

The claimant, a retail assistant store manager, was discharged for stealing company time by sleeping on the job, but personal circumstances caused him to experience unusual fatigue. Held claimant's misconduct was not in wilful disregard of the employer's interest due to mitigating circumstances.

**Board of Review
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Issue ID: 0025 4154 05

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 April 13, 2018. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on May 1, 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 September 1, 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. 151 A § 25(e)(2). After considering the recorded testimony and evidence from the hearing, the review examiner's decision, and the claimant's appeal, we afforded the parties an opportunity to submit written reasons for agreeing or disagreeing with the decision. Only the Employer responded. 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 engaged in deliberate misconduct when he fell asleep at his job and was discharged for stealing company time, is supported by substantial and credible evidence and is free from error of law.

Findings of Fact

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

1. The claimant worked full time as an assistant manager for the employer, a retail business, from April 8, 1996, until April 13, 2018, when he was discharged from employment.

2. The claimant worked approximately 50 hours each week on varying shifts.
3. The claimant's immediate supervisor was the Store Manager.
4. The claimant was assigned to work at the employer's [Town A] store.
5. The claimant worked three different shifts. He worked 5:00am to 3:00 p.m., 7:00 a.m. to 5:00 p.m. and 11:30 a.m. to 9:30 p.m. or 10:30 p.m.
6. Prior to his most recent position, the claimant worked as a Store Manager for the employer at a different location.
7. The claimant had access to the employer's policies.
8. The claimant was responsible for enforcing the policies.
9. The employer maintained a Business Ethics and Conduct Policy which advised employees they were expected to refrain from any illegal, dishonest or unethical conduct. The policy states the consequence for violation of the policy is disciplinary action up to and including termination of employment.
10. The employer maintains a Tobacco Free Environment Policy, which advises employees they are not permitted to smoke inside or outside the store on company property. The policy states the consequence for violation of the policy is disciplinary action up to and including termination of employment.
11. The employer maintained an expectation the claimant would not sleep during work hours. The purpose of the employer's expectation was to prevent the claimant from being paid for hours not work [sic], to ensure the production of work and to protect the assets of the store.
12. It was normal practice for the claimant to smoke off the back dock of the store.
13. Another Assistant Manager and truck drivers smoked on company property.
14. The claimant's supervisor saw the claimant smoke on the back dock in the past.
15. The claimant was never issued a reprimanded [sic] for smoking on company property.
16. The claimant has been treated for anxiety and a sleep disorder since January 5, 2017 after he learned his wife was unfaithful on January 1, 2017. The claimant's physician prescribed the claimant numerous medications to treat his disorders due to a lack of effectiveness. In 2017, the claimant told the

District Manager about his personal issues. The District Manager was the claimant's immediate supervisor at the time.

17. The claimant did not inform the Store Manager of the [Town A] location about his personal and medical issues because he was embarrassed by them.
18. The claimant never requested a work accommodation, a leave of absence or a change in shift from the employer due to his anxiety and sleep disorder.
19. Some days the claimant picked up his 6-year-old daughter from the bus at 3:35–3:40 p.m. when his wife worked the later shift.
20. The claimant's wife worked as a Manager for the employer and she worked the same shifts as the claimant.
21. At the time of the claimant's discharge, he was separated from his wife, but living in the same home sleeping in separate bedrooms.
22. When the claimant worked the 5:00am shift, he was the member of management responsible for the opening the store. He was the only member of management that began work at 5:00am. He was responsible for providing the freight flow employees with equipment to perform their work. The claimant was required to work with the freight flow employees pricing product and stocking the shelves on the sales floor before the store opened at 10:00 a.m.
23. On April 3, 2018, the Operations Manager reported to the Store Manager that she thought the claimant was sleeping in the office during his early morning shift.
24. The Store Manager and Operations Manager viewed surveillance video footage of the office in the morning and observed the claimant resting/sleeping.
25. The Store Manager notified the District Manager of the complaint made by the Operations Manager. The District Manager forwarded the information onto the corporate investigation team.
26. On April 5, 2018, the District Manager and the Loss Prevention Manager suspended the claimant until an investigation was completed of the claimant sleeping on the job.
27. The claimant told the District Manager and Loss Prevention Manager that he had a sleep disorder due to issues in his home life. He admitted to resting/sleeping during his shift on April 3, 2018.

28. The video surveillance footage of the office on March 26, 2018 showed the claimant seated and reclined in a chair with his feet on a desk sleeping/resting from 5:48:08 a.m. to 6:33:42 a.m. After he awoke, he sat up and laid with his head and arms on the desk from 6:34:02 a.m. to 6:39:05 a.m.
29. The video surveillance footage on March 30, 2018 showed the claimant seated and reclined in a chair with his feet on a desk sleeping/resting from 5:47:21 to 6:42:38 a.m. He stretched his arms up at 6:42:46 a.m. He then proceeded to the outside dock area and smoked a cigarette from 6:49:13 a.m. to 6:50:52 a.m.
30. The video surveillance footage on April 2, 2018 showed the claimant seated in a reclined chair with his feet on a desk resting/sleeping from 5:47:13 a.m. to 6:35:21 a.m. The claimant then proceeded to the outside dock area and smoked a cigarette from 6:39:55 a.m. to 6:41:38 a.m.
31. The video surveillance footage of April 3, 2018 shows the claimant seated and reclined in a chair with his feet on a desk from 5:36:40 a.m. to 6:11:28 a.m. The claimant sat back on the chair to rest from 6:17:28 a.m. to 6:20:53 a.m. From 6:21:12 a.m. to 6:25:24 a.m. the claimant sat with his head rested on the desk.
32. On April 13, 2018, the District Manager notified the claimant he was discharged for sleeping on the job.
33. The employer discharged the claimant for smoking on company property and stealing company time by sleeping on the job.
34. The claimant's medical documentation from his physician dated August 13, 2018 states the claimant suffers from ongoing poor sleep and related anxiety. She also states the medication she prescribed him has not corrected the problem and this could "lead to excessive sleepiness at work."

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 ultimate 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. However, as discussed more fully below, we reject the review examiner's legal conclusion that the claimant's conduct constituted deliberate misconduct in wilful disregard of the employing unit's interest.

Because the employer discharged the claimant, his eligibility for benefits must be analyzed pursuant to 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).

As discussed above, under G.L. c. 151A, § 25(e)(2), a claimant will be disqualified from benefits if his separation was solely attributable to either a knowing violation of a reasonable and uniformly policy or deliberate and wilful misconduct. We note at that, in her decision, the review examiner ultimately concluded that the employer presented insufficient evidence to show that the ethics and conduct policy at issue was uniformly enforced. We concur, and thus we conclude the employer has not met its evidentiary burden under the “knowing policy violation” prong of G.L. c. 151A, § 25(e)(2). We now consider whether the employer has established that the claimant's smoking or sleeping on the job constituted deliberate and wilful misconduct within the meaning of this provision.

In determining whether an employee engaged in deliberate misconduct, the proper factual inquiry is to ascertain the employee's state of mind at the time of the behavior that caused his discharge. In order to deny benefits, it must be shown that the claimant acted with “intentional disregard of [the] standards of behavior which his employer has a right to expect.” Garfield v. Dir. of Division of Employment Security, 377 Mass. 94 at 97 (1979).

In this matter, the claimant was discharged for smoking on company property and stealing company time by sleeping on the job. We first consider whether the claimant engaged in misconduct by smoking at work. The review examiner found that the employer has a Tobacco-Free Environment Policy, which prohibits employees from smoking while on company property. She also found, however, that employees including the claimant and one of the employer's Assistant Managers regularly smoked on the employer's back dock. The review examiner further found the claimant's supervisor was aware of the claimant's smoking while at work and the employer never reprimanded the claimant for this behavior. Based on these findings, the review examiner concluded the claimant lacked the requisite state of mind to establish that the claimant's smoking at work constituted deliberate and wilful misconduct within the meaning of G.L. c. 151A, § 25(e)(2). We concur, and again affirm the review examiner's legal conclusion in this regard. Therefore, we next address whether the claimant's conduct in sleeping on the job constitutes disqualifying misconduct within the meaning of G.L. c. 151A, § 25(e)(2).

When analyzing the “deliberate and wilful” misconduct prong of §25(e)(2), in cases involving 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.” Wedgewood v. Dir. of Division of Employment Security, 25 Mass. App. Ct. 30, 33 (1987). Each case “require[s] a circumstantial evaluation of [the] sleeping lapse.” Shriver Nursing Services v. Comm’r of Division of Unemployment Assistance, 82 Mass. App. Ct. 367, 373 (2012). The Appeals Court has further opined that each of these sleeping on job cases must be examined individually in light of any mitigating circumstances. Wedgewood, 25 Mass. App. Ct. at 33. The claimant in Wedgewood was a night-shift custodian discharged after being found asleep on the job on two occasions. Wedgewood, 25 Mass. App. Ct. at 30. The court found that at the time of his discharge, the claimant was experiencing a number of personal problems including a pending divorce and the serious illness of his parents. Id. at 31–32. The court reasoned that such serious personal problem could cause a claimant to be unusually fatigued at a particular period in his/her life and thus constitute mitigating factors “as to prevent his sleeping on the job from being considered deliberate misconduct in wilful disregard of the employer’s interest.” Id. at 33. The court ultimately concluded that, in light of the mitigating circumstances affecting the claimant, the fact that he fell asleep on the job on a few occasions was not a sufficient basis for denying the claimant unemployment benefits. Id.

In Shriver, the claimant was a nurse, whose job was to monitor the operation of life-sustaining medical equipment of her patient. In analyzing the claimant’s eligibility for benefits, the court set forth the circumstances to be considered in evaluating what it called a “sleeping lapse.” According to the court “[t]he first and dominant circumstance is the importance of the claimant’s job responsibility.” Shriver, 82 Mass. App. Ct. at 374. The second circumstance identified by the court is whether a claimant has some warning of a “susceptibility to drowsiness.” Id. at 375. The last circumstance cited by the Shriver court is whether there are any “mitigating personal circumstances,” which caused a claimant to experience “particular fatigue or stress.” Id. The court ultimately denied benefits based on the gravity and sensitivity of the claimant’s work, her awareness of her “susceptibility to drowsiness,” and the absence of any personal mitigating circumstances. Id. at 374–375. It is clear, from the court’s holdings in Wedgewood and Shriver, that the presence or absence of personal mitigating circumstances which may result in fatigue or stress at particular time, is a significant factor in determining a claimant’s eligibility for benefits. In Wedgewood, the claimant was found eligible because such mitigating circumstances existed. In Shriver, the claimant was disqualified in part because such circumstances were absent.

Applying the factors set forth by the court in Wedgewood and Shriver to the record before us, we conclude that the claimant did not engage in deliberate and wilful misconduct. The findings establish that the claimant worked as assistant manager at the employer’s retail store. The claimant began his work shift at 5:00 a.m. On at least four occasions between March 26, 2018, and April 3, 2018, the employer’s video surveillance footage indicates the claimant was sleeping/resting at his desk at various times between the hours of 5:30 and 6:45 a.m. One of the claimant’s major job responsibilities upon reporting to work was to work with the employer’s freight flow employee to ensure that product was priced and shelved prior to the store’s 10:00 a.m. opening. The claimant’s performance of job duties were no doubt important if not vital to operation of the employer’s business. Unlike the claimant in Shriver, however, the nature, gravity and sensitivity of the claimant’s job duties did not create a high risk of harm to the claimant or others, rendering alertness a quintessential part these duties. Thus, the scope, nature and gravity of the claimant’s job duties did not impose “a commensurate duty of care” or create

an “obligation to preempt or to combat fatigue or drowsiness by such cautionary measures as adequate rest, on the job physical and mental exercises, safe stimulant or calls for coverage or replacement.” Shriver, 82 Mass. App. Ct. at 374.

We note that the findings do suggest that the claimant should have been aware of his “susceptibility to drowsiness.” More significantly, however, is the clear indication in the findings of personal mitigating circumstances, which would have created unusual fatigue.

The review examiner found that, because of marital issues, the claimant has been treated for anxiety and a sleep disorder since January 5, 2017. She found that due to a lack of effectiveness, the claimant’s physician prescribed numerous medications to treat the claimant’s disorders. The record also includes documentation from the claimant’s physician dated August 13, 2018, which states that the claimant suffers from ongoing poor sleep and related anxiety. The physician’s letter states the medication she prescribed to the claimant has not corrected the problem and could “lead to excessive sleepiness at work.” Additionally, the review found that, at the time of his discharge, the claimant told the District Manager and Loss Prevention Manager that he had a sleep disorder due to issues in his home life.

Based on the findings and record before us, and consistent with the Appeals Court’s holdings in Wedgewood and Shriver, we are satisfied that the personal and medical circumstances experienced by the claimant are sufficiently mitigating to establish that the claimant was not acting in deliberate and wilful disregard of the employer’s interests, when he fell asleep during his normal work hours.

Therefore, we conclude as a matter of law that the claimant did not engage in 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 reversed. The claimant is entitled to receive benefits for the week ending April 8, 2018, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - January 14, 2019



Paul T. Fitzgerald, Esq.
Chairman



Michael J. Albano
Member

Member Charlene A. Stawicki, 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

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.

MJA/PF/rh