

Claimant paraprofessional did not have reasonable assurance for the upcoming academic year, where she had not yet started her job when the employer closed in-person schools due to the COVID-19 public health emergency. Since the claimant’s offer was revised to start with the beginning of the 2020-21 school year and she had not performed any services for the employer in the 2019-20 school year, there could be no reasonable assurance of “re-employment.”

**Board of Review
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Issue ID: 0052 1627 57

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 filed a claim for unemployment benefits with the DUA, effective March 22, 2020, which was denied in a determination issued on September 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 December 1, 2021. We accepted the employer’s application for review.

Benefits were denied after the review examiner concluded that the claimant was given reasonable assurance of re-employment 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. Only the claimant 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 employer provided the claimant with reasonable assurance of re-employment, 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 received an offer of full-time work with the employer, working 37.5 hours per week with benefits. After a discussion with the employer, the claimant was issued a letter from the employer dated March 9, 2020, indicating that the claimant was being offered the instructional aide position of ABA

Paraprofessional with the employer, working at the named elementary school, being paid \$20.85 per hour with benefits to start on March 16, 2020.

2. The claimant responded to the employer on that date accepting the position.
3. The claimant was being hired to work in a 10-month academic year position. The claimant was not guaranteed work during the summer break period. The claimant was informed that summer work was available and that she would need to request summer work from the Director.
4. On March 13, 2020, the employer school closed due to COVID-19.
5. The claimant did not start work for the employer on March 16, 2020, because there was no work available to her at that time. (The employer did not have remote work available.)
6. On March 24, 2020, the claimant was issued a letter from the employer indicating in part that “I write as a follow up to the letter I sent to you on behalf of the (employer) Public Schools dated March 9, 2020. As you know, we are in unprecedented times due to the impact of the Coronavirus (COVID-19). These effects are multifaceted and include the closure of schools statewide by Governor Baker. Given that the (employer) Public Schools are currently closed and indications suggest that they will remain so for some item [sic], we must revise our offer to you. As stated in the previous letter, you will be a valuable asset to your school system. Although the current situation will not allow us to realize that value at this time, we look forward to doing so in the future. To that end, we are revisiting our offer of employment to begin on August 31, 2020, for the 2020-2021 school year.”
7. The claimant accepted the revised offer of employment to start on August 31, 2020.
8. The claimant was then contacted by the Director of the Extended School Year program to begin summer work on July 20, 2020. The claimant began work in that program as an ABA paraprofessional working from July 20, 2020, through August 15, 2020. The claimant was working 23 hours per week, being paid at a rate of \$20.85 per hour. The claimant did not receive any benefits while performing the summer work.
9. The claimant did not work during the period of August 16, 2020, through August 30, 2020, and was not paid by the employer.
10. The claimant returned to work for the employer for the 2020-2021 academic year on August 31, 2020, in the position of full-time ABA paraprofessional, working 37.5 hours per week. The claimant was paid \$21.69 per hour and received benefits.

11. On September 24, 2020, a Notice of Disqualification was issued under Section 28A of the Law indicating “It has been established that you have performed services for an educational institution during the most recent academic year or term and there is a contract or a reasonable assurance that you will perform services for an educational institution during the next school year or term. Therefore, you may not receive a benefit based on wages earned working for an educational institution for weeks commencing during the period between these academic years or terms.” “Inasmuch as you have no wages earned working for other than an educational institution or insufficient such wages to meet the eligibility requirements of M. G. L. chapter 151A, s. 24 (a) you are not eligible to receive benefits for the period beginning 3/22/2020 and through 9/5/2020.” The claimant filed an appeal to that determination.

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.

In her capacity as an instructional aide, the claimant is an employee of an educational institution. 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:

(a) with respect to service performed in an instructional, research, or principal administrative 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, or when an agreement provides instead for a similar period between two regular but not successive terms, or during a period of paid sabbatical leave provided for in the individual's contract, 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;

(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 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 the claimant's weekly benefit rate for the period between academic terms.

In the present case, the review examiner found that the employer issued the claimant a written letter on March 9, 2020, offering her employment as an elementary school instructional aide (ABA Paraprofessional) to begin work on March 16, 2020, which the claimant accepted on the same day. *See* Finding of Fact # 1. However, the employer closed its schools on March 13, 2020, because of the COVID-19 public health emergency. *See* Finding of Fact # 4. Consequently, the claimant did not begin her employment as planned on March 16, 2020, since there was no work available for her at that time. *See* Finding of Fact # 5.

On March 24, 2020, the employer sent the claimant a letter revising the offer it transmitted on March 9, 2020. The employer offered to begin the claimant's employment on August 31, 2020, for the 2020–21 school year. *See* Finding of Fact # 6 and Exhibit 5. The claimant accepted the employer's revised offer. *See* Finding of Fact # 7. She began her full-time work for the employer on August 31, 2020. *See* Finding of Fact # 10.

Based on these findings, the review examiner disqualified the claimant from benefits, concluding that the employer provided the claimant with reasonable assurance "that she would be starting in the next academic year or term beginning August 31, 2020, under the same terms and conditions of employment." We disagree with this conclusion, as a matter of law.

Referring back to G.L. c. 151A, § 28A(b), above, the statute itself refers to the individual performing "such services in the *first* of such academic years ... and if there is ... reasonable assurance that [they] will perform services ... in the *second* of such academic years," they are considered to have reasonable assurance of re-employment and do not qualify for benefits under § 28A (emphasis added).

However, in the instant case, the claimant never performed any services for this employer during the "first" academic year of 2019–20. Her anticipated starting date was postponed until the summer, after the academic year had ended. If the claimant had worked even one day for the instant employer, the review examiner's conclusion could be justified. But where the claimant performed no services at all for the instant employer in March of 2020 (or during any part of the ten-month

2019–20 school year), we cannot disqualify her under G.L. c. 151A, § 28A, for having reasonable assurance of “re-employment.”¹

We, therefore, conclude as a matter of law that the employer did not provide the claimant with reasonable assurance of re-employment for the 2020–21 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 ending March 28, 2020, through September 5, 2020, if otherwise eligible.



Paul T. Fitzgerald, Esq.
Chairman

BOSTON, MASSACHUSETTS
DATE OF DECISION - February 24, 2022



Michael J. Albano
Member

Member Charlene A. Stawicki, Esq. 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.

JPCA/rh

¹ We acknowledge the review examiner’s findings that the claimant performed part-time summer work for this employer from July 20, 2020, through August 15, 2020. See Finding of Fact # 8. However, where this was part-time work performed during the summer break, it was not the full-time employment promised by this employer to the claimant for the ten-month school year, and it does not affect our conclusion here.