

The review examiner found the claimant ineligible for benefits under G.L. c. 151A, § 28A because the employer had provided her with reasonable assurance of re-employment for the coming academic year. However, the employer was a privately owned for-profit corporation. Therefore, it was not an educational institution subject to the provisions of G.L. c. 151A, § 28A, and the claimant could not be disqualified under that section of law.

**Board of Review
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Issue ID: 0077 2326 87

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 14, 2022. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on June 27, 2022. 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 September 13, 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. 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's wages could not be used to establish a claim for benefits because she was employed as a teacher at an academic institution and had been given reasonable assurance of re-employment for the 2022–23 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 part-time as an Assistant Teacher for the employer, a private school, from 9/1/21 until 6/14/22. The claimant worked from 8:30 a.m. until 2:00 p.m. on Monday through Thursday and was paid \$15.25 per hour.

2. The employer operates its school from September through June. The school closes for vacation weeks observed in February, April, and at Christmas. The school is a play-based program that provides instruction to children, including alphabet and counting.
3. On or about 6/14/22, the employer notified the claimant that she would be reinstated to the same position of Assistant Teacher for the next school year and her start date was 9/6/22. The claimant was returned to the same position with the same schedule; her pay rate increased to \$16.01 per hour.
4. The claimant filed an initial claim for unemployment insurance benefits, effective 6/5/22. The claimant worked her regular schedule during the period of 6/5/22 through 6/14/22. During the period of June 2021 and June 2022, the claimant did not work for any other employer.
5. On 6/22/22, the employer completed a DUA factfinding questionnaire, indicating that the employer is a private preschool and is not affiliated with the public schools. The employer reported that the claimant was notified on 6/14/22 that she would return to work in the fall, working with the same teacher in the same classroom.
6. On 6/17/22, the claimant completed a DUA factfinding questionnaire, indicating that she was notified on 6/9/22 by the employer's Director that she would be returning to work at the start of the next school year.
7. On 6/25/22, the DUA issued the claimant a Notice of Disqualification, finding her ineligible for benefits under Section 28A of the law for the week beginning 6/12/22 through 8/27/22.
8. On 6/27/22, 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 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 is an academic institution within the meaning of G.L. c. 151A, § 28A.

The review examiner concluded that the claimant was a professional employee of an educational institution and, therefore, her eligibility for benefits was properly analyzed under the provisions of G.L. c. 151A, § 28A. Upon our review of the record, we believe that the review examiner erred in concluding that the employer was an educational institution subject to the provisions of G.L. c. 151A, § 28A.

As a condition of obtaining a credit against the full unemployment tax rate imposed under the Federal Unemployment Tax Act (FUTA), state unemployment laws must meet the approval of the U.S. Secretary of Labor (DOL). One of the requirements necessary for DOL approval is set forth under 26 U.S.C. § 3304(a)(6)(A), which states, in relevant part:

[C]ompensation is payable on the basis of service to which section 3309(a)(1) applies, in the same amount, on the same terms, and subject to the same conditions as compensation payable on the basis of other service subject to such law; except that—

i) with respect to services in an instructional, . . . or principal administrative capacity for an educational institution to which section 3309(a)(1) applies, compensation shall not be payable based on 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, during such period) to any individual if such individual preforms such services in the first of such academic years (or terms) and if there is a contract or reasonable assurance that such individual will perform services in any such capacity for any educational institution in the second of such academic year or terms, . . .

This exemption for services performed as an employee of an educational institution has been incorporated into the Massachusetts unemployment statute under G.L. c. 151A, § 28A, and it must be administered in accordance with federal law.

By its terms, the federal exclusion of instructional or principal administrative services is limited to those services performed for an educational institution “to which section 3309(a)(1) applies.” 26 U.S.C. § 3309(a)(1) applies to services performed for public educational institutions or private educational organizations which are classified as nonprofit entities for federal tax purposes.¹ Accordingly, federal law specifies that the provisions of G.L. c. 151A, § 28A, apply only to public educational institutions and private educational institutions that are classified as nonprofit entities for federal tax purposes.

A review of the employer’s UI Online profile confirms that the employer is a privately owned for-profit corporation. Therefore, it is not an educational institution subject to the provisions of G.L. c. 151A, § 28A, and the review examiner erred in analyzing the claimant’s eligibility for benefits under that section of law.

We, therefore, conclude as a matter of law that the claimant’s base period wages may not be excluded pursuant to G.L. c. 151A, § 28A.

¹ Specifically, only those nonprofit organizations that employ four or more individuals in each of some 20 days during a calendar year, each day being in a different calendar week. 26 U.S.C. § 3309(c).

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the period between June 12, 2022, and September 3, 2022, if otherwise eligible.



BOSTON, MASSACHUSETTS
DATE OF DECISION - November 29, 2022

Charlene A. Stawicki, Esq.
Member



Michael J. Albano
Member

Chairman Paul T. Fitzgerald, 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.

LSW/rh