

Adjunct professor did not have reasonable assurance of re-employment under substantially similar economic terms. During the first 5 weeks of his re-opened claim, he'd been offered 1/3 fewer courses to teach in the next semester. Even with the additional course offered prior to the 6th week of his claim, the totality of circumstances did not show a high probability of teaching under substantially similar economic conditions.

**Board of Review
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Issue ID: 0025 6109 89

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 6, 2018. He re-opened a claim for unemployment benefits with the DUA, which was denied in a determination issued on July 7, 2018. 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 from May 13 through August 18, 2018, in a decision rendered on September 22, 2018. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant had been given reasonable assurance of re-employment for the subsequent academic period, and, thus, he 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 decision, which concluded that the claimant had reasonable assurance within the meaning of G.L. c. 151A, § 28A, is supported by substantial and credible evidence and is free from error of law, where there is insufficient evidence demonstrating a high likelihood that the claimant would teach in the subsequent fall semester under substantially similar economic terms.

Findings of Fact

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

1. The instant employer is a university.
2. In September 2006, the claimant started working for the instant employer as an adjunct English professor. The claimant works in the English Department.
3. In the role of adjunct professor, the claimant works part-time, is hired semester per semester, and receives no benefits.
4. In the role of adjunct professor, classes going forward are contingent upon enrollment. Classes can also be cancelled for other reasons such lack of availability for classrooms.
5. The claimant is not a union member with the instant employer.
6. The claimant does not sign a contract with the instant employer to teach classes.
7. The Chair of the English Department is the claimant's supervisor.
8. The instant employer's traditional semesters are the Spring and Fall semester.
9. The instant employer also has summer semesters.
10. The claimant is always paid the same amount every semester per class with this instant employer.
11. Since starting to work for the instant employer in 2006, the claimant has taught during each Fall & Spring semester.
12. For the majority of his employment with the instant employer, the claimant has taught 2 classes during the Spring or Fall semesters.
13. Since starting his employment with the instant employer, the claimant had classes cancelled in the past on about 3 or 4 occasions. The claimant does not know the specific time when the classes were cancelled.
14. During the Fall 2016 Semester, the claimant taught 3 classes for the instant employer.
15. During the Spring 2017 Semester, the claimant taught 3 classes for the instant employer.
16. During the Fall 2017, the claimant taught 2 classes for the instant employer. The claimant does not recall how many classes he was initially offered for this semester.

17. The Spring 2018 Semester started on January 22, 2018 and ended on May 14, 2018.

18. On March 6, 2018, the employer’s First-Year Writing Program Coordinator sent the claimant the following e-mail (Exhibit 13 Page 3):

“Below is your teaching assignment for the Fall 2018 semester.

ENG 1010-254 College Writing I (MW 12-12:50pm)-North Campus

ENG 1010-296 College Writing I (MWF 2-3:15PM)-North Campus”

Please ACCEPT OR DECLINE THIS SCHEDULE-BY TUESDAY, MARCH 20, 2018. Any schedule not explicitly accepted by that date may be assigned to another faculty member waiting for courses. Please reply directly to this e-mail.

If you have any questions about this schedule, please let me know. As always, this assignment is contingent upon sufficient enrollment, funding, fulltime faculty scheduling, needs, and adjunct union seniority status (Exhibit 13).”

19. During the Spring 2018 Semester, the claimant taught three classes for the instant employer. These classes were all sections of College Writing II. The claimant was paid \$4,700 for each class he taught. The last date the claimant worked on assignments for this semester was May 6, 2018.

20. The employer had no more work available for the claimant after the Spring 2018 Semester ended.

21. The next traditional academic semester for the instant employer is the Fall 2018. This semester begins on September 4, 2018.

22. On May 21, 2018, the claimant re-opened his claim for unemployment insurance benefits for the week beginning May 20, 2018.

23. This claim is effective from the week beginning August 20, 2017 through August 18, 2018 (Exhibit 2). The claimant initially filed [sic] this claim on August 23, 2017 (Exhibit 2).

24. On the claim effective August 20, 2017 through August 18, 2018, the claimant was paid wages as follows during his base period (Exhibit 7):

	3rd Quarter 2016	4th Quarter 2016	1st Quarter 2017	2nd Quarter 2017
1st employer	\$0.00	\$3,291	\$0.00	\$3,423

(teacher association)				
2nd employer	\$0.00	\$0.00	\$0.00	\$11,012.60
(community college)				
3rd employer	\$8,938.80	\$17,511.20	\$7,238.97	\$0.00
(community college)				
Instant employer	\$8,237.82	\$11,392.92	\$8,262.80	\$6,510.24
(university)				

25. On June 25, 2018, the claimant sent the employer's First-Year Writing Program Coordinator the following e-mail: "Hello [Coordinator's name omitted] regarding [worker's name omitted] email, and as usual, I'd love to take on additional fall courses. My schedule is the same as it always is, with MWF open. It looks like I have an open hour between 1-1:50, which would be great, but anything that fits my existing schedule is fine. Thus far I only have one course at [3rd employer's name omitted] that ends at 9:15 am on MW. So I'm free from 10am on (Exhibit 13)."
26. On June 25, 2018 at 12:29PM, the First-Year Writing Program Coordinator [sic] the following email: "How about another section of College Writing II on MWF at 11AM (Exhibit 13)?"
27. The claimant also teaches at the 2nd employer and the 3rd employer as an adjunct faculty member. The claimant plans on returning to work for both of these employers as well.
28. The employer has offered the claimant to teach 3 classes for the Fall 2018 Semester by email correspondence.
29. On July 7, 2018, the Department of Unemployment Assistance issued a Notice of Disqualification denying the claimant benefits with the instant employer under Sections 28A, (a), (b), and (c) of the Law from May 13, 2018 through August 18, 2018 (Exhibit 10).
30. The claimant appealed the Notice of Disqualification (Exhibit 11).

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 conclusion is free from error of law. After such review, the Board adopts the review examiner's findings of fact except as follows. We reject Finding of Fact # 5's statement that the claimant is not a union member, as it conflicts with a reference in the employer's email, quoted in Finding of Fact # 18, to "adjunct union seniority." 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 is ineligible for benefits.

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; . . .

The U.S. Department of Labor (DOL) has released guidance pertaining to the analysis of reasonable assurance for adjunct professors. In UIPL 5-17 (Dec. 22, 2016), DOL set forth an initial set of criteria for determining whether a claimant is entitled to benefits between academic periods. There must be a written, oral, or implied offer from a person with authority to offer employment, the offer is for a job in the same capacity (*i.e.*, professional or non-professional), and the economic conditions of the offer must not be considerably less than in the prior academic period. *Id.* at part 4(a), pp. 4–5. Where an offer includes a contingency, further criteria require that the contingency must be outside of the employer's control and the totality of circumstances must show that, notwithstanding the contingent nature of the offer, it is highly probable that the offered job will be available under substantially similar economic terms in the next academic period. *See Id.* at part 4(c), p. 6.

As an initial matter, we note that the review examiner disqualified the claimant for the period May 13 through August 18, 2018. However, following the end of the spring 2018 semester, when the claimant re-opened his unemployment claim, he certified for benefits only for the six weeks ending May 26 through June 30, 2018, before his claim expired on August 18, 2018.¹ Therefore, the only eligibility weeks at issue in this appeal are the six weeks ending May 26 through June 30, 2018.

We presume from the emails back and forth between the claimant and the First-Year Writing Program Coordinator, requesting and offering teaching assignments respectively, that the First-Year Writing Program Coordinator had been delegated authority to offer the claimant employment. *See Findings of Fact ## 18, 25, and 26.* The evidence also shows that the employer had offered the claimant work in the same professional capacity of adjunct instruction, as in the prior academic period.

There is no question that offered assignments were contingent upon sufficient student enrollment and that the employer reserved the right to cancel the course. *See Finding of Fact # 18.* Student

¹ *See Exhibit 5*, a printout from the DUA's electronic record keeping system, UI Online.

enrollment is deemed to be a factor that is beyond the employer's control.² In deciding that the reasonable assurance test had been met, the review examiner relied exclusively on the facts that the claimant taught three courses in the spring 2018 semester, that the employer again offered three courses for the fall 2018 semester, and that the claimant only had a course cancelled three or four times in the last 12 years. However, these facts merely indicate that the claimant is likely to teach courses for the employer again in the fall.

The DOL requires a deeper analysis. We must also decide whether, in light of the totality of the circumstances, there was a high likelihood that the claimant would be employed under *economic conditions* that were not considerably less than the prior academic term.

When the claimant re-opened his claim on May 21, 2018, the employer had offered him only two course assignments for the fall semester. This was one course less than the claimant's three-course load during the spring 2018 semester. *See* Finding of Fact # 19. Since the claimant was paid by the course, the employer's offer to teach two courses in the fall term constituted a 33% reduction in pay. This reduced teaching assignment was all that the employer had offered until June 25, 2018, when the employer added the College Writing II section to the claimant's fall course offering. *See* Finding of Fact # 26. Thus, during the first five weeks at issue, the employer had made an offer to teach that was considerably less than the amount earned in the prior term.³

As for the final week at issue, the week ending June 30, 2018, the totality of the circumstances do not show a high probability that the claimant would be re-employed under substantially similar economic terms in the next academic period. The claimant had experienced course cancellations due to under-enrollment in the past. Finding of Fact # 13. Although we do not know how recently, the claimant further testified that the employer has cancelled other adjunct professors' courses due to under-enrollment, has consolidated two courses into one, or has given an adjunct's course to a full-time professor who wanted the assignment.⁴ Moreover, the employer can cancel a class simply because classroom space is not available. Finding of Fact # 4. Since the employer failed to participate in the hearing to provide evidence to indicate that, notwithstanding its course cancellation contingencies and prior instances of cancellation, the claimant's three courses were likely to proceed as offered, the record does not show that its offer came with a high probability of re-employment under substantially similar economic terms as the prior semester.

We, therefore, conclude as a matter of law that because the record does not show that the claimant had reasonable assurance of performing services under substantially similar economic conditions as in the prior term, he is not disqualified by G.L. c. 151A, § 28A.

² *See* UIPL 5-17, p. 6.

³ The DOL has stated that "not considerably less" means that the offer must be at least 90% of the amount earned in the prior academic period. UIPL 5-17, part 4(a)(3), p. 5.

⁴ 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).

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the weeks ending May 26 through June 30, 2018, if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - December 24, 2018



Paul T. Fitzgerald, Esq.
Chairman



Charlene A. Stawicki, Esq.
Member

Member Michael J. Albano 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