

**Despite signing employer’s written notice of intent to reinstate her in the next academic term, claimant school bus driver had no reasonable assurance pursuant to G.L. c. 151A, § 28A, because the employer’s offer contained a clause whereby an employee who filed a claim for unemployment benefits was deemed to have resigned their position. When the claimant exercised her statutory right to file an unemployment claim, the employer withdrew its offer of reemployment and discharged the claimant.**

**Board of Review  
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**Issue ID: 0048 2990 69**

### 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 was separated from her position with the employer on June 15, 2020. On June 25, 2020, she filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on October 24, 2020. 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 and denied benefits in a decision rendered on July 17, 2021. 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 for the next 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 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 decision, which concluded that the claimant was ineligible for benefits on the ground that she was given reasonable assurance of re-employment in the next academic year, 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 part-time as a school bus driver during the 2019-2020 academic year that ended on or about 6/15/20. The claimant worked 19.75 hours per week and was paid \$25.78 per hour. The claimant's position was represented by a labor union.
2. On 6/8/20, the employer issued the claimant written notice of its intention to reinstate her to the same position at the start of the next academic year that was scheduled to start on 9/2/20. The written notice informed the claimant that her position would be available, and she needed to return the bottom portion of the notice by 7/10/20, confirming her intentions. On 6/15/20, the claimant signed the notice, confirming that she would return to work in the next academic year. The claimant returned the signed document to the employer ahead of the deadline.
3. On 6/25/20, the claimant filed an initial claim for unemployment insurance benefits, effective 6/14/20. The claimant informed the DUA that she was laid off from her work. The claimant filed the claimant [sic] after learning that she would not have work available to her in a summer program that she worked in during previous summers.
4. On 10/24/20, the DUA issued the claimant a Notice of Disqualification, finding her ineligible for benefits under Section 28A for the period of 6/14/20 through 8/29/20.
5. On 11/5/20, the claimant appealed the Notice of Disqualification.

### 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 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 findings of fact and deems them to be supported by substantial and credible evidence. However, we reject the review examiner's legal conclusion that the claimant had reasonable assurance of re-employment that rendered her ineligible for benefits from June 14, 2020, through August 29, 2020, as discussed more fully below.

As a school bus driver, the claimant is considered a non-professional employee of an educational institution. In this capacity, her eligibility for benefits during the relevant period is properly analyzed under the following provisions of G.L. c. 151A, § 28A, which state, in relevant part:

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; . . .

Before a claimant may be disqualified from receiving benefits under G.L. c. 151A, § 28A, there must be sufficient evidence to show that the employer provided reasonable assurance of re-employment. The burden to produce that evidence lies with the employer. If it is determined that a claimant had reasonable assurance, the claimant's base period earnings from that position are excluded when calculating their weekly benefit rate for the period between academic terms. Where, as here, the claimant's only base period wages come from her work as a school employee, she would not be eligible for benefits during the period between two academic terms.

In the present case, the review examiner found that the employer issued the claimant a written notice on June 8, 2020, to return to work in the academic year beginning on September 2, 2020; and that the claimant signed and return the notice on June 15, 2020, confirming she would return to work in the next academic year. *See Finding of Fact # 2 and Exhibit # 9.* After returning the letter, the claimant filed the instant claim for unemployment insurance benefits on June 25, 2020. *See Finding # 3.* Thus, the review examiner concluded that the claimant had reasonable assurance of re-employment, and disqualified her from benefits from June 14, 2020, through August 29, 2020.

In narrowly focusing on the June 8, 2020, letter, however, the review examiner's findings and analysis ignored a key issue. Because the claimant filed a claim for unemployment benefits, the employer's human resources director testified that the employer considered her to have voluntarily resigned her position as a school bus driver.<sup>1</sup> Instead of reasonably assuring the claimant that she would return to work in September, she was terminated. The assistant superintendent of schools sent her a letter on September 2, 2020, reiterating the options it had given her earlier in the year in its June 8 letter. "Option 3" had included the specific admonition, "***Apply for unemployment – this mandates separation of service***" (emphasis in original). *See Exhibit # 10.* In short, because this claimant had filed for unemployment, the employer considered her no longer employed. To work again in the fall, the claimant would have to re-apply for her job and we see nothing in the record indicating that she would be re-hired.

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<sup>1</sup> 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).

Moreover, we regard the employer’s “Option 3” as an improper and impermissible attempt to restrict employees from exercising their right to apply for unemployment benefits.<sup>2</sup> We further caution that an employer who predicates an employee’s employment status on whether they file a claim for benefits – particularly one which terminates that employee’s employment for exercising that right - may, in fact, run afoul of G.L. c. 151A, § 47, which establishes criminal penalties and fines for those employers (and their officers and agents) who interfere with an employee’s right to file a claim for benefits.

Where the employer’s offer to return to work contained an impermissible clause that required the claimant to forgo her right to file a claim for benefits (especially where it subsequently imposed a consequence by terminating her for exercising her right to file), we conclude that the employer’s offer was invalid on its face, regardless of the claimant’s acceptance of same. We, therefore, conclude as a matter of law that the employer did not provide the claimant with reasonable assurance of re-employment for the 2020–2021 academic year, pursuant to G.L. c. 151A, § 28A.

The review examiner’s decision is reversed. The claimant is entitled to receive benefits from June 14, 2020, through August 29, 2020.

**BOSTON, MASSACHUSETTS**  
**DATE OF DECISION - October 29, 2021**



Paul T. Fitzgerald, Esq.  
Chairman



Charlene A. Stawicki, Esq.  
Member

**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 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](http://www.mass.gov/courts/court-info/courthouses)**

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<sup>2</sup> Although the review examiner did not incorporate this issue in her findings, she informed the employer during the hearing that school employees often simultaneously have non-school jobs, and file claims for benefits based on their employment with those non-school employers.

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.

JPCA/jv