

An employer letter did not provide the claimant with reasonable assurance, as its purpose was to obtain information about health insurance coverage during the summer of 2021 and explicitly stated that employees would not know about their return to work until the end of the summer. The claimant’s assumption that she would return to work in the fall is, by itself, insufficient 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. However, the employer did provide the claimant with reasonable assurance in late August, 2021, when the claimant’s supervisor informed her that she would be returning to her same position the following week.

**Board of Review
100 Cambridge Street, Suite 400
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: 0072 2492 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 we affirm in part and reverse in part.

The claimant separated from her position with the employer on May 21, 2021. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on August 25, 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 February 16, 2023. 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 had provided her with a letter on May 6, 2021, regarding her return 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 findings of fact are set forth below in their entirety:

1. The claimant worked for the employer, a University, from 2016 to the current time.

2. The claimant worked as a Cook, cooking and preparing food, for the employer. The claimant only worked during the academic year.
3. There was a break that would occur from the end of December until mid-January and another break from the end of May until August.
4. The claimant would normally be contacted by telephone by her supervisor in August about returning to work for the fall term and the date she should return. (At the end of the fall term in December, she would be provided with the date to return for the spring term in January.)
5. The claimant was working full-time during the 2020–2021 academic year. The claimant was paid at a rate of \$16.49 per hour. The claimant was offered benefits with the employer. (The claimant was working in-person during the 2020–2021 academic year.)
6. On May 6, 2021, a Dining Services Non-Responsible Time + Summer Insurance Notice was sent to the claimant to her correct mailing address. The letter indicated in part “We have reached the end of the Spring Semester here at [University]: your last day of work will be May 22th and your supervisor will contact you in late summer about your fall schedule. For those of you who carry insurance through the University (“GIC”); and have not already provided the information to your supervisor, we need to determine how you will pay your portion of the premium over the summer.”
7. The claimant understood that she would be returning to work in her regular position in the fall.
8. The 2020–2021 academic year ended on May 21, 2021. The claimant had not worked for any other employer during the 2020–2021 academic year.
9. The claimant filed her claim for unemployment benefits on June 2, 2021. The effective date of the claim is May 30, 2021.
10. On August 13, 2021, the claimant was contacted by the supervisor and instructed to return to work in her regular position on August 16, 2021.
11. The claimant returned to work for the employer in her same position as a full-time Cook on August 16, 2021. The claimant’s hours, rate of pay and eligibility for benefits remained the same.
12. On August 25, 2021, 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 5/30/2021 and through 8/28/2021.” 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 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 employer provided the claimant with reasonable assurance of re-employment for the 2021–2022 academic year as of May 6, 2021.

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.

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

In the present case, the review examiner concluded that the claimant had reasonable assurance of re-employment for the subsequent academic year because the employer had provided her with a letter on May 6, 2021, discussing her return in the subsequent academic year and because the claimant understood that she would be returning to work in her regular position in the fall. Findings of Fact ## 6 and 7. 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 reaching her decision, the review examiner relied on a single line from the May 6, 2021, letter referencing the recipient's possible return to work. *See* Finding of Fact # 6. However, the substance of the May 6th letter, which was admitted into evidence as Exhibit 1, makes it clear that the purpose of this letter was for the employer to gather information about employees' health insurance coverage during the summer months.² Further, the language cited by the review examiner actually specifies that the employer would not be providing any details about an employee's fall schedule until the end of the summer. Finding of Fact # 6. It is unreasonable to infer any assurances about a claimant's terms of employment from that brief statement or to otherwise characterize the May 6th letter as providing its recipient with a *bona fide* offer of re-employment in the subsequent academic year.

As we have previously held, a claimant's belief that she would be returning in the following year, without some evidence showing the employer made a written, oral, or implied offer of re-employment, is insufficient to show that the employer provided the claimant with reasonable assurance. Board of Review Decision 0049 3291 21 (Mar. 11, 2022). As the May 6th letter did not provide the claimant with a written, oral, or implied offer of re-employment, and the employer failed to provide any additional evidence indicating it had provided the claimant with such an offer prior to the end of the academic year, the employer has failed to meet its burden under G.L. c. 151A, § 28A. The claimant did not have reasonable assurance of re-employment as of May 23, 2021.

However, on August 13, 2021, the claimant's supervisor informed the claimant that she would be returning to work in her same position effective August 16, 2021. Finding of Fact # 9. As the claimant's supervisor provided her details about the terms of her return to work during this conversation, we believe evidence of this call was sufficient to show that the employer had provided the claimant with reasonable assurance of re-employment as of that date.

We, therefore, conclude as a matter of law that the employer failed to satisfy its burden to show that it provided reasonable assurance of re-employment within the meaning of G.L. c. 151A, § 28A, through the week ending August 14, 2021. We further conclude as a matter of law that the

² Exhibit 1 is part of is part of the unchallenged evidence introduced at the hearing and placed in the record, and it is thus properly referred to in our decision today. *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).

claimant had reasonable assurance of re-employment within the meaning of G.L. c. 151A, § 28A, beginning the week of August 15, 2021.

The review examiner's decision is affirmed in part and reversed in part. The claimant is entitled to receive benefits for the for the period between May 23, 2021, and August 14, 2021, if otherwise eligible. The claimant is not entitled to benefits for the period between August 15, 2021, and August 28, 2021.

BOSTON, MASSACHUSETTS
DATE OF DECISION - May 25, 2023



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