

**Claimant's employer laid her off after the academic year ended due to lack of work. Since her separation from her employment was not due to misconduct, she is eligible for benefits pursuant to G.L. c. 151A, § 25(e)(2).**

**Board of Review  
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**Issue ID: 0068 4508 77**

### 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 17, 2021. She had filed a claim for unemployment benefits with the DUA, effective December 20, 2020, which was denied in a determination issued on May 11, 2022. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits attended by both parties, the review examiner modified the agency's initial determination, and the claimant was denied benefits commencing June 20, 2021, in a decision rendered on October 29, 2022. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant voluntarily left employment without good cause attributable to the employer or urgent, compelling, and necessitous reasons, and thus, was disqualified under G.L. c. 151A, § 25(e)(1). 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 further evidence regarding the claimant's employment. Only the claimant attended the remand hearing. 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 disqualified from receiving benefits under G.L. c. 151A, § 25(e)(1), because she voluntarily left her employment to attend nursing school in Florida, 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. In September of 2019, the claimant began working for the employer, a bus company, as a school bus driver. She was supervised by the dispatcher. Her rate of pay was \$26.00 per hour.
2. The position was a full-time, seasonal position. The claimant was guaranteed 180 days of work per year and 25 hours of work per week during the school year. The claimant also had the opportunity to pick up 10–15 hours a week of extra time, such as driving students to and from special events such as field trips or games.
3. During the school year, the claimant has weeks off for school holidays, including a winter break, a February break, and an April break. The claimant was laid off every summer vacation and was expected to return and guaranteed work when the fall semester begins.
4. Occasionally, there was work available to employees during the summer, including driving for summer camps.
5. The claimant typically files for unemployment during school breaks, including the summer vacation.
6. The claimant worked for the instant employer from September 13, 2019, until March 10, 2020. During this time, the claimant's rate of pay was \$26.00 per hour for her regular work and \$18.00 per hour for extra time.
7. Between December 20, 2019 and January 1, 2020, the claimant did not have work due to the school break.
8. On March 10, 2020, the employer no longer had work for the claimant due to the school district's response to the COVID-19 [sic].
9. In 2020 and 2021, the claimant had very occasional, limited work with nine different home health agencies as a personal care attendant. The claimant took these positions in order to have employment when the employer shut down due to the COVID-19 pandemic.
10. The claimant returned to work for the instant employer for the 2020-2021 school year.
11. The claimant worked for the instant employer from September of 2020, until June 17, 2021. During this time, the claimant's rate of pay was \$27.00 per hour for her regular work and \$18.00 per hour for extra time.
12. During 2020, the claimant applied for a position as a bus driver with a different public school system (the second employer).

13. During the 2020-2021 school year, the claimant had no work due to the school breaks during the weeks of December 19, 2020 to January 4, 2021; February 21, 2021 to February 27, 2021; and April 18, 2021 until April 24, 2021.
14. The last day the claimant worked for the instant employer was June 17, 2021, the end of the 2020-2021 school year and the beginning of the summer break.
15. Both the instant employer and the claimant expected her to return to her work for the instant employer on August 1, 2021.
16. After June 17, 2021, the claimant went to Florida to attend a review for nursing school. If the claimant did not have to complete this review, she would not have gone to Florida.
17. The claimant has family in Florida.
18. In July of 2021, the second employer called the claimant about her application for the bus driver position. The claimant had a phone interview with the second employer.
19. The second employer offered the claimant a full-time, permanent position as a bus driver with a similar schedule as the claimant's schedule with the instant employer.
20. The claimant accepted the position with the second employer and passed a required drug test.
21. On July 31, 2021, the claimant's supervisor with the instant employer called the claimant to see if she was returning to work with the instant employer.
22. The claimant informed her supervisor that she had accepted a job with the second employer.
23. At the time the claimant left her position with the instant employer, she was not in danger of being fired.
24. The claimant quit her position with the instant employer on July 31, 2021, in order to begin a full-time, permanent position with the second employer.
25. The claimant returned to Massachusetts from Florida on August 1, 2021.
26. The claimant started working with the second employer on August 9, 2021.
27. On August 9, 2021, the claimant began orientation and training for the second employer. She was paid \$17.75 per hour for training.

28. During the third week of August of 2021, the claimant began her work as a bus driver.
29. When the claimant began driving for the second employer, the claimant typically worked between 35 and 45 hours per week. She worked 35-37 regular driving hours per week and earned \$27.00 per hour. The claimant also worked 4-8 hours of extra time per week and earned \$18.00 per hour.
30. If the claimant had not been offered the position with the second employer, she would have returned to the instant employer in September of 2021 and the instant employer would have had work for her.
31. The claimant filed a claim for unemployment benefits with an effective date of December 26, 2021, due to the school closure for a holiday break.
32. During the 2021-2022 school year, the claimant did not have work due to school breaks for the weeks of December 26, 2021 to January 1, 2022; February 20, 2022 to February 26, 2022; and April 17, 2022 until April 23, 2022.
33. The school year ended, and the claimant was in unemployment from June 23, 2022 until September 7, 2022, during the summer break.
34. In the summer of 2022, she received a raise to \$28.00 per hour for regular driving hours.
35. On May 11, 2022, the Department of Unemployment Assistance issued a Notice of Disqualification denying the claimant benefits under Section 25(e)(1) of the Law commencing the week beginning December 13, 2020, and until she has had eight (8) weeks of work and has earned an amount equivalent to or in excess of eight (8) times her weekly benefit amount. The claimant appealed the Notice of Disqualification.

#### Credibility Assessment:

The claimant, the employer's witness (the vice president of operations) and the employer's representative attended a hearing on October 18, 2022. The claimant attended a remand hearing on June 20, 2023. The employer did not participate in the remand hearing and submitted no additional documents.

The claimant's testimony in the initial hearing and the remand hearing differed significantly. During the initial hearing, the claimant testified that after the school year ended in June of 2021, she spent four months in Florida attending a review for nursing school. In the remand hearing, however, the claimant testified that she was only in Florida for little over a month and that when she returned to Massachusetts, she did not continue to work for the instant employer because she had accepted a full-time, permanent position with a second employer. Based on the claimant's demeanor during the two hearings and the correlation between the claimant's

testimony during the remand hearing and the claimant's monetary summaries (Remand Exhibits 5 and 6), employment history (Remand Exhibits 9 and 10), and wages in 2020 and 2021 (Exhibit 11), it is determined that her testimony during the remand hearing is more accurate. Therefore, the claimant's testimony that she left her position with the instant employer on July 31, 2021 after she accepted a position with a second employer is credible.

The Board of Review asked for the parties to produce evidence of the claimant's gross weekly wages with the instant employer and for the claimant to produce her paystubs for the second employer. The instant employer, who did not attend the remand hearing, did not produce any records in connection with the claimant. The claimant testified that she did not have access to the documents demonstrating her gross weekly earnings from either employer. The record was left open for the claimant to obtain and upload her paystubs or earning statements, but the claimant did not do so. Instead, the claimant uploaded a report from the Internal Revenue Service (IRS) entitled Wage and Income Transcript, showing information from the claimant's 2021 W-2 tax form (Remand Exhibit 15) and a report from the IRS entitled Record of Account for the claimant during the tax period ending December 31, 2021 (Remand Exhibit 16). Remand Exhibit 15 shows the claimant's gross wages with the instant employer in 2021 on page 2 and her gross wages with the second employer in 2021 on page 3. These records are not the documents requested by the Board of Review and do not show the claimant's gross weekly wages with either employer.

As a result, no findings of fact were made with regards to the claimant's gross weekly wages. However, the claimant's Monetary Summaries (Remand Exhibits 5 and 6) and 2020-2021 Wages (Remand Exhibit 11) were entered into the record. Based on the claimant's reported quarterly gross earnings and the number of weeks the claimant worked each quarter, it is possible to calculate her approximate weekly wages with both the instant employer and the second employer. There are certain difficulties presented because, for both employers, the claimant had regular driving hours with one rate of pay and extra time hours with another rate of pay and did not make the same amount each week. In addition, there are quarters where the claimant's gross earnings are significantly lower because the employer had no work for the claimant due to COVID-19 or to summer vacation.

For the instant employer, claimant was guaranteed 25 hours a week and, if she wanted, she could pick up an additional 10-15 hours of extra time. In the 2019-2020 school year, the claimant's rate of pay was \$26.00 per regular hour, which totaled \$650.00 per week, plus \$18.00 for every additional hour worked. In the 2020-2021 school year, the claimant's rate of pay was \$27.00 per regular hour, which totaled \$675.00 per week, plus \$18.00 for every additional hour worked. In the 2019-2020 school year, the claimant's [sic] earned \$13,440.00 working 12 weeks during the fourth quarter of 2019 and \$9,800.00 working 9 weeks during the first quarter of 2020. The second and third quarter of 2020 were eliminated because the claimant was not working due to the COVID-19 pandemic and due to summer vacation. The

claimant's gross weekly wages during the 2019-2020 school year, therefore, range from \$1,088.88 to \$1,120.00.

The effect of COVID-19 on the school schedule in the 2020-2021 school year adds additional difficulty in calculating weekly wages for that time. The claimant earned \$11,210.00 working 12 weeks in the fourth quarter of 2020 and \$7,302.50 working 9 weeks in the second quarter of 2021. The first quarter of 2021 is not used because the claimant earned \$2,199.00 and worked only 89 hours. The claimant's gross weekly wages in the 2020-2021 school year range approximately from \$811.33 to \$934.16.

For the second employer, the claimant was guaranteed 35 hours or regular work per week and, if she wanted, she could pick up 4-8 hours of extra time. In the 2021-2022 school year, she earned \$27.00 per hour, which totaled \$945.00 per week, plus \$18.00 for every additional hour worked. In the 2022-2023, the claimant earned \$28.00 per hour, which totaled \$980.00 per week, plus \$18.00 for every additional hour worked. In the 2021-2022 school year, the claimant earned \$18,705.74 working 12 weeks in the fourth quarter of 2021, \$15,978.41 working 11 weeks in the first quarter of 2022, and \$18,376.41 working 11 weeks in the second quarter of 2022. The third quarter of 2022 was eliminated because it overlapped with summer vacation. The claimant's gross weekly wages in the 2021-2022 school year ranged from \$1,452.58 to \$1,670.58. In the 2022-2023 school year, the claimant earned \$18,972.51 working 12 weeks in the fourth quarter of 2022, for an average of \$1,581.04 per week.

### 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 conclusion is free from error of law. After such review, the Board adopts the review examiner's consolidated findings of fact except as follows. We reject the portion of Consolidated Finding # 2, which states that her employment was "seasonal", as the term is statutorily defined under G.L. c. 151A, § 24A. Whether or not the claimant's position with the employer meets that definition here is immaterial to our decision. We reject the portion of Consolidated Finding # 24, which states the claimant "quit" her job with the instant employer, as it is inconsistent with Consolidated Findings ## 3, 5, 14 and 15 which states the claimant was laid off. We also reject Consolidated Finding # 33. Whether the claimant was in unemployment is also a separate legal question under G.L. c. 151A, § 29(a) and (b), that is not before us.

In adopting the remaining findings, we deem them to be supported by substantial and credible evidence. We further believe that the review examiner's credibility assessment is reasonable in relation to the evidence presented. However, as discussed more fully below, we disagree with the review examiner's legal conclusion that the claimant is ineligible for benefits.

Consolidated Findings ## 3, 14, and 15, state the claimant worked until the end of the academic year on June 17, 2021, and was laid off by her employer. Since the instant employer initiated the

separation, her eligibility for benefits must be analyzed pursuant to G.L. c. 151A, § 25(e)(2), which provides, in pertinent part, as follows:

[No waiting period shall be allowed and no benefits shall be paid to an individual under this chapter] . . . (e) For the period of unemployment next ensuing . . . after the individual has left work . . . (2) by discharge shown to the satisfaction of the commissioner by substantial and credible evidence to be attributable to deliberate misconduct in wilful disregard of the employing unit’s interest, or to a knowing violation of a reasonable and uniformly enforced rule or policy of the employer, provided that such violation is not shown to be as a result of the employee’s incompetence . . . .

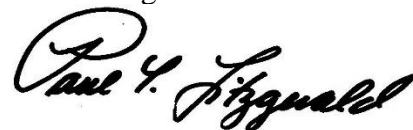
“[T]he grounds for disqualification in § 25(e)(2) are considered to be exceptions or defenses to an eligible employee’s right to benefits, and the burdens of production and persuasion rest with the employer.” Still v. Comm’r of Department of Employment and Training, 423 Mass. 805, 809 (1996) (citations omitted).

In this instance, the claimant worked for the instant employer from September, 2020, until June 17, 2021, apart from the occasional school break when no work was available. *See* Consolidated Findings ## 11, 13 and 14. The findings also reflect that, after every academic school year, the claimant was laid off in the summer. *See* Consolidated Finding # 3. Because the claimant was laid off every summer, and nothing in the record indicates that she had engaged in any misconduct, we can reasonably infer that she did not work after the school year ended on June 17, 2021, because the employer again laid her off. The lack of available work is not a basis to disqualify the claimant pursuant to the provisions of G. L. c. 151A, § 25(e)(2).

We, therefore, conclude as a matter of law that the claimant is eligible for benefits under G.L. c. 151A, § 25(e)(2), as her separation from the instant employer was the result of a layoff.

The review examiner’s decision is reversed. The claimant is entitled to receive benefits for the week ending June 26, 2021, and for subsequent weeks, if otherwise eligible.

**BOSTON, MASSACHUSETTS**  
**DATE OF DECISION - September 15, 2023**



Paul T. Fitzgerald, Esq.  
Chairman



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](http://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.

DY/rh