0011 0695 47 (Oct. 24, 2014) – Security booth operator who fell asleep at his post was not disqualified under G.L. c.151A, § 25(e)(2), because of mitigating circumstances. On the night in question, claimant was assigned to float to a location that involved a 60-mile commute each way, and he took steps to stay awake by leaving his post to get something to eat and drink.

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Issue ID: 0011 0695 47
Claimant ID: 10133854

BOARD OF REVIEW DECISION

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 was discharged from his position with the employer on July 23, 2013. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on September 24, 2013. 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 21, 2014. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest, and, thus, was disqualified under G.L. c. 151A, § 25(e)(2). After considering the recorded testimony and evidence from the hearing, the review examiner's decision, and the claimant's appeal, we afforded the parties an opportunity to submit written reasons for agreeing or disagreeing with the decision. Neither party responded. Our decision is based upon our review of the entire record.

The issue before the Board is whether the review examiner's conclusion that the claimant engaged in deliberate misconduct when he fell asleep at his post, because he took no measures to ensure his alertness in order to perform his job duties, 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 credibility assessments are set forth below in their entirety:

1. The claimant began working for the employer, which provides private security for client companies, in July of 2004.

2. The claimant worked full time as a security guard for forty (40) hours per week, with possible overtime, at the pay rate of $14 per hour.
3. At the time of his separation, the claimant was working in a "floater" position for the employer, meaning he was assigned to various sites as needed when other employees called out of work or were unavailable for other reasons.

4. The employer maintains an expectation that employees will conduct themselves professionally while working, which includes remaining awake, alert, and not sleeping during their shift. This is maintained to ensure the safety of any customer's site.

5. The claimant was aware of the expectation through his own experience as a security guard and common sense knowledge that one cannot sleep while being paid to work.

6. During a previous assignment received from the employer, the claimant was working a double shift when an employee of the company where he was stationed found him asleep and had to rouse him.

7. The employer called the claimant to their company office and gave him a verbal warning for falling asleep; during the same conversation, the employer informed the claimant that a repeat of the behavior could result in his termination.

8. In July 2013, the claimant was assigned to an electric company ("Client") facility in Newington, NH.

9. The Client's facility was approximately sixty (60) miles away from where the claimant lived.

10. The claimant was assigned to the location for a one (1) night shift that ran from 10 p.m. on July 16 to 6 a.m. on July 17.

11. The claimant commonly worked on one-day assignments, and had performed the 10 p.m. to 6 a.m. shift often during his time with the employer.

12. Nothing out of the ordinary occurred in the claimant's private life during July 16.

13. The claimant was stationed in the security booth at the front of the Client's facility, where he was to check the credentials of anyone trying to enter the door of the building on foot or through the front gate where vehicles entered by car.

14. The claimant was the only security officer assigned to the client's site during his shift.

15. The claimant did not engage in any physical activity, drink coffee or another stimulant, or take any other step to ensure that he stayed awake and alert.

16. At approximately 2 a.m. on July 17, the claimant was awoken by a car horn, at which time he saw a car waiting to enter and realized that he had fallen asleep.

17. The car approached the building and the claimant realized one of the Client's management staff ("Manager") was inside the car.

18. The Manager asked the claimant if he had been sleeping, and the claimant stated the he "must have dozed off."

19. The Manager then told the claimant that she had waited approximately five (5) minutes before honking, and that she would have to report that the claimant was sleeping to the employer since the Client needed its security guard to be alert as the facility was supposed to be a secure building.

20. On July 23, 2013, the employer terminated the claimant for falling asleep at his post.

Ruling of the Board

In accordance with our statutory obligation, we review the review examiner's decision to determine: (1) whether the findings are supported by substantial and credible evidence; and (2) whether the examiner's conclusion is free from error of law. After such review, the Board adopts the review examiner's findings of fact and credibility assessment except as follows. We reject Finding of Fact #15, because the record lacks any evidence that the claimant did not engage in any physical activity, drink coffee or other stimulant, or take any other step to ensure that he stayed awake and alert. This finding also contradicts the unchallenged testimony of the claimant that he had gotten up from his post to go and get some food and something to drink other than coffee, which he does not drink, in order to help him stay awake. In adopting the remaining findings, we deem them to be supported by substantial and credible evidence. As discussed more fully below, we conclude, contrary to the examiner, that the claimant did not engage in disqualifying misconduct.

Since the claimant was discharged, his qualification for benefits is governed by G.L. c. 151A, § 25(e)(2), which provides in pertinent part:

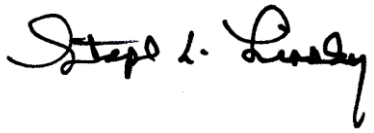
> No waiting period shall be allowed and no benefits shall be paid to an individual under this chapter for . . . [T]he period of unemployment next ensuing . . . after the individual has left work . . . (2) by discharge shown to the satisfaction of the commissioner by substantial and credible evidence to be attributable to deliberate misconduct in wilful disregard of the employing unit's interest . . . .

In order to determine whether an employee engaged in deliberate misconduct, the proper factual inquiry is to ascertain the employee's state of mind at the time of the behavior that caused his discharge. In order to deny benefits, it must be shown that the claimant acted with "intentional disregard of [the] standards of behavior which his employer has a right to expect." Garfield v. Dir. of Division of Employment Security, 377 Mass. 94 at 97 (1979). What must be proved, at a minimum, is "intentionality" in the form of awareness by the employee of what he is doing, and that what he is doing is violating the employer's policy. Still v. Comm'r of Department of Employment and Training, 423 Mass. 805, 813 (1996).

The Appeals Court has noted that, while "the act of falling asleep, by its very nature, ordinarily has an unintentional aspect to it," such misconduct can be disqualifying in certain circumstances. Each such case must be examined individually in light of any mitigating circumstances. Wedgewood v. Director of Division of Employment Security, 25 Mass. App. Ct. 30, 33 (1987); Shriver Nursing Services, Inc. v. Comm'r of Division of Unemployment Assistance, 82 Mass. App. Ct. 367 (2012). The claimant in Wedgewood, a night-shift custodian, was allowed benefits because he established that he was struggling with significant personal burdens that interfered with his ability to stay awake. In Shriver, the court denied benefits to the claimant nurse, whose job was to monitor the operation of life-sustaining medical equipment. One of the principal grounds on which the Shriver court relied, in express distinction from Wedgewood, was the claimant's failure to suggest any mitigating circumstances that might have caused unusual fatigue.

In the instant case, the claimant worked as a "floater" or fill-in security guard assigned to various locations. During the final assignment, he was working in the security booth, where his job was to check the credentials of anyone trying to enter the door of the building on foot or the front gate by vehicle. He was awakened by the horn of a vehicle that wanted to get through the gate. Like the claimant in Wedgewood, the instant claimant had produced evidence of mitigating circumstances on the night in question. The incident giving rise to his discharge had occurred during an unusual assignment –working a night shift with a 60-mile commute in each direction. Also, as noted earlier, and contrary to the examiner's findings, the claimant was aware of feeling sleepy and had left his post to get something to eat and drink in order in an effort to stay awake. As in Wedgewood, we are satisfied that these circumstances are sufficiently mitigating to prevent the employer from meeting its burden of establishing that this claimant was acting in deliberate and wilful disregard of the employer's interests, when he fell asleep during his shift.

We, therefore, conclude as a matter of law that the claimant's discharge is not attributable to deliberate misconduct in wilful disregard of the employer's interest within the meaning of G.L. c. 151A, § 25(e)(2). The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week ending July 29, 2013, and for subsequent weeks, if otherwise eligible.



DATE OF DECISION: October 24, 2014

Stephen M. Linsky, Esq.
Member

Judith M. Neumann, Esq.
Member

Chairman Paul T. Fitzgerald, Esq., did not participate in this decision, but concurs with the result.

ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS 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.

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.

SPE/ jv