

There is no indication from the record that the employer’s Nutritional Assistant, who told the claimant she would be returning in the following academic year, had the authority to make a *bona fide* offer or that she communicated that the claimant would be returning in the same capacity and under the same economic terms. Thus, the employer did not meet its 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: 0059 4303 10

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, which was denied in a determination issued on December 31, 2021. 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 August 25, 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’s Nutrition Assistant told the claimant that she would be returning to work for the employer in the 2020-21 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 and are set forth below in their entirety:

1. On September 5, 2018, the claimant started working for the employer, a municipal school district, as a part-time Cafeteria Worker.
2. The claimant does not work for the employer during the summer months.
3. The claimant was hired to work onsite at the employer’s school facilities.

4. The claimant's supervisor is the Lead Person.
5. The employer notifies cafeteria workers verbally if they are going to return to work following a summer recess period. The cafeteria workers then confirm what school they will be assigned to work at a meeting prior to the school year.
6. During the employer's 2019–2020 school year the claimant started initially working for the employer in September 2019 onsite. The claimant was scheduled to work Monday through Friday from 10 a.m. until 2 p.m. for a total of 20 hours per week. The claimant was paid by the hour.
7. Prior to filing an initial claim for unemployment benefits, the claimant's last date of work performing tasks for the employer was on March 12, 2020.
8. On March 15, 2020, the employer's schools closed to onsite learning due to the [COVID]-19 pandemic.
9. On March 16, 2020, the employer offered the claimant to work Monday through Friday from 10:45 a.m. until 2 p.m. outside at the parks distributing meals to students. The claimant declined to work outside as the claimant was having medical issues involving her sinuses. The claimant offered to continue to work indoors for the employer. The employer did not offer the claimant indoor work at that time.
10. The claimant received some pay from the employer after March 12, 2020 while not working.
11. On June 5, 2020, the employer's Nutrition Assistance [sic] notified the claimant verbally that the claimant was going to return to work for the employer's 2020–2021 school year after the summer recess period.
12. The employer's 2019–2020 school year ended sometime early June 2020.
13. The claimant filed an initial unemployment claim effective the week beginning May 31, 2020. The employer is the only base period employer.
14. On a questionnaire the employer submitted to the Department of Unemployment Assistance (DUA) for consideration, the employer selected "yes" to the following question: "Was the claimant notified s/he will return to work in the same or similar position at the beginning of the next school year, semester or term, or after school vacation?"
15. On September 15, 2020, the claimant returned to work for the employer's 2020–2021 school year in her role of part-time cafeteria worker.

16. On December 31, 2020, the DUA issued a Notice of Disqualification denying the claimant benefits under Sections 28A (a), (b) & (c) of the Law from the week beginning May 31, 2020 through the week ending September 5, 2020. On the Notice of Disqualification, the DUA wrote: “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 5/31/2020 and through 9/5/2020.” 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, 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. G.L. c. 151A, § 28A, which states, 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

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

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 the employer's Nutrition Assistant told the claimant that she would be returning to work for the employer in subsequent academic year. Finding of Fact # 11. We disagree.

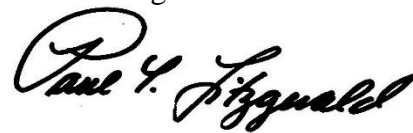
Under the federal guidelines, a claimant will not have reasonable assurance of re-employment unless he or she receives a *bona fide* offer of re-employment in the subsequent academic year in the same capacity and under the same or similar economic terms as the previous academic year. Such an offer may 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 (UIPL) No. 5-17, (Dec. 22, 2016), 4(a).

In this case, there was insufficient evidence to suggest that the conversation the claimant had with the employer's Nutritional Assistant provided her with reasonable assurance of re-employment in accordance with the requirements of UIPL 5-17. See Finding of Fact # 11. Specifically, there was no indication from the record that the Nutritional Assistant told the claimant that she would be returning to work for the employer in the same capacity, for the same number of hours, or for the same wages. As the Nutrition Assistant was not the claimant's supervisor, there is also no indication that she had authority to provide the claimant with a *bona fide* offer of re-employment. See Findings of Fact ## 4 and 11. Absent any evidence suggesting the claimant had specific assurances that she would be returning to work in same capacity and under the same economic terms as the previous academic year from someone with such authority, 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 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 July 5, 2020, through August 29, 2020, if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - October 27, 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