

Per the Shriver decision, the claimant is disqualified because she fell asleep while watching a high-risk patient, she did not take any steps to remain awake despite being on notice of her susceptibility to drowsiness, and no mitigating personal circumstances were established.

**Board of Review
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Issue ID: 0031 6902 89

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 her position with the employer on July 25, 2019. She filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on August 22, 2019. The employer 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 awarded benefits in a decision rendered on October 9, 2019. We accepted the employer's application for review.

Benefits were awarded after the review examiner determined that the claimant did not engage in deliberate misconduct in wilful disregard of the employer's interest and, thus, 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 afforded the parties an opportunity to submit written reasons for agreeing or disagreeing with the decision. Neither party 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's separation is not disqualifying under G.L. c. 151A, § 25(e)(2), because she did not intentionally fall asleep during an overnight shift, is supported by substantial and credible evidence and is free from error of law, where the claimant was assigned to a high-risk patient during that shift.

Findings of Fact

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

1. The claimant worked full-time as a mental health technician for the employer, a psychiatric health hospital, from July 9, 2018 until July 25, 2019, when she was discharged from employment.
2. The claimant worked the 11:00 p.m. to 7:30 a.m. shift.
3. The claimant was paid \$19.00 per hour plus a shift differential.
4. The claimant's immediate supervisor was the Registered Nurse Night Supervisor.
5. A one-on-one patient is an individual that requires 24-hour watch due to being suicidal or homicidal. During the overnight hours, a mental health technician is required to sit in a chair outside the patient's room and keep watch to ensure the safety of the patient, other patients and employees.
6. Mental Health Technicians are prohibited from sleeping at work because it compromises the safety of the patients and the staff.
7. On May 28, 2019, the employer issued the claimant a written warning for sleeping during her shift on May 27, 2019.
8. The claimant worked Wednesday, July 17, 2019 at 11:00 p.m. until Thursday, July 18, 2019 at 7:30 a.m. The claimant was assigned to a one-on-one patient. During the claimant's shift, she fell asleep sitting in a chair outside the patient's room.
9. The claimant did not intend to sleep during her shift.
10. The claimant is prescribed Lantus, Novolog and Atorvastatin to treat her diagnosis of Type 1 Diabetes and Hyperlipidemia.
11. The medication the claimant is prescribed causes the claimant to become tired.
12. The claimant didn't notify the employer that the medication she was prescribed made her tired.
13. On July 25, 2019, the claimant was discharged by the Chief Nursing Officer for falling asleep during her shift on July 25, 2019.

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 original 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 did not engage in deliberate misconduct in wilful disregard of the employer's interests when she fell asleep during her overnight shift. We believe that the review examiner's findings of fact support a denial of unemployment benefits.

Because the claimant was terminated from her employment, her 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

In her original decision, the review examiner notes that the employer did not present a written policy addressing the reason for which the claimant was discharged, sleeping while on duty. Thus, we agree with the review examiner's conclusion, that because the employer did not present a relevant policy, it did not establish that the claimant's discharge was due to a knowing violation of a reasonable and uniformly enforced rule or policy of the employer pursuant to G.L. c. 151A, § 25(e)(2). Consequently, the claimant's separation from employment must be analyzed under the deliberate misconduct prong of G.L. c. 151A, § 25(e)(2).

The review examiner found that the claimant was assigned to a one-on-one patient for her overnight shift, which began at 11:00 p.m. on July 17, 2019. One-on-one patients are those who are either suicidal or homicidal and require constant supervision during the overnight hours. The review examiner found that, while the claimant sat in a chair outside of the patient's room during this overnight shift, she unintentionally fell asleep.

When evaluating the deliberate misconduct prong of G.L. c.151A, § 25(e)(2) in this type of case, the Massachusetts Appeals Court has stated, "Although 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). The Appeals Court has further opined that each sleeping case "require[s] a circumstantial evaluation of [the] sleeping lapse." Shriver Nursing Services, Inc. v. Comm'r of Division of Unemployment Assistance, 82 Mass. App. Ct. 367, 374 (2012).

In Shriver, the Appeals Court set forth the circumstances to be considered in evaluating the "sleeping lapse." According to the court, "[T]he first and dominant circumstance is the importance of the employee's responsibility." In the instant matter, the claimant's assignment was to continuously monitor a high-risk patient who could harm himself or others. Alertness was a quintessential part of the claimant's job responsibility and created 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 stimulants, or calls for coverage or replacement."

Shriver, 82 Mass. App. Ct. at 374. Likewise, “the gravity and sensitivity” of the claimant’s work “imposed a commensurate duty of care, and a knowing awareness of its required wakefulness.” Id.

The second circumstance identified by the court in Shriver is whether a claimant had some warning of a susceptibility to drowsiness. Id. at 375. Here, the review examiner found that the claimant had been warned on May 28, 2019, for sleeping on the job during her May 27th shift. Additionally, the claimant testified at the September 16, 2019, hearing that she caught herself falling asleep off and on during the July 17th overnight shift.¹ Thus, the claimant had clear and ample notice of her “susceptibility to drowsiness,” particularly during this overnight shift. Despite this awareness on the claimant’s part, there is no indication in the record that she took any measures to stay awake during this shift, once she realized she was having trouble staying awake.

The last circumstance we must consider, as noted by the Shriver court, is whether there are any “mitigating personal circumstances”, which cause a claimant to experience “particular fatigue or stress.” Id. In the instant matter, the review examiner found that, at the time she fell asleep while on duty, the claimant was taking prescription medications that caused her to become tired. However, there is no indication in the record that the medications caused the claimant to become sleepy in addition to making her feel tired, as the claimant herself testified that taking the medication was not a “big deal,” as she had only fallen asleep at work twice, despite taking the medication on a daily basis. In light of the review examiner’s finding and the claimant’s testimony during the hearing, we do not believe that the claimant’s medication caused her any particular fatigue during the July 17th overnight shift that would mitigate her failure to remain awake while watching a high-risk patient.

On the record before us and consistent with the court’s analysis and holding in Shriver, we conclude as a matter of law that the claimant, by falling asleep while on duty, engaged in deliberate misconduct within the meaning of G.L. c. 151A, 25(e)(2).

¹ We have supplemented the findings of fact, as necessary, with the unchallenged evidence before the review examiner. See Bleich v. Maimonides School, 447 Mass. 38, 40 (2006); Allen of Michigan, Inc. v. Deputy Dir. of Department of Employment and Training, 64 Mass. App. Ct. 370, 371 (2005).

The review examiner's decision is reversed. The claimant is denied benefits for the week ending July 27, 2019, and for subsequent weeks, until such time as she has had at least eight weeks of work and has earned an amount equivalent to or in excess of eight times her weekly benefit amount.

BOSTON, MASSACHUSETTS
DATE OF DECISION - December 3, 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.

SVL/rh