

**Where the employer failed to show that the claimant slept while on duty, yet he was fired for that conduct, the employer has not carried its burden to show that the claimant should be denied benefits under either provision of G.L. c. 151A, § 25(e)(2).**

**Board of Review  
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**Issue ID: 0025 1186 33**

## **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 reverse.

The claimant was discharged from his position with the employer on or about March 30, 2018. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on April 27, 2018. 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 July 20, 2018.

Benefits were denied after the review examiner determined that the claimant 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, 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 accepted the claimant's application for review and remanded the case to the review examiner to take additional evidence regarding the claimant's state of mind and knowledge of the employer's policies and expectations. Only the claimant 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 decision, which concluded that the claimant is 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 claimant was sleeping on the employer's premises, but during his lunch break.

### **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 surgical technician for the employer, a healthcare facility, between 05/20/2014 and 03/30/2018, when he separated.
2. The claimant's immediate supervisor was the nurse manager.
3. The employer maintains an employee conduct policy prohibiting "sleeping while on duty" (policy A). The policy has an effective date of 01/01/2018. The purpose of policy A was to ensure employees were working when they were supposed to be working. Per policy A, sleeping while on duty is an example of conduct that is "subject to dismissal." Employees who are found to be sleeping while on duty are terminated from employment.
4. The claimant participated in orientation upon hire. Neither the director of human resources nor the nurse manager was present during the claimant's orientation. Sleeping was never brought up during the claimant's orientation. The claimant received documentation during orientation relating to dress code and punctuality. The claimant does not recall receiving any documentation during orientation relating to sleeping.
5. Neither the director of human resources nor the nurse manager personally gave policy A to the claimant.
6. The employer's policies are also available to view electronically through an icon on the computer. The claimant has never gone onto an employer computer to view any policies electronically and was never instructed to do so. The claimant never viewed policy A electronically through an icon on an employer computer.
7. It is unknown what policy regarding sleeping, if any, was in effect when the claimant was hired and when the claimant went through orientation.
8. The claimant did not sign for the receipt of any employer policies.
9. At no point prior to the final incident had the claimant been warned about sleeping.
10. The employer expected employees not to sleep while on duty. The purpose of this expectation was to ensure employees were working when they were supposed to be working. The employer did not inform the claimant of this expectation. The claimant was admittedly aware (based upon common sense) not to "sleep on the job."
11. Employees receive a thirty (30) minute meal break and a fifteen (15) minute break.

12. The claimant was never informed that he could not or was not allowed to combine his fifteen (15) minute break with his thirty (30) minute meal break.
13. During the claimant's employment, he received coverage relief for his meal break. The claimant did not receive coverage relief for his morning fifteen (15) minute break. The claimant could not leave morning surgical case rounds to take a fifteen (15) minute break because he did not have coverage and the surgical doctor would not have allowed it. Because of these circumstances, the claimant would routinely take his morning fifteen (15) minute break with his thirty (30) minute meal break. The claimant was never spoken to or disciplined for doing this.
14. The claimant was never informed of any expectation that he not sleep while on break. The claimant was never informed that he could not sleep while on his breaks. The claimant observed other employees sleep during their breaks without issue. The claimant thought he could do what he wanted on his break.
15. On 07/15/2016, the nurse manager spoke with the claimant about the importance of notifying someone when leaving the unit.
16. On 11/28/2016, the nurse manager issued the claimant a final written warning. The claimant was required to notify the manager or the charge nurse if he was leaving the department.
17. On 03/26/2018, the claimant was scheduled to work between 7:45 a.m. and 4:15 p.m.
18. The claimant began his lunchbreak at an unknown time prior to 11:30 a.m.
19. The claimant did not notify anyone that he would be going on his lunchbreak.
20. During his break, the claimant went to the lobby to play games on his phone and take a nap.
21. The nurse manager could not find the claimant in the unit and began looking for him at 11:30 a.m. The nurse manager found the claimant in the lobby at 11:35 a.m. At this time the claimant was awake. The nurse manager asked the claimant a payroll question and left the lobby.
22. The nurse manager expected that the claimant be back in the unit to return to his daily tasks thirty (30) minutes after he began his lunchbreak, sometime before 12:00 p.m.
23. The claimant thought his break period at this time totaled forty-five (45) minutes.

24. By 12:00 p.m., the claimant had not returned to the unit. The nurse manager saw the claimant sleeping in the lobby.
25. The claimant woke up himself and returned to the unit before 12:10 p.m. The claimant did not set any alarms or use any other devices to wake up.
26. On 03/29/2018 or 03/30/2018, the employer terminated the claimant's employment. During the termination meeting, the claimant was informed that he was being terminated for sleeping while on duty on 03/26/2018.
27. The claimant is a union member. The claimant filed a grievance of his termination. The claimant's grievance is pending arbitration.
28. The claimant completed a fact finding questionnaire for the Department of Unemployment Assistance (DUA) dated 04/03/2018. The claimant did not disclose any information in this questionnaire about being discharged for sleeping at work. The claimant stated he was discharged for "leaving the department."

#### Credibility Assessment:

The claimant participated in the original and remand hearings. During the original and remand hearings, the claimant consistently maintained that he woke himself up. The employer did not participate in the remand hearing to offer any further testimony or evidence regarding the nurse manager waking the claimant up in the lobby. As such, the claimant's consistent testimony over the course of the original and remand hearings that he woke himself up is deemed more credible than the nurse manager's testimony during the original hearing that she woke the claimant up. During the remand hearing, the claimant also offered direct testimony about his own state of mind (unrefuted by the employer as they did not participate in the remand hearing to answer the Board of Review's questions) about not receiving policy A, not being informed that he could not combine his breaks, not being informed that he could not sleep while on break, and that he believed his break on 03/26/2018 to total forty-five (45) minutes in length. Such unrefuted direct testimony from the remand hearing is deemed credible.

#### 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 original 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. As discussed more fully below, we conclude that the claimant should not be disqualified from receiving unemployment benefits.

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 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 . . . .

Under this section of law, the employer has the burden to show that the claimant is not eligible to receive benefits. Following the initial hearing, the review examiner concluded that the employer had carried its burden. After reviewing the entire record, including the consolidated findings of fact issued by the review examiner after the remand hearing, we conclude that the employer's burden was not met in this case.

The claimant was discharged "for sleeping while on duty" on March 26, 2018. Consolidated Finding of Fact # 26. As an initial matter, in all discharge cases, the employer must show that the claimant actually engaged in the alleged prohibited conduct. After reviewing the entire record, the review examiner has now made consolidated findings indicating that the claimant did not sleep while "on duty." On March 26, 2018, the claimant started his lunch break at some point prior to 11:30 a.m. Consolidated Finding of Fact # 18. He returned to his unit to work at 12:10 p.m. Consolidated Finding of Fact # 25. Although the employer's witnesses testified at the initial hearing that the lunch break could not be combined with the fifteen-minute break, the claimant disputed this assertion. The review examiner resolved this dispute by crediting the claimant's testimony. Thus, none of the findings now indicate that the claimant was prohibited from combining his break periods into one 45-minute break. *See* Consolidated Findings of Fact ## 11–13. Because it is not clear what time the claimant left to go on his break, we cannot conclude that the employer has shown that the claimant was on his break for more than 45 minutes. It follows that we also cannot conclude that the claimant was sleeping while on duty, or at a time that was not his break period.

It seems clear from the record that the nurse manager thought that the claimant was sleeping while on duty when she saw him in the lobby around noon on March 26, 2018. *See* Consolidated Finding of Fact # 24. However, because the claimant had combined his break periods, she was mistaken in believing the claimant was on duty. Moreover, the act of sleeping while on break (rather than while "on duty") does not appear to have been prohibited by the employer. *See* Consolidated Finding of Fact # 14. In sum, the employer has not shown that the claimant engaged in the alleged misconduct at issue.

We, therefore, conclude as a matter of law that the review examiner's decision to deny benefits pursuant to G.L. c. 151A, § 25(e)(2), is not supported by substantial and credible evidence or free from error of law, because the employer has not carried its burden to show that the claimant engaged in the alleged prohibited conduct, sleeping while on duty.

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week beginning March 25, 2018, and for subsequent weeks if otherwise eligible.

**BOSTON, MASSACHUSETTS**  
**DATE OF DECISION – September 27, 2018**



Charlene A. Stawicki, Esq.  
Member



Michael J. Albano  
Member

Chairman Paul T. Fitzgerald, 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