

0020 4770 73 (Aug. 28, 2017) – Claimant had a heightened obligation to take precautionary measures to stay awake on the night shift, where he was responsible for monitoring adolescents on suicide watch. A prior warning for sleeping on the job put him on notice that he was susceptible to drowsiness. Because the claimant denied that he was sleeping on the job, he offered no mitigating factors. He is not eligible for benefits after resigning in lieu of discharge.

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Issue ID: 0020 4770 73

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The employer appeals a decision by a review examiner of the Department of Unemployment Assistance (DUA), to award unemployment benefits. We review, pursuant to our authority under G.L. c. 151A, § 41, and reverse.

The claimant resigned from his position with the employer on November 21, 2016. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on January 16, 2017. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, attended only by the claimant, the review examiner overturned the agency's initial determination and awarded benefits in a decision rendered on March 16, 2017. We accepted the employer's application for review.

Benefits were awarded after the review examiner determined that the claimant voluntarily left employment for good cause attributable to the employer, and was thus not 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 employer's appeal, we remanded the case to the review examiner to afford the employer an opportunity to present testimony and evidence. Both parties 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 initial conclusion that the claimant left work for good cause attributable to the employer when he resigned in anticipation of being discharged for non-disqualifying reasons, is supported by substantial and credible evidence and is free from error of law, where after remand the record shows that the claimant fell asleep while on duty for the employer.

Findings of Fact

The review examiner's consolidated findings of fact and credibility assessments are set forth below in their entirety:

1. The claimant worked for the employer, a residential treatment center for adolescents, as a full time residential counselor from approximately February 1, 2014 until November 8, 2016 and worked the day shift.
2. No policy relevant to the claimant's separation was presented at the hearing.
3. The employer exercised discretion in the enforcement of any disciplinary action.
4. In August 2016, the claimant began volunteering for overnight shifts in addition to his typical day schedule in order to supplement his income.
5. The employer required overnight staff to provide continuous 1 on 1 monitoring of adolescent residents on suicide watch and close observation of the remaining residents within the locked unit, who presented a heightened risk of harm to themselves or others.
6. This reasonable expectation protected the safety of the clients under the employer's care and the staff working within the unit.
7. The claimant understood that he was expected to remain awake for the duration of an overnight assignment in order to ensure the safety of the client under his watch.
8. On August 12, 2016, the claimant volunteered to work an overnight shift. It is unknown if he was assigned to provide 1x1 coverage to a specific resident during that shift.
9. On August 18, 2016, the claimant was issued a Written Employee Warning after multiple employees and a client reported that he had allegedly fallen asleep on numerous occasions during his August 12, 2016 overnight shift. The reporting individuals claimed that they had made multiple unsuccessful attempts to wake him. A supervisor provided the Director with a photograph which the Director believed clearly reflected the claimant sleeping while on duty the night of August 12, 2016. The claimant denied the allegation.
10. The warning stated that the claimant must remain awake at all times while on duty and obtain proper rest before his shift. The warning also documented [that] additional events of the same nature would result further disciplinary action up to and including termination of employment.
11. On October 5, 2016, the parent of a resident reported observing the claimant using his cellphone on October 1, 2016.

12. During initial questioning regarding the claimant's potential cell phone use, multiple employees and a client came forward with allegations that the claimant had fallen asleep while on duty on the night of October 1, 2016.
13. Effective October 5, 2016, the claimant was placed on paid administrative leave while the employer investigated the reports of him sleeping on the job.
14. The two other staff members who worked with the claimant on the night of October 1, 2016 reported that, based on their observations, they believed him to have frequently nodded off and to have also fallen asleep entirely. The employer expanded its interviews to additional staff who had worked with the claimant on other overnight shifts. These staff members reported observing similar behavior.
15. The claimant denied sleeping on the job throughout the investigation.
16. The employer determined the allegations of the claimant sleeping while on duty to be substantiated based on significantly similar statements from multiple staff members in good standing.
17. The employer found the act of falling asleep while responsible for a locked unit of high-risk adolescents after receiving a warning for the same behavior to be egregious enough to warrant termination.
18. The employer discharged approximately 6 employees for sleeping on the job during the claimant's final year of employment.
19. On November 8, 2016, the claimant was notified that he was going to be discharged for sleeping on the job and was asked if he would prefer to resign.
20. Effective November 8, 2016, the claimant resigned in lieu of being discharged for sleeping while working the overnight shift.

CREDIBILITY ASSESSMENT: The claimant provided conflicting testimony regarding his actions and disciplinary history at the February 22, 2017 and May 19, 2017 hearings, and his testimony at times differed with the consistent testimony of the employer.

On February 22, 2017, the claimant denied receiving any disciplinary action for sleeping on the job prior to his separation. When presented with the August 19, 2016 Written Employee Warning on May 19, 2017, he stated that he "mostly" did not remember the warning. At the May 19, 2017 hearing, he did recall receiving the warning to the extent that he knew there would be consequences if he "fell asleep again" and that he signed the document because he felt failure to do so would result in termination. On February 22, 2017, the claimant testified that he did not recall falling asleep at work but that he had been ill and "wouldn't doubt it". On May 19, 2017, the claimant argued that, despite his

prior statement, it was not possible that he had fallen asleep at work at any time. The claimant initially indicated that he resigned on November 31, 2016 after being notified that he had been found sleeping on or around November 22, 2016. After hearing the employer's May 19, 2017 testimony, he agreed that he was placed on leave effective October 5, 2016.

Regardless of whether or not his intent was to be evasive, or was due to poor memory recall, the claimant's testimony is not deemed credible due to multiple inconsistencies about critical facts.

Ruling of the Board

In accordance with our statutory obligation, we review 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 ultimate conclusion is free from error of law. Upon such review, the Board adopts the review examiner's consolidated findings of fact and deems them to be supported by substantial and credible evidence. However, as discussed more fully below, based on the new consolidated findings, we conclude that the claimant is subject to disqualification under G.L. c. 151A, § 25(e)(1).

At the initial hearing, attended only by the claimant, the review examiner heard and accepted the claimant's testimony that he did not sleep on the job, had never received a warning for doing so, and resigned in lieu of discharge for allegedly sleeping on duty. Consequently, the review examiner analyzed the claimant's separation under G.L. c. 151A, § 25(e)(1), 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 (1) voluntarily unless the employee establishes by substantial and credible evidence that he had good cause for leaving attributable to the employing unit or its agent

The Supreme Judicial Court has held that if employees leave employment under the reasonable belief that they are about to be fired, their leaving cannot fairly be regarded as voluntary within the meaning of G.L. c. 151A, § 25(e)(1). Malone-Campagna v. Dir. of Division of Employment Security, 391 Mass. 399, 401–402 (1984), *citing* White v. Dir. of Division of Employment Security, 382 Mass. 596, 597–598 (1981). Since the record indicates the claimant resigned in lieu of discharge, his separation is deemed to be involuntary and is more properly analyzed under G.L. c. 151A, § 25(e)(2). This provision states in relevant 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

Following remand, the review examiner's findings establish that the claimant accepted overnight shifts in addition to his regular daytime schedule to supplement his income. During overnight shifts, the staff was required to provide continuous one-on-one monitoring of adolescent residents on suicide watch, and close observation of the other residents in the locked unit, who presented a heightened risk of harm to themselves and others. The claimant was aware of this requirement. In August, 2016, the claimant was issued a written warning for falling asleep during one of his overnight shifts. The claimant's written warning stated that the claimant had to remain awake at all times while on duty and obtain proper rest before his shift. The warning also indicated that additional events of the same nature would result in further disciplinary action up to and including termination of employment. The employer believed that falling asleep while responsible for a locked unit of high risk adolescents after receiving a warning for the same behavior to be egregious enough to warrant termination. While investigating a complaint regarding the claimant's cell phone use, the employer became aware of allegations that the claimant had fallen asleep during his October 1, 2016, overnight shift. The employer conducted an investigation, which included interviews with numerous staff members. The claimant denied sleeping on the job throughout the employer's investigation. The findings suggest that based on this investigation, the employer concluded that the claimant had been sleeping during the shift in question. The employer notified the claimant he would be discharged for sleeping on the job and he was asked if he preferred to resign. The claimant resigned in lieu of being discharged for sleeping while working the overnight shift.

In rendering her findings, the review examiner provided a credibility assessment setting forth her reasons for accepting the employer's testimony over that of the claimant, including that the claimant provided conflicting testimony, and that regardless of whether his intent was to be evasive or due to poor memory recall, that the claimant's testimony was not deemed credible due to multiple inconsistencies about critical facts. Such assessments are within the scope of the fact finder's role, and, unless they are unreasonable in relation to the evidence presented, they will not be disturbed on appeal. *See School Committee of Brockton v. Massachusetts Commission Against Discrimination*, 423 Mass. 7, 15 (1996).

Given the totality of the record before us, we see no reason to disturb the review examiner's credibility assessment. We note in this regard the employer's case was based in part on hearsay evidence. However, hearsay evidence is not only admissible in informal administrative proceedings such as DUA hearings, but it can constitute substantial evidence on its own if it contains "indicia of reliability." *Covell v. Department of Social Services*, 439 Mass. 766, 786 (2003), *quoting Embers of Salisbury, Inc. v. Alcoholic Beverages Control Commission*, 401 Mass. 526, 530 (1988). Indicia of reliability can be assessed by determining, among other things, whether the underlying testimony was presented under oath, was detailed and consistent, was resistant to the suggestiveness of leading questions, and whether it was corroborated by other evidence in the record. *Covell*, 439 Mass. at 785-786. The review examiner observed that the hearsay evidence offered by employer consisted of significantly similar statements from multiple staff members in good standing as well as a client of the employer. The consistency of these statements combined with a lack of any indication that the makers of these statements were biased against the claimant or were motivated to be untruthful provides indicia of reliability to the hearsay evidence offered.

The findings and record establish the claimant would have been discharged for sleeping on duty. When evaluating the deliberate misconduct prong of G.L. c.151A, § 25(e)(2), in these type of cases, the Massachusetts 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). The Appeals Court has further opined that each sleeping case “require[s] a circumstantial evaluation of [the] sleeping lapse.” Shriver Nursing Services, Inc. v. Comm’r of Division of Unemployment Assistance, 82 Mass. App. Ct. 367, 374 (2012).

In Shriver, the Appeals Court set forth the circumstances to be considered in evaluating the “sleeping lapse.” According to the court “[T]he first and dominant circumstance is the importance of the employee’s responsibility.” In the instant matter, the claimant job assignment was to continuously monitor the employer’s adolescent residents on suicide watch and closely observe the other residents within the employer’s locked unit who presented a heightened risk of harm to themselves or others. Alertness was a quintessential part of the claimant’s job responsibility and created an “obligation to preempt or to combat fatigue or drowsiness by such cautionary measures as adequate rest, on-the-job physical and mental exercises, safe stimulants, or calls for coverage or replacement.” Shriver, 82 Mass. App. Ct. at 374. Likewise, “the gravity and sensitivity” of the claimant’s work “imposed a commensurate duty of care, and a knowing awareness of its required wakefulness.” Id.

The second circumstance identified by the court in Shriver is whether a claimant has some warning of a susceptibility to drowsiness. Id. at 375. Here, the claimant received a written warning from the employer after the first incident in which he fell asleep on duty. Thus, the claimant had clear notice of his “susceptibility to drowsiness.”

The last circumstances cited by the Shriver court is whether there are any “mitigating personal circumstances”, which caused a claimant to experience “particular fatigue or stress.” Id. Since the claimant repeatedly denied falling asleep during any of his overnight shifts, he has not presented any personal difficulties or hardship, which mitigated his conduct.

On the record before us and consistent with the court’s analysis and holding in Shriver, we conclude as a matter of law that the claimant, by falling asleep while on duty, engaged in deliberate misconduct within the meaning of G.L. c. 151A, 25(e)(2).

The review examiner’s decision is reversed. The claimant is denied benefits for the week ending December 3, 2016, and for subsequent weeks, until such time he has had at least eight weeks of work and has earned an amount equivalent to or in excess of eight times his weekly benefit amount.



Paul T. Fitzgerald, Esq.
Chairman

BOSTON, MASSACHUSETTS
DATE OF DECISION - August 28, 2017



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

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/rh