Tow truck driver fell asleep during his 60-hour a week job due to exhaustion caused by the combination of child-care demands and an inability to get his hours reduced. Held the claimant was eligible for benefits under § 25(e)(2), because the misconduct was due to mitigating circumstances and not wilful disregard of the employer's interest.

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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 benefits to the claimant following his separation from employment. Benefits were granted on the ground that the employer failed to prove that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest or that he knowingly violated a reasonable and uniformly enforced rule or policy of the employer pursuant to G.L. c. 151A, § 25(e)(2).

The claimant had filed a claim for unemployment benefits, which was denied in a determination issued by the agency on December 2, 2017. The claimant appealed to the DUA Hearings Department. Following a hearing on the merits, the review examiner reversed the agency's initial determination in a decision rendered on January 13, 2018. The employer sought review by the Board, which dismissed the appeal due to lack of jurisdiction,[1] and the employer appealed to the District Court, pursuant to G.L. c. 151A, § 42.

On June 5, 2018, the District Court ordered the Board to conduct a full review of the hearing officer's decision on the merits. Consistent with this order, we reviewed the recorded testimony and documentary evidence from the hearing, the review examiner's decision, and the employer's appeal.[2]

The issue before the Board is whether the review examiner's decision, which concluded that the claimant's discharge for falling asleep on the job was not due to a knowing violation of a reasonable and uniformly enforced policy or to deliberate misconduct in wilful disregard of the

[1] The employer filed its appeal one day beyond the 30-day statutory appeal period set forth under G.L. c. 151A, § 40. Because the appeal filing deadline was prescribed by statute, it is considered jurisdictional and necessitated dismissal of the appeal. *See* Hamer v. Neighborhood Housing Services of Chicago *et al.*, No. 16-658, slip op. at 3 (U.S. Nov. 8, 2017).

[2] The Board disagrees with the District Court order remanding the matter for full review. Nevertheless, the Board has fully complied with said order.

employer's interest, is supported by substantial and credible evidence and is free from error of law.

After reviewing the entire record, we affirm the review examiner's decision to award unemployment benefits.

Findings of Fact

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

1. From July 1, 2015, until September 27, 2017, the claimant worked as a full-time (60 hours per week) driver for the employer, a towing company.

2. At his time of hire, the claimant was given a copy of the employer's employee handbook. The specific language of the handbook is unknown.

3. The claimant's work hours were from 6 p.m. to 6 a.m. on Mondays, Tuesdays, Wednesdays, Fridays, and Saturdays.

4. As part of his job duties, the claimant drove the employer's company vehicle and answered service calls for tows. During periods of time when the employer received no service calls, the claimant sat in the company vehicle and waited for the calls to come in.

5. As a way of maximizing its business profits, the employer expected the claimant to stay awake throughout his shift and answer service calls.

6. During the work week, after coming home from work, the claimant would typically drive his wife to her work, drop off his two older children in school, and care for his two 3-year-old boys during the day until he picked up his wife from work at 5 p.m. The claimant typically would sleep between 2 to 4 hours each day depending on the length of his boys' daytime naps.

7. As a result of his lack of sleep, the claimant, on approximately 3 occasions, accidentally fell asleep while sitting in the company vehicle waiting for service calls to come in.

8. On one of these occasions, the employer's manager (the manager) discovered the claimant sleeping in a parked company vehicle and proceeded to issue him a written warning and a suspension.

9. The claimant, realizing that his work and home schedule were leaving him exhausted, asked both the manager and the employer's co-owner if he could change his schedule and reduce his hours. The claimant's schedule was neither changed nor reduced.

10. On September 27, 2017, while sitting in the parked company vehicle and waiting for service calls to come in, the claimant accidentally dozed off and fell asleep. As a result, the claimant did not hear his cell phone and missed a service call that had come in for the employer.

11. The claimant did not intentionally fall asleep but did so as a result of his exhaustion.

12. After the claimant did not answer his phone, the employer's answering service contacted the manager. The manager tracked the vehicle which the claimant was driving on GPS and drove to its location.

13. After driving to the vehicle's GPS location, the manager saw the claimant's vehicle parked across the street from the employer's workplace. The manager called the claimant, who answered the phone, and told him to bring the car over to the employer's workplace right away.

14. Concluding that the claimant's actions of falling asleep and failing to answer a service call on September 27, 2017, violated the employer's expectations to stay awake during his shift and answer service calls, the manager decided to discharge the claimant.

15. On September 27, 2017, the manager discharged the claimant from his employment.

16. On September 27, 2017, the claimant filed a claim for unemployment benefits with an effective date of September 17, 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 findings are supported by substantial and credible evidence; and (2) whether the review examiner's conclusion is free from error of law. Upon such review, the Board adopts the review examiner's findings of fact and deems them to be supported by substantial and credible evidence. We further believe that the review examiner's findings of fact support the conclusion that the claimant is eligible for benefits, as outlined below.

Because the claimant was terminated from his employment, his 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 . . . .

"[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).

In order to prove the knowing violation prong of G.L. c. 151A, § 25(e)(2), the employer must produce, at a minimum, evidence of the policy that the claimant violated. Its employee handbook was not presented into evidence at the hearing and the review examiner found that its contents are unknown. Finding of Fact # 2. On appeal, the employer alleged that the review examiner obstructed its ability to produce further evidence about its policies. Specifically, the appeal asserts that the review examiner sequestered the employer's witnesses and did not give the employer's co-owner an opportunity to testify about the provisions in the employee handbook. We have reviewed the entire hearing transcript and found nothing to suggest that the review examiner either sequestered witnesses or interfered with the employer's ability to produce evidence. To the contrary, the co-owner was expressly permitted to stay in the room during the entire hearing. After the employer's manager testified, he did not ask that another witness be allowed to present evidence. Moreover, before closing the hearing, the review examiner asked the manager if there was anything else he wished to add. On this record, we find no procedural due process error, as alleged.

Absent a policy addressing the misconduct at issue, we agree with the review examiner that the employer has not sustained its burden to establish a knowing violation of a reasonable and uniformly enforced policy under G.L. c. 151A, § 25(e)(2).[3]

Alternatively, we consider whether the employer has shown deliberate misconduct in wilful disregard of the employer's interest under the separate provision of G.L. c. 151A, § 25(e)(2). In order to determine whether an employee's actions constitute deliberate misconduct, the proper factual inquiry is to ascertain the employee's state of mind at the time of the behavior. Grise v. Dir. of Division of Employment Security, 393 Mass. 271, 275 (1984). In order to evaluate the claimant's state of mind, we must "take into account the worker's knowledge of the employer's expectation, the reasonableness of that expectation and the presence of any mitigating factors." Garfield v. Dir. of Division of Employment Security, 377 Mass. 94, 97 (1979).

There is no question that the employer expected the claimant not to fall asleep on the job, as he had been warned about doing so before, and that, on September 27, 2017, the claimant fell asleep while in his tow truck waiting for service calls to come in. *See* Findings of Fact ## 7, 8, and 10. Thus, he engaged in the misconduct for which he was discharged. Nonetheless, the review examiner concludes that the claimant is not disqualified, reasoning that because the claimant's act of falling asleep at work was unintentional, he did not engage in deliberate misconduct. *See* Finding of Fact # 11. The finding that the claimant did not plan to fall asleep, that he did so unintentionally, is reasonable in relation to the evidence presented. *Compare* Board of Review

[3] Even if a policy prohibiting sleeping on the job had been presented, there is also no evidence establishing that this policy had been uniformly enforced, another key element necessary to disqualify a claimant under this provision of G.L. c. 151A, § 25(e)(2).

Decision 0014 3517 20 (Sept. 21, 2015) (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). However, our analysis does not end here.

In cases where the underlying misconduct is sleeping on the job, the Massachusetts Appeals Court has stated, "[a]lthough 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. However, each such case must be examined individually in light of any mitigating circumstances." Shriver Nursing Services, Inc. v. Comm'r of Division of Unemployment Assistance, 82 Mass. App. Ct. 367, 373 (2012), *quoting* Wedgewood v. Director of Division of Employment Security, 25 Mass. App. Ct. 30, 33 (1987).

Mitigating circumstances include factors that cause the misconduct and over which a claimant may have little or no control. *See* Shepherd v. Dir. of Division of Employment Security, 399 Mass. 737, 740 (1987). In the present case, the review examiner found that the claimant worked 60 hours a week, that, after leaving a 12-hour shift at 6:00 a.m., he drove his wife to work, dropped two older children off at school, was responsible for watching his two 3-year-old twins until picking up his wife from work at 5:00 p.m., then he had to report back to his own job at 6:00 p.m. *See* Findings of Fact ## 3 and 6. On this schedule, he could only sleep two to four hours each day. He fell asleep on September 27, 2017, because he was exhausted. Findings of Fact ## 10 and 11. The findings further provide that the claimant, knowing he had trouble staying awake due to exhaustion, had asked the employer's manager and the co-owner to change his schedule and reduce his hours, but it did not happen. *See* Finding of Fact # 9. It is evident that the claimant's act of falling asleep was not done in wilful disregard of the employer's interest, but was due to the combination of his child-care responsibilities and the demanding work schedule that he could not change.

In analyzing this type of case, where a claimant is fired for sleeping on the job, we are also directed to consider the duty of care commensurate with the gravity and sensitivity of a claimant's work. Shriver, 82 Mass. App. Ct. at 374. The Appeals Court noted a distinct difference between the consequent interruption of a school maintenance worker's custodian chores in Wedgewood, and a Licensed Practical Nurse's (LPN) responsibility to monitor life sustaining medical equipment in Shriver, observing that a lapse in the LPN's attention could have catastrophic consequences. Id. at 374, n. 9. Compared to the latter, the claimant's job duties were not as sensitive. We do not challenge the employer's business decision to terminate the claimant's employment. However, because we view the claimant's duty of care as a tow truck operator to be more akin to the work of the night shift custodian in Wedgewood than to the life sustaining duty of the LPN in Shriver, he is entitled to benefits.

We, therefore, conclude as a matter of law that the employer has not sustained its burden to show that the claimant was discharged either for a knowing violation of a reasonable and uniformly enforced policy or 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 entitled to receive benefits for the week beginning September 24, 2017, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - August 24, 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

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