

0014 3517 20 (Sept. 21, 2015) – Claimant intentionally fell asleep at work during the night shift. He went to sleep on a couch at 1:00 a.m., setting an alarm to wake himself up at 5:00 a.m. There were no mitigating circumstances for his conduct.

Board of Review
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Issue ID: 0014 3517 20
Claimant ID: 1398146

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 affirm.

The claimant was discharged from his position with the employer on September 2, 2014. He filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on October 1, 2014. The employer appealed the determination to the DUA hearings department. Following a hearing on the merits, attended only by the employer, the review examiner overturned the agency's initial determination and denied benefits in a decision rendered on January 13, 2015. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant knowingly violated a reasonable and uniformly enforced rule or policy of the employer 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 remanded the case to the review examiner to give the claimant an opportunity to testify and present other evidence. Both parties attended the remand hearing. Thereafter, the review examiner issued his consolidated findings of fact. Our decision is based upon our review of the entire record.

The issue on appeal is whether the review examiner's conclusion that the claimant was discharged for knowingly violating a reasonable and uniformly enforced rule or policy of the employer by sleeping on the job 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 assessments are set forth below in their entirety:

1. The employer runs a shelter for families. The claimant worked for the employer as a direct care staff member from 3/13/14 until 9/02/14.

2. The claimant's assigned schedule was three ten hour shifts per week. He worked 9:00 a.m. to 7:00 a.m. shifts.
3. The claimant's job required him to stay awake and ensure a safe environment for the shelter residents. When the claimant worked his shifts, he was the only worker at the shelter.
4. The employer created a handbook. The handbook indicated that "There will be no sleeping while on duty, in any positions." (Exhibit 5, pg. 4). The claimant understood that he must not sleep while at work.
5. The employer will always discharge employees who sleep while at work.
6. The employer required the claimant to stay awake at work because he was charged with the shelter residents' safety.
7. The employer contracted with the Commonwealth of Massachusetts. The contract indicated that workers must not sleep while at work.
8. In August and September 2014, the claimant took three prescribed medications. (Remand Exhibit 5).
9. Commonly, the employer asked the claimant to work more than three shifts in a week. The employer asked the claimant to work more shifts because it was understaffed. The claimant sometimes declined the additional shifts. However, he often accepted the additional shifts. The employer did not discipline the claimant when he declined shifts: it was optional to accept the additional shifts.
10. The claimant trained another worker ("Worker X") on an overnight shift in August 2014. The claimant trained the worker on only this one occasion. The claimant told Worker X that he slept between 1:00 a.m. and 5:00 a.m. and that he set an alarm for 5:00 a.m. to wake him up. The claimant lied (sic) down on the couch and slept from 1:00 a.m. to 5:00 p.m.
11. Worker X told the employer's shelter director that the claimant slept between 1:00 a.m. and 5:00 a.m. on the shift when he trained her.
12. Shelter residents told the director that they witnessed the claimant asleep at work. Residents reported that they saw the claimant asleep more than once. One resident told the program director that she saw the claimant sleeping face down on a couch. The residents told the program director that they did not feel safe when the claimant was at work.
13. The program director discharged the claimant shortly after she received the reports. The employer discharged the claimant because he slept at work.

CREDIBILITY ASSESSMENT:

The claimant testified that he did not intend to sleep at work. Given the totality of the testimony and evidence presented, it is concluded that the claimant slept at work and intended to do so. First, Worker X testified that the claimant told her that he slept between 1:00 a.m. and 5:00 a.m. and told her that he set an alarm for 5:00 a.m. Worker X also testified that she witnessed the claimant sleep on a shift from 1:00 a.m. to 5:00 a.m. Second, the claimant testified that he sometimes lied [sic] down from 1:00 a.m. to 5:00 a.m. and set an alarm for 5:00 a.m. to ensure that he was awake at that time. Third, the employer's program director testified that several residents complained to her that the claimant slept at work. These factors show that the claimant had an intentional sleep routine. The factors show that the claimant did not fall asleep by accident or due to medication, but rather had a planned time for sleep.

Ruling of the Board

In accordance with our statutory obligation, we review the examiner's decision to determine: (1) whether the findings of fact are supported by substantial and credible evidence; and (2) whether the ultimate conclusion that the claimant is not entitled to benefits is free from error of law. Upon such review and as discussed more fully below, the Board adopts the review examiner's consolidated findings of fact except as follows. In light of the totality of the evidence in the record, the portion of Consolidated Finding # 2 that says 9:00 a.m. should read 9:00 p.m., and the portion of Consolidated Finding # 10 that says 5:00 p.m. should read 5:00 a.m. In adopting the remaining findings, we deem them to be supported by substantial and credible evidence.

Since the claimant was discharged, his qualification for benefits is governed by 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 . . . 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

In order to deny benefits under the above provision, the employer must show 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 at the time both 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. Dir. 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 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.

At the remand hearing, the claimant testified that he notified the employer he could not to work more than 30 hours per week for health reasons, but he frequently worked more than 30 hours because the employer regularly asked the claimant to fill in for other employees. The claimant also contended that, in weeks in which he worked more than 30 hours, due to the side effects of his medication (*i.e.*, tiredness), he unintentionally fell asleep at work after he lay down merely to rest. The claimant's testimony implies that working more than his 30-hour limit contributed to his failure to stay awake at work. However, the review examiner found that the claimant was allowed to turn down shifts that exceeded his 30-hour maximum without consequences, but he instead chose to accept the extra shifts. Furthermore, in his credibility assessment, the review examiner concluded that the claimant's contention that he fell asleep accidentally due to the side effects of his medication was not credible. The examiner concluded that the claimant had a planned routine to sleep for several hours while on duty. Specifically, the examiner found that at 1:00 a.m. during one of his overnight shifts in August of 2014, the claimant set an alarm for 5:00 a.m. and proceeded to sleep between 1:00 a.m. and 5:00 a.m. The claimant engaged in this conduct even though he was aware of the employer's policy prohibiting employees from sleeping while on duty. As we cannot say that the review examiner's credibility determination and resultant findings were unreasonable in relation to the evidence presented, we will not disturb them. School Committee of Brockton v. Massachusetts Commission Against Discrimination, 423 Mass. 7 (1996). As in Shriver, the claimant here has not shown that mitigating circumstances caused him to accidentally fall asleep while on duty.

We, therefore, conclude as a matter of law that the claimant's discharge is attributable to a knowing violation of a reasonable and uniformly enforced policy of the employer.

The review examiner's decision is affirmed. The claimant is denied benefits for the week ending September 13, 2014, and for subsequent weeks, until such time as he has had eight weeks of work and has earned an amount equivalent to or in excess of his weekly benefit amount.

BOSTON, MASSACHUSETTS
DATE OF DECISION - September 21, 2015



Paul T. Fitzgerald, Esq.
Chairman



Judith M. Neumann, Esq.
Member

Member Stephen M. Linsky, Esq. did not participate in this decision.

**ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS STATE DISTRICT
COURT OR TO THE BOSTON MUNICIPAL 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.

SVL/rh