

On a final written warning for tardiness, the claimant knowingly violated the employer's tardiness policy. Rather than ensure that she had plenty of sleep and enough time to report for her night shift work, the claimant chose to help her grandson find a stolen bicycle rather than sleep, set her alarm for only 40 minutes before her shift started, and failed to take steps to avoid hitting the snooze function, such as moving the alarm clock across the room or setting a second alarm.

**Board of Review
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Issue ID: 0021 6177 90

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The claimant appeals a decision by Rorie Brennan, 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 her position with the employer on April 19, 2017. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on May 6, 2017. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, attended by both parties, the review examiner affirmed the agency's initial determination and denied benefits in a decision rendered on June 15, 2017. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant had both engaged in deliberate misconduct in wilful disregard of the employer's interest and knowingly violated a reasonable and uniformly enforced rule or policy of the employer, and, thus, she 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 for further subsidiary findings of fact from the record pertaining to why the claimant was late for her last day of work. 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 knowingly violated a reasonable and uniformly enforced employer policy and engaged in deliberate misconduct in wilful disregard of the employer's interest when she arrived at work late on April 16, 2017, 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 claimant worked as a full time General Inspector for the employer, a manufacturer, from 12/01/14 until 04/19/17. The claimant's rate of pay was \$18.83 per hour plus shift differential.
2. The employer has a written Partial Absences policy that governs employees who report to work late and leave early. The employer defines a partial absence as any missed scheduled time less than 2 hours.
3. Any four incidents of partial absences (tardy or early quit) within a rolling 12 month period will result in one point.
4. The employer's progressive point system is: (1) 1 point = Verbal Notification; (2) 2 points = Written Warning; (3) 3 points = Final Written Warning; (4) 4 points = Termination.
5. If a partial absence occurs resulting in a point and a corresponding disciplinary step is issued, any past occurrences that are beyond the rolling 12 month period as of that date will drop off and the employer will assign the appropriate disciplinary level as of the current date.
6. The employer discharges all employees who incur four points for partial absences.
7. On 06/01/15, the employer issued the claimant a Verbal Notification for incurring 1 partial absences point.
8. On 09/14/16, the employer issued the claimant a Written Warning for incurring 2 partial absences points.
9. On 12/19/16, the employer issued the claimant a Final Written Warning for incurring 3 partial absences points.
10. On 01/02/17, 01/05/17, 02/22/17, and 03/17/17, the claimant was partially absent.
11. The claimant lives in the same building as her mother. Her half-brother, who is a convicted sex offender recently released from prison, lives with the claimant's mother.
12. The claimant is uncomfortable living in the same building with her half-brother.

13. The claimant has trouble sleeping and generally “gets very little sleep.”
14. On 04/16/17, the claimant was scheduled to work her regular 3rd shift schedule beginning at 10:00 p.m.
15. That day, she did not sleep much because she was driving around the neighborhood looking for her grandson’s stolen bicycle.
16. Later in the day, the claimant set her alarm clock for 9:20 p.m. and attempted to sleep before work.
17. The claimant woke up at approximately 9:30 p.m. after hitting the snooze button when her alarm went off and [she] fell back asleep.
18. The claimant got up, brushed her teeth, put her hair in a ponytail and drove to work about 15 minutes away.
19. The claimant arrived and punched in at work four minutes late.
20. The claimant attempted to arrive to work on time.
21. On 04/20/17, the Human Resources Supervisor discharged the claimant in the presence of her union representative.
22. On 04/21/17, the claimant filed a claim for unemployment benefits with an effective date of 04/16/17.

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. As discussed more fully below, we also agree with the review examiner’s legal conclusion that the claimant is ineligible for benefits.

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 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 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

"[T]he grounds for disqualification in § 25(e)(2) are considered to be exceptions or defenses to an eligible employee's right to benefits, and the burdens of production and persuasion rest with the employer." Still v. Comm'r of Department of Employment and Training, 423 Mass. 805, 809 (1996) (citations omitted).

The consolidated findings provide that the employer fired the claimant after she arrived at work four minutes late on April 16, 2017. We consider first whether the employer has shown that this instance of tardiness, which triggered her discharge, was a knowing violation of a reasonable and uniformly enforced policy.

The employer's Partial Absences policy is reasonable, as it communicates the employer's expectation that employees timely report for work and imposes discipline only when there have been multiple infractions. *See* Consolidated Findings ## 2–5. The review examiner has found that the employer's policy is uniformly enforced. Consolidated Finding # 6. There is also no question that the claimant was aware of the attendance policy, as she signed an acknowledgment that she received a copy, she had already received several warnings which referenced the policy, and she told the DUA that she knew about the policy. *See* Exhibits ## 1, 6, and 7.¹

The issue before us is not whether the employer was justified in terminating the claimant's employment, but whether she is eligible for unemployment benefits. The purpose of the unemployment statute is to provide temporary relief to "persons who are out of work . . . through no fault of their own." Cusack v. Dir. of Division of Employment Security, 376 Mass. 96, 98 (1978) (citations omitted). Thus, the employer must prove that the claimant intentionally violated the policy on April 16, 2017. *See* Still, 423 Mass. at 813.

The Supreme Judicial Court has directed that to establish a knowing violation, the employer must show that "at the time of the act, [the employee] was consciously aware that the consequence of the act being committed was a violation of an employer's reasonable rule or policy." *Id.* An employer does not meet its burden if the conduct was "unintentional by virtue of being involuntary, accidental, or inadvertent." *Id.*, quoting Still v. Comm'r of Department of Employment and Training, 39 Mass. App. Ct. 502, 510 (1995). We remanded the present appeal for further subsidiary findings about the circumstances surrounding the claimant's tardiness and her state of mind.

Commented [HR(1): *Id.* here would refer to Still (the most recent citation), but the reference seems to be quoting Still instead. I am unfamiliar with the case law in question and thus do not have the correct citation for this.

Consolidated Finding # 20 states that the claimant attempted to arrive at work on time on April 16, 2017. This seems to be true only as to the last half-hour before the start of her shift. Consolidated Finding #18 indicates that from the moment the claimant woke up at 9:30 p.m., she hastily tried to get to work by 10:00 p.m. It does not tell the whole story. The claimant had a habit of reporting for work late. She had received several warnings in the past, including a final written warning four months earlier, which put her on notice that further violations of the policy would put her job in jeopardy. *See* Consolidated Findings ## 4, 8–10. Yet, during the day on

¹ We have supplemented the findings of fact, as necessary, with the unchallenged evidence before the review examiner. *See* Bleich v. Maimonides School, 447 Mass. 38, 40 (2006); Allen of Michigan, Inc. v. Deputy Dir. of Department of Employment and Training, 64 Mass. App. Ct. 370, 371 (2005).

April 16, 2017, she did not sleep much. We see nothing involuntary about the claimant choosing to help her grandson find his stolen bicycle rather than trying to get enough sleep.² We also see nothing inadvertent about setting an alarm for only 40 minutes before the start of her shift.

Finally, we find nothing accidental about the claimant hitting the snooze function on her alarm clock. Knowing that she did not get much sleep and knowing that her job was on the line if she were to be late again, the claimant could reasonably be expected to take extra precautions to ensure that she woke up on time. The claimant might have moved her alarm clock across the room so it was not so easy to hit the snooze button, or she could have set up a backup alarm. Under these circumstances, we think the claimant deliberately risked being late again. See Lycurgus v. Dir. of Division of Employment Security, 391 Mass 623, 628 (1984) (by waiting until the last minute to report for work, the claimant intentionally adopted a routine that inevitably would result in tardiness from time to time). See also Shriver Nursing Services v. Comm'r of Division of Unemployment Assistance, 82 Mass. App. Ct. 367, 374 (2012) (“[T]he unintentional aspect of falling into sleep cannot categorically insulate an applicant from disqualification for benefits . . . A more general and anticipatory knowledge of the duty to avoid sleeping on the job is the mentality contemplated by the statute.”).

We, therefore, conclude as a matter of law that the employer has established that the claimant knowingly violated a reasonable and uniformly enforced policy within the meaning of G.L. c. 151A, § 25(e)(2). Having satisfied its burden of proof as to a knowing violation, we need not address whether the employer has also shown deliberate misconduct in wilful disregard of the employer’s interest.

The review examiner’s decision is affirmed. The claimant is denied benefits for the week beginning April 16, 2017, and for subsequent weeks, until such time as she has had at least eight weeks of work and has earned an amount equivalent to or in excess of eight times her weekly benefit amount.

BOSTON, MASSACHUSETTS
DATE OF DECISION - November 30, 2017



Paul T. Fitzgerald, Esq.
Chairman



Charlene A. Stawicki, Esq.
Member

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

² Although Consolidated Finding # 13 states that the claimant has trouble sleeping, this general statement does not explain the claimant’s inability to report for work on time on April 16th. Presumably, she had the same problem on other days, when she was not late.

(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.

AB/rh