

The employer provided the claimant recess and lunch aide with an offer letter that may have been sufficient to constitute reasonable assurance under G.L. c. 151A, § 28A, for the 2020-21 academic year. However, the claimant’s return to work was delayed until October and her hours were reduced from the previous year as a result of the pandemic. As such, she did not return to the same position under the same economic terms and is entitled to retroactive benefits.

**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 9543 50

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 15, 2020. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on January 13, 2021. 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 for the period between June 21, 2020, and September 12, 2020, in a decision rendered on April 26, 2022. 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 in the next academic year, and, thus, she 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 remanded the case to the review examiner to obtain subsidiary findings of fact relevant to the claimant’s work in the 2020–21 academic year. 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 was not entitled to benefits under G.L. c. 151A, § 28A, during the summer of 2020 because she had received a letter offering her reasonable assurance of re-employment for the subsequent academic year, 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 and credibility assessment are set forth below in their entirety:

1. The claimant filed an unemployment claim effective 03/22/2020 with a benefit year end of 03/20/2021. During the base period (01/01/2019 to 12/31/2020), the claimant worked for the employer.
2. The Department of Unemployment Assistance (DUA) determined the claimant was monetarily eligible to receive weekly benefits in the amount of \$86.00 with the use of the employer's base period wages.
3. The employer is a municipal school district.
4. The claimant began working for the employer in 09/2017 or 10/2017 as a part-time recess and lunch aide.
5. For the 2019-2020 school year, the claimant was paid hourly and earned \$13.50 per hour.
6. The claimant's last day worked was an unknown date in 03/2020, when the school closed due to the COVID-19 pandemic.
7. The last day of school for the 2019-2020 school year was 06/15/2020.
8. On 06/24/2020, the claimant received a letter from the employer's treasurer and human resources coordinator stating, "I just wanted to make you aware that the state and department of labor has expanded the eligibility of unemployment compensation to workers not normally eligible for benefits. Because of this, even though you are employed under the letter of reasonable assurance and normally not able to collect unemployment benefits during vacations, this year you can collect during the summer months up until you return to work so long as your initial unemployment was connected to the COVID-19 pandemic."
9. When school reopened in 09/2020, it opened to virtual learning, not in person learning.
10. The claimant did not return to work in 09/2020 because the students were learning not in person.
11. In 10/2020, the claimant returned to work for the employer when the school reopened for in person learning.
12. When the claimant returned to work in 10/2020, she returned to work four days a week, not five days a week. The employer closed the school one day a week for cleaning.

Credibility Assessment:

Upon review of the claimant's initial testimony, she testified directly to the questions asked. Further, the employer was not present to rebut her testimony. As

such, none of her testimony was deemed incredible. Given her frank and direct testimony, the claimant's testimony is deemed credible.

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. Upon such review, the Board adopts the review examiner's consolidated 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 was not eligible for benefits during the summer of 2020.

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;

(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

If it is determined that a claimant has reasonable assurance of re-employment pursuant to G.L. c. 151A, § 28A, 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.

The review examiners original decision disqualified the claimant from receiving benefits on the ground that she had reasonable assurance of re-employment for the subsequent academic year. Even if the claimant was provided with reasonable assurance of re-employment on June 24, 2020, the record shows that the claimant did not return to her position as a lunch and recess attendant. *See Consolidated Findings ## 8, 10–12.* We must decide whether these circumstances entitle the

claimant to the payment of retroactive benefits even if she was provided with reasonable assurance of re-employment at the end of the previous academic year.

The U.S. Department of Labor has stated that, in order to constitute reasonable assurance, the employer's offer must be for employment in the same capacity and under economic conditions that are not considerably less than the prior academic period.¹ The DUA has also promulgated regulations for non-professional school employees which are applicable to this case. Specifically, an employer must provide the employee with an "opportunity to perform" "suitable services." 430 CMR 4.96(1). These terms are defined under 430 CMR 4.93, as follows:

Opportunity to Perform Services means a chance to actually perform services in the next ensuing academic year or term.

Suitable Services as used in 430 CMR 4.96(1) means service in the same or substantially similar position at the same or higher pay, except as otherwise provided by a collective bargaining agreement.

Because the employer elected to start the 2020–21 academic year in remote learning, the claimant was unable to resume working until October, 2020. Consolidated Findings ## 9–11. When she did return to work, the employer was only able to offer her work four days per week because the employer's schools were closed once per week for cleaning. Consolidated Finding # 12. Based on this information, we can reasonably infer that the claimant was not earning as much money as she did in the 2019–20 school year. Therefore, she was not offered the opportunity to perform suitable services in the 2020–21 academic year. *See* Board of Review Decision 0047 7352 64 (Jan. 8, 2021). Under 430 CMR 4.98(1), she is entitled to retroactive benefits for any period originally excluded due to having initially been given reasonable assurance of re-employment.

We, therefore, conclude as a matter of law that, pursuant to G.L. c. 151A, § 28A(b), and 430 CMR 4.96(1), the claimant may not be disqualified from receiving unemployment benefits for any weeks of unemployment in the period between the 2019–20 and 2020–21 academic years. We further conclude that pursuant to 430 CMR 4.98(1), she is entitled to retroactive benefits.

¹ U.S. Department of Labor Unemployment Insurance Program Letter (UIPL) 5-17 (Dec. 22, 2016), 4(a).

The review examiner's decision is reversed. The claimant is entitled to receive benefits based upon the wages earned from the employer during her base period from the week beginning June 21, 2020, through September 12, 2020, and for subsequent weeks if otherwise eligible.



Paul T. Fitzgerald, Esq.
Chairman

BOSTON, MASSACHUSETTS
DATE OF DECISION - July 29, 2022



Charlene A. Stawicki, Esq.
Member

Member Michael J. Albamo 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