

**Since the employer presented only uncorroborated hearsay evidence, no video evidence, and blurry photos of the claimant at work, it was unable to carry its burden to show through substantial and credible evidence that the claimant slept at work.**

**Board of Review  
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**Issue ID: 0021 4189 55**

## **BOARD OF REVIEW DECISION**

### **Introduction and Procedural History of this Appeal**

The employer appeals a decision by Krista Tibby, 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 affirm.

The claimant was discharged from her position with the employer on March 25, 2017. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on April 12, 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 June 1, 2017.

Benefits were awarded after the review examiner determined that the claimant had not engaged in deliberate misconduct in wilful disregard of the employer's interest or knowingly violated a reasonable and uniformly enforced rule or policy of the employer and, thus, was not 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 employer's appeal, we accepted the employer's application for review and remanded the case to the review examiner to allow the employer an opportunity to provide evidence regarding the claimant's separation. Only the employer 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 conclusion that the claimant is not subject to disqualification pursuant to G.L. c. 151A, § 25(e)(2), is supported by substantial and credible evidence and is free from error of law, where the employer alleged that the claimant was sleeping at work on March 24, 2017, but, following remand, the record indicates the claimant did not sleep during her work shift on the date in question.

### **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 part time as a storage sales associate for the employer, a moving truck rental and storage unit rental company, from August 2016 until March 25, 2017.
2. The claimant's immediate supervisor was the Manager.
3. The claimant was the Manager's only employee.
4. The claimant's job duties included customer service, renting moving trucks and storage units to customers and running the office.
5. The employer maintained an expectation that employees not sleep at work. The employer maintained this expectation to ensure the employer was paying its employees for completing work and to ensure employees took care of customers. The employer provided the claimant with a job description that contained the expectation at the time she was hired.
6. Over the course of the claimant's employment, she experienced migraines. The migraines caused the claimant to experience disorientation, confusion and sensitivity to light.
7. On January 4, 2017, the claimant received a final warning from the Manager for not making a deposit; hiding in the bathroom; poor performance; and customer complaints. The warning stated "I will no longer deal with how your performance running my store will [sic] I am away. I will make it clear one more mistake, anything and I will let you go."
8. On or about February 7, 2017, the claimant's physician diagnosed her with migraines.
9. On March 24, 2017, the claimant had a migraine at work. The claimant placed her head down on her arms for approximately forty-five (45) minutes. The claimant closed her eyes because the fluorescent lights in the office caused her to experience light sensitivity.
10. It was unknown why the claimant did not call the Manager to tell him she had a migraine.
11. On March 24, 2017, a customer (the Customer) arrived to the store while the claimant's head was down and her eyes were closed.
12. The claimant did not hear the Customer enter the office because she was concentrating on the pain she experienced. The claimant did not lift her head up because she did not hear the Customer enter the office.

13. The Customer knocked on the countertop to get the claimant's attention because the claimant did not respond to the Customer when she entered the office.
14. The claimant was not asleep while at work. The pain the claimant experienced because of the migraine prevented her from sleeping at work.
15. The Customer did not wake the claimant up on March 24, 2017.
16. On March 25, 2017, the employer's area field manager (the Area Field Manager) called the Manager, told him the Customer was in his office the previous day and that she complained to him because she believed the claimant was a drug addict and was asleep when she arrived in the store on March 24, 2017. The Customer told the Area Field Manager she was a drug addiction counselor.
17. The Manager did not speak with the Customer.
18. On March 25, 2017, the Manager called the claimant and asked her to bring him her keys. When the claimant arrived to the office, the Manager told the claimant she was discharged. The claimant asked the Manager why she was discharged and he told her "figure it out on your own".
19. On March 25, 2017, the Manager discharged the claimant because she was allegedly asleep at work on March 24, 2017.
20. The claimant was not asleep at work on March 24, 2017.
21. The Manager did not give the claimant a reason for her discharge because he believed she would find out "in unemployment court".
22. The Manager did not view the office's videotaped recording before he discharged the claimant.
23. On or about March 27, 2017, after he discharged the claimant, the Manager viewed the office videotaped recording for March 24, 2017. The videotaped recording was from the back and the Manager was unable to see the claimant's face in the video.

#### **Credibility Assessment:**

The Manager offered the Area Field Manager's hearsay testimony at the hearing that the claimant was asleep when the Customer arrived on March 24, 2017. The Manager admitted he did not witness the claimant actually sleeping on March 24, 2017. Although the Manager did view the office's video recording from March 24, 2017, he did not do so until after he discharged the claimant. The Manager

believed the claimant was asleep on March 24, 2017 because she had received a warning for multiple reasons the month prior and because he felt the Customer's profession as a drug addiction counselor meant she was believable. The Manager did not have any first-hand knowledge regarding the claimant allegedly being asleep on March 24, 2017. Also, the employer failed to provide the video of the claimant allegedly sleeping and did not provide clearer photos of the claimant allegedly sleeping as requested by the Board of Review because the employer felt the photograph previously provided was clear enough.

Although the claimant was not at the remand hearing, she offered testimony at the original hearing that rebutted the Manager's hearsay testimony. The claimant offered direct testimony that although her head was down and her eyes were closed on March 24, 2017, she was not asleep because the pain she experienced prevented her from sleeping. The claimant's testimony is reasonable given her migraine diagnosis. The claimant also provided medical documentation at the original hearing corroborating her migraine diagnosis.

Based on the Manager's hearsay testimony that relied on what the Customer told the Area Field Manager and the claimant's testimony from the original hearing, that the pain she experienced prevented her from sleeping, her eyes were closed because of light sensitivity, together with the medical documentation, it is concluded the claimant was not asleep on March 24, 2017.

### 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, as discussed more fully below, deems them to be supported by substantial and credible evidence. We conclude that the review examiner's decision to award benefits to the claimant is free from error of law and supported by the record.

There was no dispute that the claimant was discharged on March 25, 2017. Because the claimant was terminated from her employment, her qualification for benefits is governed by G.L. c. 151A, § 25(e)(2), which provides, 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 . . . .

Under this section of law, the employer has the burden to show that the claimant is not eligible to receive benefits. The review examiner concluded that the employer had not carried its burden. Following our review of the entire record, including the testimony given by the employer at the remand hearing and the consolidated findings of fact, we agree with the review examiner's conclusions.

The employer discharged the claimant on March 25, 2017, for allegedly sleeping while at work on March 24, 2017. In order for the employer to ultimately carry its burden, it must first show that the claimant engaged in the alleged misconduct. Sleeping at work would be in violation of the employer's expectation that employees not sleep while working. *See Consolidated Finding of Fact # 5.* The review examiner concluded in her decision that the employer had not showed that the claimant slept at work on March 24. Her consolidated findings of fact reflect the same. *See Consolidated Finding of Fact ## 14, 15 and 20.*

Whether the claimant was sleeping at work on March 24, 2017, is a question and dispute of fact. At this stage of the administrative process, the "inquiry by the board of review into questions of fact, in cases in which it does not conduct an evidentiary hearing, is limited . . . to determining whether the review examiner's findings are supported by substantial evidence." Dir. of Division of Employment Security v. Fingerman, 378 Mass. 461, 463 (1979). "Substantial evidence is 'such evidence as a reasonable mind might accept as adequate to support a conclusion,' taking 'into account whatever in the record detracts from its weight.'" Lycurgus v. Dir. of Division of Employment Security, 391 Mass. 623, 627-628 (1984), *quoting* New Boston Garden Corp. v. Assessors of Boston, 383 Mass. 456, 466 (1981); G.L. c. 30A, § 1(6). Since the Board did not hold a hearing in this matter, we cannot make findings of fact. We also cannot set aside the review examiner's credibility determination, unless it is unreasonable or unsupported by the evidence cited in the assessment. In unemployment proceedings, "[t]he responsibility for choosing between conflicting evidence and for assessing credibility rests with the examiner." Zirelli v. Dir. of Division of Employment Security, 394 Mass. 229, 231 (1985).

As noted above, we have accepted the review examiner's consolidated findings of fact. We do so essentially for the reasons stated in the review examiner's credibility assessment, which accompanied her new findings. The employer's witness, the store manager, was not present on March 24 when the claimant was allegedly sleeping. His basis for believing that the claimant slept at work on that day came from the area field manager, who spoke with the customer who had complained about the claimant's behavior. Thus, the store manager's testimony during the hearing constituted hearsay.<sup>1</sup> In administrative proceedings, hearsay evidence can be received and may constitute substantial evidence if it contains sufficient indicia of reliability and probative value. *See* Embers of Salisbury, Inc. v. Alcoholic Beverages Control Comm'n, 401 Mass. 526, 530 (1988). Here, the hearsay evidence was not shown to be reliable. The employer did not submit a video of the claimant sleeping. The photographs submitted into the record are blurry, and it is unclear if the claimant is actually sleeping. *See Exhibit # 5.* No other witness was produced to verify what the customer reported to the area field manager. Few, if any, indicia of reliability were provided to support the hearsay evidence. Thus, it was reasonable for

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<sup>1</sup> The hearsay at issue is actually double hearsay. The first layer is what the customer reported, and the second layer is what the area field manager told to the store manager.

the review examiner to discount or give little weight to the store manager's testimony as to whether the claimant slept on March 24.

Moreover, as noted, the other evidence presented was insufficient to show that the claimant was sleeping on March 24. Although the store manager testified that he viewed the video of the store from March 24, he admitted during the remand hearing that he could not see the front of the claimant's face. The review examiner believed his testimony that the video showed the claimant with her head down on her arms for forty-five minutes. *See Consolidated Finding of Fact # 9.* However, that was not sufficient to show that the claimant was asleep. On this disputed fact, the review examiner found the claimant to be more credible. She found, in accordance with the claimant's testimony, that the claimant had a migraine at work, she put her head down to deal with it, and she wouldn't have been able to sleep at all due to the migraine. This resolution of the conflicting testimony was reasonable, given the evidence in the record. Therefore, we accept that the claimant did not sleep on March 24.<sup>2</sup>

We, therefore, conclude as a matter of law that the review examiner's initial decision to award benefits is supported by substantial and credible evidence and free from error of law, because her findings that the claimant did not sleep on March 24, 2017, as alleged by the employer, are based on a reasonable view of the record and, thus, the employer did not carry its burden to show that the claimant is subject to disqualification under G.L. c. 151A, § 25(e)(2).

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<sup>2</sup> Even if the review examiner has found that the claimant fell asleep, it appears that such misconduct would have been mitigated by her issues with her migraine that day. *See Consolidated Findings of Fact ## 6, 8, 9, 12, and 14. See Garfield v. Dir. of Division of Employment Security*, 377 Mass. 94, 97 (1979) (noting the importance of mitigating factors in deciding whether claimant is subject to disqualification under G.L. c. 151A, § 25(e)(2)).

The review examiner's decision is affirmed. The claimant is entitled to receive benefits for the week beginning March 19, 2017, and for subsequent weeks if otherwise eligible.

**BOSTON, MASSACHUSETTS**  
**DATE OF DECISION - August 31, 2017**



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.

SF/rh