

**Claimant was discharged after being found in a non-alert state during her overnight shift. Though she denied sleeping, she was found in a dark room, lying across chairs with her head on a pillow and her glasses off. She is disqualified due to deliberate misconduct in wilful disregard of the employer's interest.**

**Board of Review  
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**Issue ID: 0022 8337 59**

## **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 her position with the employer on August 17, 2017. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on September 30, 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 January 27, 2018. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest, 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 make subsidiary findings from the record. 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, a certified nursing assistant who is responsible for the care and safety of residential clients, was discharged for deliberate misconduct after she was found lying down in a non-alert state during her overnight shift, 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 Certified Nursing Assistant (“CNA”), for the employer, a Human Service Agency, from August 8, 2016 until August 17, 2017, when she was separated from the employer.
2. The claimant worked at one of the employer’s residential facilities.
3. The claimant worked at least thirty hours per week for the employer. The claimant usually worked the overnight shift.
4. The claimant did not work for any other employers.
5. The claimant did not work for any other employers.
6. The claimant suffers from Reyes disease, asthma, arthritis, and sleep apnea.
7. The employer expects all employees to remain awake and alert during their shifts in order to ensure client safety.
8. The claimant was informed of this expectation at hire.
9. During the claimant’s tenure with the employer, the claimant saw other employees laying down while on duty.
10. The claimant knew that she was not allowed to sleep while on duty.
11. The employer never told the claimant that she was allowed to lay down while on duty.
12. The claimant’s medical conditions did not affect her ability to comply with the employer’s expectations regarding being alert on duty.
13. The claimant worked on July 17, 2017. The claimant’s shift began at 2:30pm. The claimant agreed to work a double shift for the employer.
14. The employer had received some complaints that staff had been sleeping during the overnight shift so the employer decided to visit some of the residential facilities that night to see what was going on.
15. Two managers got to the residential facility where the claimant was working at approximately 2:30am on July 18, 2017.
16. When the managers got to the facility, they observed that the house was dark and most of the lights were off. The managers walked into the house and saw that all of the lights were off in the living room.
17. The managers saw that there were two staff (one of them being the claimant) who were in the dark living room. The employer turned the lights on and saw one staff member sleeping on the couch. The employer saw the claimant lying across three

chairs that had been put together. The claimant's head was on a pillow and she had a blanket on her.

18. Both the claimant and her co-worker had been lying down. Both the claimant and her co-worker saw that the other person was lying down.
19. Shortly after the lights went on, the claimant sat up.
20. The employer instructed both the claimant and the other employee to leave because they were being suspended.
21. At the time the claimant was suspended, she was not given a specific return-to-work date.
22. On July 19, 2017, the claimant called the employer's legal department and lodged a complaint of age discrimination and hostile work environment.
23. The employer began an investigation into the claimant's complaints as well as the incident that led to the claimant's suspension.
24. The employer met with the claimant on July 26, 2017.
25. During the meeting, the claimant denied that she had been sleeping on her shift, but admitted that she was lying on chairs and that she was lying down and resting.
26. The employer decided to terminate the claimant.
27. On August 17, 2017, the employer sent the claimant a termination letter.
28. The employer terminated the claimant for failing to remain alert and awake during her overnight shift that began on July 17, 2017 and ended on July 18, 2017.
29. The employer terminated all of the employees who were caught sleeping and/or in a non-alert state during the overnight shift beginning July 17, 2017 and ending July 18, 2017.
30. The claimant filed for unemployment benefits and received an effective date of July 16, 2017.
31. It is not known if the claimant was technically "asleep" at 2:30am on July 18, 2017, but the claimant was in a non-alert state at the time.

#### Credibility Assessment:

The claimant's testimony that she suffers from Reyes disease, asthma, arthritis, and sleep apnea are credible. There has been no testimony or evidence produced to the contrary. The claimant never asserted that her medical conditions prevented her from

complying with the employer's expectations. The claimant asserted that her medical conditions would have prevented her from "sleeping" at work. No medical documentation was presented to back up the statement or refute the statement. Even if her medical conditions prevented her from "sleeping", no argument was presented that her medical conditions prevented her from being able to be in a non-alert state.

The claimant presented inconsistent testimony. The claimant first testified that she was not sleeping at work during the shift in question. After further questioning, the claimant testified that she does not remember whether she had been sleeping. The claimant also alleged that she was merely resting. The claimant admitted to lying on all of the chairs on a pillow, but denied using a blanket. The claimant also admitted that she did not have her glasses on while she was lying down. The claimant also admitted that the lights in the room which she was lying down in [sic].

The claimant may have thought she was allowed to "rest", but not that she was allowed to lay down. Although the claimant may have seen other employees lying down, it does not automatically follow that she thought the employer allowed such behavior. It is concluded the claimant may have thought she was allowed to "rest", but not that she was allowed to lie down in the dark.

Given the record as a whole, it is concluded that by lying down in the dark, with her glasses off and her head on a pillow, that the claimant was not working in an alert state when the employer did a spot-check on the residence. Furthermore, it is concluded that the claimant's actions during her shift amounted to more than mere "resting".

### 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. We further believe that the review examiner's credibility assessment is reasonable in relation to the evidence presented.

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 . . . .

Under G.L. c. 151A, § 25(e)(2), it is the employer's burden to establish that the claimant was discharged for deliberate misconduct in wilful disregard of the employing unit's interest. The review examiner initially concluded the claimant was subject to disqualification. We remanded the case to clarify the record regarding the reason(s) for the claimant's discharge and for the

review examiner to weigh the parties' credibility. After remand, we also conclude that the employer has met its burden.

The consolidated findings of fact establish that the employer discharged the claimant because she was discovered to be in a non-alert state during her overnight shift beginning on July 17, 2017. The employer expects all employees to remain awake and alert during their shifts in order to assure client safety and they have discharged all employees who are discovered to be sleeping or in a non-alert state. Although the claimant denied sleeping on her shift, she did admit to lying down on chairs and resting. While the review examiner could not positively establish that the claimant was sleeping on the job, it is clear from the findings that the claimant was lying down across several chairs with her head on a pillow in a dark room, with her glasses off. In such a state, the claimant would have been unable care for and keep vigilant watch over the safety of the employer's residential clients.

The review examiner made a detailed credibility assessment that the claimant's testimony was inconsistent and that by lying down in the dark with her glasses off and her head on a pillow, the claimant was not working in an alert state when the employer did a spot-check on the residence. The review examiner also determined that the claimant's actions during her shift amounted to more than mere resting. 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). We believe the credibility assessment was reasonable in light of the evidence presented.

The claimant presented no evidence of mitigating circumstances, given her denial that she was sleeping on the job or that she was in a non-alert state. Thus, the weight of the evidence supports the conclusion that the claimant was in a non-alert state during her shift.

We, therefore, conclude as a matter of law that the claimant was discharged for deliberate misconduct in wilful disregard of the employer's interest within the meaning of G.L. c. 151A, § 25(e)(2).

The review examiner's decision is affirmed. The claimant is denied benefits for the week beginning August 13, 2017, and for subsequent weeks, until such time as she has had eight weeks of work, and in each of those weeks has earned an amount equivalent to or in excess of her weekly benefit amount.

**BOSTON, MASSACHUSETTS**  
**DATE OF DECISION - May 31, 2018**



Paul T. Fitzgerald, Esq.  
Chairman



Charlene A. Stawicki, Esq.  
Member

Member Michael J. Albano 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.

spe/ jv