

Adjunct professor had reasonable assurance of re-employment within the meaning of G.L. c. 151A, § 28A, when the employer mailed her a written contract offering her the same number of courses as she taught the prior term under economic terms dictated by a collective bargaining agreement. The fact that the employer's fall enrollment was pretty certain by the time it mailed the contract and that the claimant's salary has never been pro-rated or her courses bumped by more senior faculty, and she hasn't had an offered course cancelled in the last five years make it highly probable that the claimant will teach the course assignment, as offered.

**Board of Review
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Issue ID: 0031 7719 63

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 separated from her position with the employer in May, 2019. She filed a claim for unemployment benefits with the DUA, effective July 28, 2019, and was denied benefits from July 28 through August 31, 2019, in a determination issued on September 5, 2019. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits attended by both parties, the review examiner affirmed the agency's initial determination to deny benefits for the same period, in a decision rendered on January 11, 2019. 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 term, and, thus, she was not eligible for benefits under G.L. c. 151A, § 28A. After considering the recorded testimony and evidence from the hearing, the review examiner's decision, and the employer's appeal, we remanded the case to the review examiner to render subsidiary findings from the record about the date and economic terms of the job offer. 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 decision, which concluded that the claimant had reasonable assurance of reemployment as an adjunct instructor for the fall academic term as of July 28, 2019, pursuant to 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 consolidated findings of fact are set forth below in their entirety:

1. The claimant filed a new claim for unemployment benefits on 7/31/19. The effective date of her claim was 7/28/19.
2. The claimant began working as an adjunct faculty member for the employer, a state university, in 2001.
3. During the spring semester of 2013, the claimant taught Basic Photography for 3 credits.
4. During the summer of 2013, the claimant did not teach any courses.
5. During the fall 2013, she taught 3 (3) credit courses for a total of 9 credits; Intro to Gender Women Studies, and two Communication classes.
6. During the spring of 2014, the claimant taught Basic Photography for 3 credits.
7. During the summer of 2014, the claimant did not teach any courses.
8. During the fall of 2014, the claimant taught 3 (3) credit courses for a total of 9 credits; Intro to Gender Women Studies, and two Communication classes.
9. During the spring of 2015, the claimant taught 3 (3) credit courses for a total of 9 credits.
10. During the summer of 2015, the claimant did not teach any courses.
11. During the fall of 2015, the claimant taught 3 (3) credit courses for a total of 9 credits.
12. During spring of 2016, the claimant taught 2 (3) credit courses.
13. During the summer of 2016, the claimant did not teach any courses.
14. During the fall of 2016, the claimant taught 3 (3) credit courses.
15. During the spring of 2017, the claimant taught 2 (3) credit courses.
16. During the summer I session of 2017, the claimant did not teach any courses.
17. During the summer II session of 2017, the claimant taught 1 (3) credit online course.
18. During the fall of 2017, the claimant taught 3 (3) credit courses.
19. During the spring of 2018, the claimant taught 3 (3) credit courses.

20. During the summer I session of 2018, the claimant did not teach any courses.
21. During the summer II session of 2018, the claimant taught 1 (3) credit course online.
22. During the fall of 2018, the claimant taught 3 (3) credit courses.
23. During the spring of 2019, the claimant taught 3 (3) credit courses.
24. During the summer session I, the claimant taught 1 (3) credit course.
25. During the summer session II, the claimant did not teach any courses.
26. During the fall of 2019, the claimant taught 3 (3) credit courses; Intro to Photography, Film and Gender, and Intro to Gender and Women Studies.
27. The spring semester begins in the beginning of January each year and runs until the middle of May.
28. The summer I session begins June and ends after 7/4 each year.
29. The summer II session begins in the middle of July and ends in the middle of August.
30. The fall semester begins after Labor Day and ends in the middle of December.
31. The Department Head puts together a list of courses being offered semester by semester and checks the availability of the faculty. Each faculty is given their courses via email.
32. The written contract offering the claimant employment to teach 9 credits in the fall 2019 semester is Exhibit 3, page 1. The employer pays the claimant by the course credit hour. This rate is established under a collective bargaining agreement. The claimant's rate of pay increased for the fall of 2019 semester. Under her fall 2019 contract, the claimant is to receive \$17,584.47 for teaching the 9 credits. The change in compensation is a result of retroactive increases during fall 2019 semester.
33. In a questionnaire dated 8/2/19, the employer indicated that contracts for the fall 2019 semester were mailed to employees on 7/12/19. The University Dean sends out the employment contract because Deans are the only ones with state level authority to enter into a binding agreement. The Dean signed the contract on 8/12/19. The claimant signed the contract on 8/29/19.

34. Each fall semester since 2014, once a written agreement similar to exhibit 3 has been issued to the claimant, she has taught the courses offered. No courses have been cancelled due to insufficient student enrollment.
35. Whether a course is held depends on student enrollment. The employer has no control over the number of students who enroll for each course. If a course has low enrollment, the employer could ask the [adjunct] Professor to teach the course on a prorated basis per student, and [if] a Professor is not available to teach the course, they can cancel the course all together. Since 2014, the claimant's salary has not been pro rated due to low student enrollment nor has any faculty or more senior adjunct professors bumped the claimant out of a course offered in her written agreement.
36. The claimant has had courses cancelled in 2006 (History of Photography) and in the fall of 2014 (Photo Journalism). In 2006, her Photo Digital course ran with low enrollment.
37. The majority of students begin the school year during the first week of September, two days after Labor Day, and they end their academic year in May of each year. Fall student enrollment opens in March and is closed by July each year so that by the time they send out contracts to adjunct professors in July, the employer is pretty certain of student enrollment in their assigned fall courses. It is rare in the Day School where the claimant is assigned to teach her fall courses, for a course to be dropped due to low enrollment following the fall add-drop period.
38. On 9/5/19, the DUA issued the claimant a Notice of Disqualification finding her ineligible for benefits under Section 28A for the period beginning 7/28/19 through 8/31/19.
39. On 9/11/19, the claimant appealed the Notice.

Ruling of the Board

In accordance with our statutory obligation, we review the record and 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. After such review, the Board adopts the review examiner's consolidated findings of fact except as follows. Consistent with the parties' hearing testimony, we read the last sentence of Consolidated Finding # 32 to refer to retroactive salary increases implemented during the fall 2019 semester. As discussed more fully below, we believe that the review examiner's consolidated findings of fact support disqualification, but only during the period August 11 through August 31, 2019.

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 Unemployment Insurance Program Letter (UIPL) No. 5-17 (Dec. 22, 2016), the DOL sets 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 in the next academic period. Id. at part 4(c), p. 6.

Consolidated Finding # 33 provides that the University Dean has authority to offer employment contracts and he mailed the contracts to employees on July 12, 2019. However, the Dean’s signature on the claimant’s agreement is dated August 12, 2019. We can reasonably infer that the Dean signed the agreement before mailing it, and, at least with respect to the claimant before us, her written contract offer was not sent until August 12, 2019. The offer is for employment in the same capacity, adjunct instruction, as in the prior semester. *See* Consolidated Finding # 32.

The employer has also established that the offer was under economic terms that were not considerably less than the prior academic term. Although the consolidated findings do not reveal the claimant’s spring, 2019 salary, Consolidated Finding # 32 states that she is paid by the number of course credit hours taught and that the rate of pay is set under a collective bargaining agreement. Since the employer offered the claimant the same number of credit hours for the fall, 2019 semester as she taught in the spring, 2019 semester, we are satisfied that she was offered re-employment under similar economic terms as she was paid in the prior academic term.

However, Consolidated Finding # 35 provides that the employer reserves the right to cancel an offered course, assign it to a more senior faculty member, or pro-rate the offered salary if student enrollment is insufficient. Because the employer’s fall, 2019 offer is contingent upon student enrollment, we must consider whether, notwithstanding the contingent nature of the offer, it is

highly probable that the offered job will be available in the fall. Student enrollment is deemed to be a factor that is beyond the employer's control.¹

In this case, the employer has never pro-rated the claimant's salary, nor had a more senior faculty member bump her from any of her assigned courses. Consolidated Finding # 35. The claimant has also not had a course cancelled in the last five years. *See* Consolidated Finding # 34. Although there is an add-drop period at the beginning of the fall term, the review examiner found that because fall student enrollment closes in July, the employer is pretty certain of its fall enrollment figures before it mails its contract offer. She further found that where the claimant teaches in the Day School, course cancellations are rare. *See* Consolidated Finding # 37. Such factors make it highly probable that the claimant will teach the course assignment, as offered.

In light of this record, we conclude as a matter of law that, as of August 12, 2019, the employer provided the claimant with reasonable assurance of re-employment for the subsequent academic period within the meaning of G.L. c. 151A, § 28A.

The portion of the review examiner's decision which denied benefits from July 28 through August 10, 2019, is reversed. The claimant is entitled to receive benefits for these two weeks, if otherwise eligible. The portion of the review examiner's decision which denied benefits during the remainder of August, 2019, is affirmed. The claimant is denied benefits for the week beginning August 11, 2019, through August 31, 2019.



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Fitzgerald, Esq.

DATE OF DECISION - May 12, 2020

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
(See Section 42, Chapter 151A, General Laws Enclosed)**

The last day to appeal this decision to a Massachusetts District Court is ordinarily thirty days from the mail date on the first page of this decision. However, due to the current COVID-19 (coronavirus) pandemic, the 30-day appeal period does not begin until June 1, 2020². If the

¹ *See* UIPL 5-17, p. 6.

² *See* Supreme Judicial Court's Updated Order Regarding Court Operations Under the Exigent Circumstances Created by the COVID-19 (CORONAVIRUS) Pandemic, dated 4-27-20.

thirtieth day falls on a Saturday, Sunday, or legal holiday, the last day to appeal this decision is the next business day 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