

Failure of an educational employer to give the claimant a pink slip is not sufficient to meet the employer's burden to show that it provided reasonable assurance of re-employment within the meaning of G.L. c. 151A, § 28A.

**Board of Review
19 Staniford St., 4th Floor
Boston, MA 02114
Phone: 617-626-6400
Fax: 617-727-5874**

**Paul T. Fitzgerald, Esq.
Chairman
Charlene A. Stawicki, Esq.
Member
Michael J. Albano
Member**

Issue ID: 0049 3291 21

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 her position with the employer on June 19, 2020. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on September 19, 2020. 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 in a decision rendered on January 14, 2022. 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, and, thus, 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 of re-employment because the employer did not issue her a pink slip at the end of the 2019–2020 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 began her employment with the employer in September 1994.
2. The claimant worked for the school department, as a paraprofessional, during the academic year 2019–2020, beginning August 29, 2019, and ending June 19, 2020.
3. The claimant, pursuant to a Collective Bargaining Agreement (CBA), was paid \$20.00 per hour.

4. On March 15, 2020, due to the advent of COVID-19, the employer transitioned to remote work through the end of the 2019–2020 academic year.
5. Employees, if not issued a “pink slip” before the end of the academic year, are expected to return to work for the next academic year.
6. The claimant was not issued a “pink slip.”
7. The claimant understood she was expected to return to work for the 2020–2021 academic year having not been issued a “pink slip.”
8. The claimant did not doubt she would be returning to work for the 2020–2021 academic year.
9. The 2020–2021 school calendar set forth a September 3, 2021, start date for the 2020–2021 academic year and end date of June 21, 2021.
10. On July 7, 2020, the claimant filed her claim for unemployment insurance benefits with the Department of Unemployment Assistance (DUA), with an effective begin date of July 5, 2020, and an effective end date of July 3, 2021.
11. The base period for the claimant’s claim was July 1, 2019, through June 30, 2020.
12. During the base period (July 1, 2019, through June 30, 2020), the claimant, in addition to her 10-month paraprofessional position, also worked for the employer as a bus monitor, and as a special education paraprofessional during the employer’s 2019 summer program which positions required applications.
13. The claimant’s bus monitor employment and summer program employment was [sic] not required as part of the claimant’s 2019–2020 academic professional job.
14. The claimant’s base period (July 1, 2019, through June 30, 2020) wages, which included her paraprofessional position, bus monitor position, and summer program position, totaled \$39,813.14.
15. The claimant had no other base period (July 1, 2019, through June 30, 2020) wages.
16. The claimant applied for and was accepted to work the 2020 Summer Program.
17. Due to COVID-19, the summer program was conducted remotely, and paraprofessionals were not needed.
18. The claimant did not work the 2020 summer program.

19. On September 3, 2020, the claimant returned to work for the 2020–2021 academic year as a paraprofessional at \$20.00 per hour.
20. On September 19, 2020, the Department of Unemployment Assistance (DUA) issued a Notice of Disqualification determining the claimant performed services for an educational institution during the most recent academic term or year and there was a contract or reasonable assurance that she would perform services for an educational institution during the next year or term and therefore could not receive a benefit based on wages earned working for an educational institution for week [sic] commencing during the period between these academic years or terms and therefore was not eligible to receive not entitled to receive [sic] benefits for the period beginning July 7, 2020, through September 12, 2020.

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, as discussed more fully below, we reject the review examiner’s legal conclusion that the claimant had reasonable assurance of re-employment for the 2020–21 academic year.

As a non-professional employee of an educational institution, the claimant’s 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; provided that, if such individual was not offered an opportunity to perform such services for the educational institution for the second of such academic years or terms, such individual shall be entitled to a retroactive payment of benefits for each week for which the individual filed a timely claim for benefits and for which benefits were denied solely because of a finding that such individual had reasonable assurance of performing services in the second of such academic years or terms

Before a claimant may be disqualified from receiving benefits pursuant to 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.¹ If it is determined that a claimant had reasonable assurance, the claimant's base period earnings from that position are excluded when calculating the claimant's weekly benefit rate for the period between academic years.

In the present case, the review examiner concluded that the claimant had reasonable assurance of re-employment, because she had been led to believe that she would be returning to the same position in the subsequent academic year unless she received a pink slip. We disagree.

Under the federal guidelines, a claimant will not have reasonable assurance of re-employment unless he or she receives a *bona fide* offer of re-employment in the subsequent academic year in the same capacity and under the same or similar economic terms as the previous academic year. Such an offer may be written, oral, or implied and must be made by an individual with actual hiring authority. See U.S. Department of Labor Unemployment Insurance Program Letter No. (UIPL) 5-17, (Dec. 22, 2016), 4(a).

In this case, there was no evidence that a written, verbal, or implied offer sufficient to meet the requirements articulated in UIPL 5-17 was ever made to the claimant. While we recognize that the UIPL permits reasonable assurance to be conveyed in writing, orally, or in an implied manner, we do not believe that the fact that the employer did not give the claimant a pink slip meets this standard. This is particularly so in view of the drastic changes forced on schools during 2020 because of the COVID-19 pandemic and the absence of any other evidence indicating that the claimant would be returning to work. See Board of Review Decision 0047 0949 58 (Jan. 26, 2021).

The employer's response to the COVID-19 pandemic substantially impacted the claimant's work during the spring and summer of 2020, and there is no indication from the record that the employer addressed uncertainties surrounding the coming academic year in light of the ongoing public health emergency. See Findings of Fact ## 4, 16, and 17. The employer's inaction is insufficient to convey to the claimant a *bona fide* offer of re-employment in the same capacity and under the same or substantially similar economic terms. See Findings of Fact ## 5-7. Absent any evidence suggesting the claimant had any specific assurances from the employer that she would be returning to work in the same capacity and under the same economic terms as the previous academic year, and we see none, we conclude the employer has failed to meet its burden.

We, therefore, conclude as a matter of law that the employer did not provide the claimant with reasonable assurance of re-employment to the claimant for the 2020-21 academic year, pursuant to G.L. c. 151A, § 28A.

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week beginning May 31, 2020, through August 29, 2020, if otherwise eligible.

¹ See Board of Review Decision 0016 2670 84 (Jan. 29, 2016).

BOSTON, MASSACHUSETTS
DATE OF DECISION - March 11, 2022



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
(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.

LSW/rh