

**Employer auto dealership fired the claimant service advisor after coworkers saw him sleeping at his desk. Claimant had denied actually sleeping, but failed to participate in the hearing. Lacking evidence of mitigating circumstances, the Board held the claimant was ineligible due to deliberate misconduct in wilful disregard of the employer's interest.**

**Board of Review  
19 Staniford St., 4<sup>th</sup> 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**

The employer appeals a decision by a review examiner of the Department of Unemployment Assistance (DUA) to award 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 February 11, 2019. He filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on May 2, 2019. The employer appealed the determination to the DUA hearings department. Following a hearing on the merits attended only by the employer, the review examiner affirmed the agency's initial determination and awarded benefits in a decision rendered on June 1, 2019. We accepted the employer's application for review.

Benefits were awarded after the review examiner determined that the claimant had not engaged in deliberate misconduct in wilful disregard of the employer's interest or knowingly violated a reasonable and uniformly enforced rule or policy of the employer and, thus, he was not 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 employer's appeal, we remanded the case to the review examiner to obtain material findings about whether the claimant was sleeping on the job and to afford the claimant an opportunity to present any mitigating circumstances. Only the employer attended the remand hearing. Thereafter, the review examiner issued his 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 did not engage in deliberate misconduct in wilful disregard of the employer's interest because he did not intentionally fall asleep at work, 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 assessment 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 Cashiers working across from the claimant's desk noticed the claimant sitting with his head on his hand and his eyes closed. The Cashiers joked that it looked like he had "nodded off" at his desk and one of them took a picture of the claimant before someone walking by caused the claimant to open his eyes in a startled manner.
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 Manager 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 Manager 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. 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 sleeping while at work.

10. When questioned by the employer on 02/11/19, the claimant acknowledged frequently sitting with his eyes closed for short periods but denied that he was ever sleeping on 02/09/19.
11. The claimant at all times denied any intentional wrongdoing. The claimant denied ever intentionally sleeping at work.
12. 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.
13. On 02/09/19 at approximately 2:35 p.m., the claimant while sitting at his desk in a cubicle unintentionally fell asleep for several minutes. The claimant's eyes were closed because it was the end of the shift, he had completed his work with customers for the day and he was tired.
14. On 03/15/19, the claimant filed a claim for unemployment benefits effective 03/10/19.

#### Credibility Assessment:

The claimant's testimony that he had no memory of sleeping while at work on 02/09/19 is accepted as credible. The employer's photographs and comments regarding the claimant nodding off at his desk on 02/09/19 at approximately 2:35 p.m. are accepted as credible. There is no credible evidence to suggest that the claimant intentionally slept while at work. There is credible evidence that the claimant unintentionally nodded off while seated in his work cubicle at the end of his shift on 02/09/19.

#### Ruling of the Board

In accordance with our statutory obligation, we review the record and 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. Although the credibility assessment inaccurately states that the claimant testified at the hearing,<sup>1</sup> it is otherwise reasonable in relation to the evidence presented. However, as discussed more fully below, we reject the review examiner's legal conclusion that the claimant is eligible for 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:

---

<sup>1</sup> Our review of the recorded transcripts and hearing sign-in sheets shows that the claimant did not participate in either the original or the remand hearing.

[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).

We agree with the review examiner's conclusion that the employer did not satisfy its burden to show that the claimant knowingly violated a reasonable and uniformly enforced policy. The employer did not present any evidence of a written policy about sleeping on the job. *See Consolidated Finding # 7*. While we do not question the employer's stated practice that it will discharge any worker for sleeping, there is also insufficient evidence to conclude that it has done so under circumstances such as those before us. Thus, we cannot conclude that any such sleeping policy has been uniformly enforced.

Alternatively, the claimant will be disqualified if the employer can show that it discharged him for deliberate misconduct in wilful disregard of the employer's interest. 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).

In this case, there is no evidence that the claimant was actually instructed not to sleep at work, but we accept the review examiner's finding that it was common knowledge and a matter of common sense that employees at the employer's auto dealership were expected to stay awake for their work day. *See Consolidated Finding # 7*. From this, we can infer that the claimant knew the employer expected him not to sleep during his eight-hour shift. That the expectation is reasonable is self-evident.

The review examiner originally concluded that the claimant was entitled to benefits, because he was fired for an act that was unintentional. *See also Consolidated Finding # 13*, where he finds that the claimant “unintentionally fell asleep for several minutes.” In cases where an employee is fired for sleeping at work, however, the analysis does stop here. 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 the job cases must be examined individually in light of any mitigating circumstances. Wedgewood, 25 Mass. App. Ct. at 33.

In prior statements to the DUA, the claimant denied sleeping and indicated that there may have been mitigating circumstances for closing his eyes on February 9, 2019. He asserted that he had been trying to quit smoking, that on February 9, 2019, he had been put on hold while calling a warranty company for a customer, and that he closed his eyes and meditated in an effort to make his craving for a cigarette go away.<sup>2</sup> We remanded the case to confirm whether the claimant had closed his eyes or was actually sleeping. Consolidated Finding # 13 confirms that he was sleeping. Also, we remanded to afford the claimant an opportunity to present evidence of mitigating circumstances. Because the claimant failed to participate in the hearing, nothing in the consolidated findings shows any mitigating circumstances.

Thus, we have findings that show that the employer reasonably expected the claimant to stay awake for his shift, the claimant knew this, and yet he fell asleep anyway on February 9, 2019. Absent mitigating circumstances, we assume that if he was tired, he could have stood up, gotten some coffee, or taken any number of measures to stay awake for the final 30 minutes of his shift. That he did not do so demonstrates wilful disregard of the employer’s interest.

We, therefore, conclude as a matter of law that the employer has met its burden to show that the claimant engaged in deliberate misconduct in wilful disregard of the employer’s interest within the meaning of G.L. c. 151A, § 25(e)(2), when he fell asleep on the job.

---

<sup>2</sup> These claimant statements appear in Exhibits 13 and 14, the claimant’s completed DUA fact-finding questionnaire and notes of a conversation between a DUA adjudicator and the claimant.

The review examiner's decision is reversed. The claimant is denied benefits for the week ending February 16, 2019, and for subsequent weeks, until such time as he has had at least eight weeks of work and has earned an amount equivalent to or in excess of eight times his weekly benefit amount.

**BOSTON, MASSACHUSETTS**  
**DATE OF DECISION - September 23, 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](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.

AB/rh