

0016 9834 50 (June 1, 2016) – Information Coordinator, who employed various preventive measures to stay awake during her shift, but nonetheless fell asleep at her desk in plain view of anyone who might enter her work area, is entitled to benefits under G.L. c. 151A, § 25(e)(2). The Board considered the claimant's duty of care, which was commensurate with the gravity and sensitivity of her work.

**Board of Review**  
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**Issue ID: 0016 9834 50**  
**Claimant ID: 10413813**

## **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 her position with the employer on September 11, 2015. She filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on October 8, 2015. The employer appealed the determination to the DUA hearings department. Following a hearing on the merits, attended by both parties, the review examiner overturned the agency's initial determination and denied benefits in a decision rendered on December 22, 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 afforded the parties an opportunity to submit written reasons for agreeing or disagreeing with the decision. Only the claimant responded. 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 on appeal is whether the review examiner's conclusion that the claimant knowingly violated a reasonable and uniformly enforced rule or policy of the employer, under G.L. c. 151A, § 25(e)(2), by falling asleep in her chair while on duty, 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 work for the employer on February 14, 2005.
2. The claimant worked full-time as an Information Coordinator for the employer's hospital. The claimant worked 40 hours per week.
3. The claimant typically worked from 7:00 A.M. to 3:00 P.M. In April of 2015, the claimant's shift changed to 11:00 P.M. to 7:00 A.M.
4. As an Information Coordinator, the claimant sat at the front desk and assisted people who walked into the hospital during the night.
5. The front area is usually quiet at night.
6. The claimant sometimes nodded off or closed her eyes while she worked during her night shift.
7. To stay awake, the claimant took deep breaths, stretched, and moved around.
8. The employer had a written policy prohibiting employees from sleeping on duty.
9. The reason for the employer's policy was to ensure that staff performed their duties.
10. The claimant was advised of the employer's policy when she was hired and through counseling during her employment.
11. The employer discharged all employees that were found to be asleep on duty.
12. On August 10, 2015, the claimant fell asleep in her chair while on duty for several minutes.
13. On September 9, 2015, an anonymous DVD was left for the Manager to view. The Manager viewed the video on the DVD, which showed the claimant sitting in a chair with her head down and eyes closed for several minutes. The video had that (sic) date of August 10, 2015.
14. The Manager pulled up the employer's surveillance video for August 10, 2015 and observed the claimant sitting in a chair, with her head down and eyes closed. The Manager could see the claimant's eyes were closed from the position of the camera.
15. The Manager contacted the Human Resources Department and provided the DVD. The Human Resources Department conducted an investigation.

16. The HR Generalist viewed the anonymous DVD and employer's surveillance video for August 10, 2015 and saw the claimant sitting in a chair, with her head down and eyes closed for several minutes.
17. On September 11, 2015, the claimant met with the Manager and HR Generalist and was informed that the claimant was observed on video sleeping while on duty on August 10, 2015.
18. On September 11, 2015, the claimant was discharged by the Manager and HR Generalist for violating the employer's policy when the claimant fell asleep on duty on August 10, 2015.

### 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 original 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 findings of fact. In adopting these findings, we deem them to be supported by substantial and credible evidence. However, we conclude that the findings support an award of benefits to the claimant.

Since the claimant was discharged from her employment, her eligibility 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 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 . . . .

In a discharge case, the employer bears the burden of proof to show that the claimant should be disqualified from receiving benefits. In this case, the employer has not met its burden.

The review examiner found that, on August 10, 2015, the claimant fell asleep in her chair for several minutes during her overnight shift. The employer's surveillance video caught the claimant with her head down and her eyes closed. In order to deny benefits under the deliberate misconduct standard, it must be shown that the claimant acted with "intentional disregard of [the] standards of behavior which [her] employer has a right to expect." Garfield v. Dir. of Division of Employment Security, 377 Mass. 94 at 97 (1979). In order for an employee's conduct to be deemed a knowing violation at the time of the act, the employee must have been "... consciously aware that the consequence of the act being committed was a violation of an employer's reasonable rule or policy." Still v. Comm'r of Department of Employment and Training, 423 Mass. 805, 813 (1996).

The Massachusetts Appeals Court has stated that for these types of cases, in evaluating the knowing violation prong of G.L. c. 151A, § 25(e)(2), “[K]nowing violation’ means knowledge of an employer’s rule or policy against on-duty sleeping, but not knowledge of the precise act of entering sleep.” Shriver Nursing Services, Inc. v. Comm’r of Division of Unemployment Assistance, 82 Mass. App. Ct. 367, 374 (2012). As for evaluating the deliberate misconduct prong, the Appeals Court has stated, “Although the act of falling asleep, by its very nature, ordinarily has an unintentional aspect to it, we acknowledge that sleeping on the job may constitute such misconduct in wilful disregard of an employer’s interest as to justify the denial of unemployment benefits.” Wedgewood v. Dir. of Division of Employment Security, 25 Mass. App. Ct. 30, 33 (1987). Each case “require[s] a circumstantial evaluation of [the] sleeping lapse.” Shriver, 82 Mass. App. Ct. at 373.

Here, the review examiner found that the claimant was aware of the employer’s policy prohibiting employees from sleeping while on duty. However, there is nothing in the record to indicate that the claimant intentionally fell asleep during her shift on August 10<sup>th</sup>, or that it was done in wilful disregard of the employer’s interest. The fact that, on August 10<sup>th</sup>, she fell asleep while sitting in her chair, in plain view of anyone who entered her work area, is indicative of a lack of intent to go to sleep. It is highly unlikely that she would have intentionally taken a nap in plain sight of anyone who walked into her work area, including other hospital staff that could report such behavior.

Moreover, the review examiner found that the claimant employed various techniques to stay awake during her shifts, such as taking deep breaths, stretching, and moving around. These preemptive measures taken by the claimant tend to show that she generally did everything in her power to stay awake while on duty. *See* Board of Review Decision BR-124793-A (April 29, 2013) (when family shelter counselor fell asleep, she did not have a blanket or pillow with her, and her shoes were on her feet at the time).<sup>1</sup> *Compare* Board of Review Decision 0014 3517 20 (Sept. 21, 2015) (held claimant, who went to sleep on the couch at 1:00 a.m., setting an alarm to wake himself up at 5:00 a.m., intentionally fell asleep).

We must also consider the claimant’s duty of care, which is commensurate with the gravity and sensitivity of her work. Shriver, 82 Mass. App. Ct. at 374. In Shriver, the Appeals Court disqualified a nurse, who fell asleep while monitoring life-sustaining medical equipment for a child with cerebral palsy that could have exposed the patient to life-threatening danger. *Id.* at 368, 374 n. 9. In the present case, the claimant’s job as front desk information coordinator was not as sensitive. It was more akin to the work of the night shift custodian in Wedgewood, whose sleepiness may have caused an interruption in custodial chores. Shriver, 82 Mass. App. Ct. at 374 n. 9.

We, therefore, conclude as a matter of law that the claimant is entitled to benefits because the employer has not established that the claimant’s sleeping on the job was attributable to deliberate misconduct in wilful disregard of the employer’s interest or to a knowing violation of a rule or policy of the employer, as meant under G.L. c. 151A, § 25(e)(2).

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<sup>1</sup> Board of Review Decision BR-124793-A is an unpublished decision, available upon request. For privacy reasons, identifying information is redacted.

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week ending September 12, 2015, and for subsequent weeks, if otherwise eligible.

**BOSTON, MASSACHUSETTS**  
**DATE OF DECISION - June 1, 2016**



Paul T. Fitzgerald, Esq.  
Chairman



Charlene A. Stawicki, Esq.  
Member

Member Judith M. Neumann, 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](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.

SVL/rh