception to the between terms denial for employees who choose to make themselves available for summer session work. Id. at 1252–53. In support of its decision, the court quoted, *inter alia*, In re Claim of Lintz, (N.Y. App. Div. 1982) ("The law was . . . not enacted to supplement the income of a regularly employed teacher who chose to teach a few days during her regular summer vacation while awaiting the commencement of the next academic year for which she had unquestioned assurance of employment."), and Friedlander v. Employment Div., 676 P.2d 314, 318 (Or. Ct. App. 1984) ("That an employee of an educational institution may choose to work during what is traditionally vacation time does not make it part of the academic year."). Significantly, in the appeal before us, the claimant does not get to choose whether to work her summer assignment. As noted, it is a mandatory part of the job description for her 12-month position.[3]

We are also unpersuaded by a Rhode Island decision that the employer presented, which reads its statutory between terms disqualification as an absolute bar to benefits, regardless of whether the school employees work the academic year or year-round. *See* Delicato v. Board of Review, 643 A.2d 216, 223 (R.I. 1994), *citing* Krupa v. Murray, 557 A.2d 868, 869 (R.I. 1989) (no exception is made for 52-week employees because the statute contained no exception based on the number

[3] *See* note 2, *infra*.

of weeks an educational employee actually works). We believe this literal construction unfairly penalizes year-round educational employees.

Here, the claimant cannot refuse the part-time summer hours without jeopardizing her job. Because she must work for the employer, she cannot get different, full-time summer work.[4] And, unlike academic year school employees, the claimant does not have the option of taking the summer off, if she wanted to. We do not believe the Legislature intended to deny benefits under these circumstances. *See* Cusack v. Dir. of Division of Employment Security, 376 Mass. 96, 98 (1978) (the purpose of the unemployment statute is to provide temporary relief to "persons who are out of work and unable to secure work through no fault of their own.") (citations omitted). Where a 12-month educational employee must work reduced hours during the summer in order to keep her job, the disqualification under G.L. c. 151A, § 28A, does not bar the award of partial unemployment benefits during those weeks.

In this case, the claimant sought benefits during the entire period from the week ending June 24, 2017, through September 2, 2017, including weeks before and after the summer program. Our decision concludes that she is entitled to partial unemployment benefits during the six weeks ending July 15, 2017, through August 19, 2017, when she had to work for the employer. The next question is whether, as an educational employee, G.L. c. 151A, § 28A(c), disqualifies her from receiving benefits during the weeks before and after the summer program, when she was not required to work. Finding no evidence to the contrary, we presume that these brief periods were customary vacation periods. Thus, the weeks ending July 1, 2017, through July 8, 2017, and August 26, 2017, through September 2, 2017, were weeks commencing during an established and customary vacation period. The claimant performed services in the period immediately before such vacation periods, and she had reasonable assurance that she would again perform her ABA technician services in the period immediately following such vacation periods. For this reason, she is not entitled to benefits in the two weeks before and the two weeks after the six week summer session.[5]

We, therefore, conclude as a matter of law that the claimant is not disqualified under G.L. c. 151A, § 28A(b), from receiving partial unemployment benefits during the six weeks of her mandatory part-time summer assignment. We further conclude that G.L. c. 151A, § 28A(c), renders her ineligible for benefits during the weeks immediately before and after this summer assignment, when the claimant was on vacation.

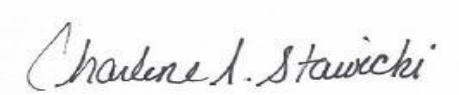
[4] *See* Rogel v. Taylor School District, 394 N.W. 2d 32, 35 (Mich. Ct. App. 1986) (lengthening the school year by a month deprived claimants, who ordinarily sought other employment, of one month in which to work during the summer).

[5] In so ruling, we note that, pursuant to the collective bargaining agreement, the claimant was given her fixed summer assignment before April 15th. *See* Exhibit 7, Article XI. Had the employer kept the claimant on call throughout the summer, such that she could not make alternate employment or vacation plans, we might reach a different result.

The review examiner's decision is affirmed in part and reversed in part. The claimant is entitled to receive partial benefits for the six weeks ending July 15, 2017, through August 19, 2017, if otherwise eligible. The claimant is denied benefits for the four weeks ending July 1, 2017, July 8, 2017, August 26, 2017, and September 2, 2017.

BOSTON, MASSACHUSETTS
DATE OF DECISION - April 27, 2018

Paul T. Fitzgerald, Esq.
Chairman



Charlene A. Stawicki, Esq.
Member

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