

After a court-ordered remand hearing to afford the claimant an opportunity to testify, the review examiner found that he did not fall asleep at work. Since he did not engage in the misconduct for which he was fired, he may not be denied benefits under G.L. c. 151A, § 25(e)(2).

**Board of Review
19 Staniford St., 4th Floor
Boston, MA 02114
Phone: 617-626-6400
Fax: 617-727-5874**

**Paul T. Fitzgerald, Esq.
Chairman
Charlene A. Stawicki, Esq.
Member
Michael J. Albano
Member**

Issue ID: 0029 5403 10

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

After separating from employment, the claimant filed a claim for unemployment benefits, which was approved in a determination issued by the agency on May 2, 2019. The employer appealed to the DUA Hearings Department. Following a hearing on the merits in which only the employer participated, the review examiner affirmed the agency's initial determination in a decision rendered on June 1, 2019. The employer sought review by the Board, which remanded the case for additional evidence. Only the employer attended the remand hearing. Subsequently, the Board issued a decision on September 23, 2019, to deny benefits, and the claimant appealed to the District Court pursuant to G.L. c. 151A, § 42.

On January 8, 2020, the District Court ordered the Board to obtain further evidence. Consistent with this order, we remanded the case to the review examiner to afford the claimant an opportunity to present evidence about his separation. Thereafter, the review examiner issued his consolidated findings of fact.

The issue before the Board is whether, in light of the new consolidated findings of fact, the review examiner's original decision to award benefits on the ground that the claimant had not intentionally fallen asleep at work, is supported by substantial and credible evidence and is free from error of law.

After reviewing the entire record, including the recorded testimony and evidence from the original and both remand hearings, the review examiner's decision, the employer's appeal, the District Court's Order, and the most recent consolidated findings of fact, we affirm the review examiner's decision to award benefits.

Findings of Fact

The review examiner's most recent consolidated findings of fact and credibility assessment, which were issued following the District Court remand, are set forth below in their entirety:

1. The claimant worked full-time as a non-union Service Advisor at this employer's car dealership beginning on 10/15/18.
2. As a Service Advisor, the claimant's job duties include greeting customers coming in for service on their vehicles and being the person responsible for communications between the customers and the mechanics doing the repair work. The Service Advisor also prepares the final billing information for the customer to take to the Cashier after the repair work is completed.
3. On Saturday, 02/09/19, the claimant was scheduled to work from 7:00 a.m. to 3:00 p.m. The claimant's desk is in a three-walled cubicle with one side open so he is facing coworkers and customers walking by his desk.
4. The service area where the claimant worked closed at 3:00 p.m. on Saturday, 02/09/19.
5. On 02/09/19 at approximately 2:35 p.m., the claimant was using his telephone for a business reason and was on hold for a long time. While listening to the "on hold music," the claimant closed his eyes for a few seconds. One of the Cashiers took a picture of the claimant at a time his eyes were closed.
6. No one said anything to the claimant on 02/09/19 about any concerns with his behavior that day.
7. The employer does not have an express policy prohibiting sleeping at work. The employer does have an expectation that workers not sleep while at work. The expectation is common knowledge in the workplace although not specifically voiced to the employees. There is a "common sense" understanding that workers will not sleep at work. There is an implied rule that no one can sleep while at work.
8. On Monday 02/11/19, the Cashiers told the Service Director that they had seen the claimant "nodding off" at work on 02/09/19 and showed him the picture of him sitting with his eyes closed. The Service Director conferred with the General Manager and based on the picture that was taken on 02/09/19 (at approximately 2:35 p.m.) and the Cashiers' statements that the claimant was seen "nodding off" at his desk, management decided to discharge the claimant when he arrived for work on 02/11/19.
9. The decision to discharge the claimant was made before the claimant was asked about his version of events.
10. On 02/11/19, when the claimant arrived at work, he was shown the picture that was taken of him with his eyes closed on 02/09/19 and was told that he was being discharged for allegedly sleeping while at work.

11. When questioned by the employer on 02/11/19, the claimant acknowledged frequently sitting with his eyes closed for short periods of time, but he at all times denied that he was ever sleeping on 02/09/19.
12. The claimant at all times denied any wrongdoing. The claimant denied ever sleeping at work.
13. Employer management will discharge any worker found to be sleeping, for any period of time during the workday regardless of intent, unless there is a medical reason offered as a mitigating circumstance.
14. On 02/09/19 at approximately 2:35 p.m., the claimant while sitting at his desk in a cubicle closed his eyes for a few seconds while using the telephone and waiting on hold. The claimant never fell asleep while at work on 02/09/19 or at any other time.
15. The Cashier, who took the picture of the claimant on 02/09/19 and who made allegations against the claimant, had been questioned by the claimant in the past because she was smoking marijuana in front of the employer's business while on her break. The Cashier had told the claimant to "mind your own business". The claimant did not see this as much of an argument and he was surprised that she would raise false allegations against him about sleeping while at work.
16. On 03/15/19, the claimant filed a claim for unemployment benefits effective 03/10/19.

Credibility Assessment:

The claimant consistently denied the allegation that he was sleeping while at work. The Cashier, who took the photo of the claimant with his eyes closed and who alleged that the claimant was sleeping while at work on 02/09/19, did not attend the court ordered remand hearing. The Service Director, who attended the court ordered remand hearing as the employer's witness, had no personal direct knowledge of the events of 02/09/19 that triggered the discharge from employment. This Review Examiner accepted the claimant's consistent testimony that he was never sleeping while at work because it was credible.

Ruling of the Board

In accordance with our statutory obligation, we review the record and the original decision made by the review examiner to determine: (1) whether the most recent 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 new consolidated findings of fact and deems them to be supported by substantial and credible evidence. As outlined below, we now agree with the review examiner's original conclusion that the claimant is eligible for benefits, although on different grounds.

Because the claimant was discharged, this case is properly analyzed under 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 of proof. *See Still v. Comm'r of Department of Employment and Training*, 423 Mass. 805, 809 (1996) (citations omitted).

As a threshold matter, the employer must prove the claimant violated a rule or engaged in some form of misconduct. The claimant had not participated in the original hearing or the remand hearing. Thus, the review examiner accepted the employer's testimony and, in the consolidated findings returned to the Board before our first decision, found that the claimant had fallen asleep at work on February 9, 2019. After hearing the claimant testify at the court-ordered remand hearing, the review examiner has now found that he did not fall asleep. Consolidated Finding # 14.

In rendering that finding, the review examiner chose the claimant's version of events over the employer's. 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). "The test is whether the finding is supported by "substantial evidence." *Lycurgus v. Dir. of Division of Employment Security*, 391 Mass. 623, 627 (1984) (citations omitted.) "Substantial evidence is 'such evidence as a reasonable mind might accept as adequate to support a conclusion,' taking 'into account whatever in the record detracts from its weight.'" *Id.* at 627–628, *quoting New Boston Garden Corp. v. Board of Assessors of Boston*, 383 Mass. 456, 466 (1981) (further citations omitted).

The review examiner's new credibility assessment states merely that, at the District Court-ordered remand hearing, the employer's witness had no personal knowledge of the event on February 9, 2019, which triggered the claimant's discharge. In contrast, he found the claimant's first-hand, consistent testimony that he had not fallen asleep to be credible.

The Supreme Judicial Court has stated that hearsay evidence is permissible at these informal administrative hearings, and it may constitute substantial evidence if it contains "indicia of reliability." *See Covell v. Department of Social Services*, 439 Mass. 766, 786 (2003), *quoting Embers of Salisbury, Inc. v. Alcoholic Beverages Control Commission*, 401 Mass. 526, 530 (1988). The new credibility assessment does not explain why the review examiner now rejects the first-hand testimony offered by the cashier at the original and first remand hearing that the claimant was asleep. However, the record does. At the court remand hearing, the claimant

pointed out several inconsistencies in her testimony.¹ We believe these inconsistencies, together with the claimant's consistent testimony, detract from the weight of the cashier's version of events. What remains is hearsay testimony that lacks any indicia of reliability. For this reason, we have no reason to disturb the finding that the claimant never fell asleep.

Since the claimant did not engage in the misconduct for which he was terminated, the employer has not met its burden to prove that the claimant's discharge was for a knowing violation of a reasonable and uniformly enforced policy or for deliberate misconduct in wilful disregard of the employer's interest. The claimant may not be disqualified under G.L. c. 151A, § 25(e)(2).

The review examiner's decision is affirmed. The claimant is entitled to receive benefits for the week ending February 16, 2019, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - February 7, 2020



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.

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¹ For example, the claimant pointed out the following. At the May, 2019, hearing, the cashier did not know how long the claimant had been asleep. At the August remand hearing, she said it was 15 or 20 minutes even though she also testified that she became aware that the claimant was asleep when someone walked by him and woke him up, and that he remained awake after that.