

**The review examiner credited the claimant's direct testimony over the employer's uncorroborated evidence, and found that she did not sleep while at work. Thus, the findings do not establish that the claimant engaged in misconduct. Her discharge is not disqualifying under G.L. c. 151A, § 25(e)(2).**

**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: 0032 1284 15**

### 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 her position with the employer on July 28, 2019. She filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on April 24, 2020. The employer appealed the determination to the DUA hearings department. Following a hearing on the merits attended only by the employer, the review examiner overturned the agency's initial determination and denied benefits in a decision rendered on April 15, 2021. 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. 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 remanded the case to the review examiner to allow the claimant to testify and afford both parties an opportunity to present additional evidence. Both parties 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 engaged in deliberate misconduct in wilful disregard of the employer's interest by sleeping while at work, is supported by substantial and credible evidence and is free from error of law, where following remand, the review examiner found that the claimant did not sleep while working.

### Findings of Fact

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

1. The employer provides services for disabled people. The claimant worked as a full-time residential counselor for the employer. The claimant worked for the employer from 1/15/2019 to 7/28/2019.
2. The employer operates group homes. The claimant worked in one of the employer's group homes. The employer had five clients who lived in the home. The employer required the claimant to ensure the safety of the five clients.
3. The employer did not allow the claimant to sleep while at work. The employer did not allow the claimant to sleep at work because it required her to ensure the safety of the clients in the home.
4. The claimant attended a new hire orientation. In this orientation, the employer informed the claimant that she must not sleep while at work.
5. The employer created a written policy (Policy 1). Policy 1 reads, in part, "Employees may be disciplined or terminated for poor job performance, including, but not limited to the following... Unsatisfactory quality or quantity of work...Failing to follow instructions or Agency procedures...Failing to follow established safety regulations." The employer presented this policy to the claimant in her new hire orientation.
6. The claimant did not sleep while at work for the employer on 7/28/2019. The claimant never slept while at work for the employer.
7. The employer suspected that the claimant slept at work on 7/28/2019. The employer placed the claimant on unpaid leave to investigate what happened on 7/28/2019.
8. The employer discharged the claimant because it determined that she slept at work on 7/28/2019.

#### Credibility Assessment:

In the hearing, the employer alleged that the claimant slept at work on 7/28/2019. In the hearing, the employer relied on two bases to show that the claimant indeed slept at work. First, the employer submitted a photograph to establish that the claimant slept at work. The photograph depicts a person prone on a couch. In the hearing, the employer's residential director testified that the claimant is the person in the photograph. Second, in the hearing, the employer's residential director testified that the claimant admitted to her on 7/30/2020 that she slept at work. In the remand hearing, the claimant testified that she is not the person in photograph that the employer submitted and that she spoke with the residential director but that she did not tell the residential director that she slept at work. The DUA cannot use the conversation between the residential director and the claimant to determine credibility because neither party submitted any other witnesses to the conversation. This leaves the photograph. The DUA finds the claimant's testimony about the

photograph more credible because the employer did not submit any other material to verify that the photograph indeed depicts the claimant. Specifically, the employer did not submit any other documents to prove the photograph depicts the claimant and the employer did not present any other witnesses in the hearing aside from the residential director. The employer did not present a second witness to verify that the person in the photograph is the claimant.

### 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. We further believe that the review examiner's credibility assessment is reasonable in relation to the evidence presented, except the statement asserting that the DUA cannot use the conversation between the residential director and the claimant as evidence. Whether or not the statements made during that conversation constitute hearsay, such evidence is admissible in these proceedings.<sup>1</sup> As discussed more fully below, we believe that the review examiner's consolidated findings of fact now support the conclusion that the claimant is qualified for benefits.

Since the claimant was discharged from her employment, we analyze her eligibility for benefits 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, . . .

In the original decision, the review examiner decided the claimant's eligibility under the deliberate misconduct prong of G.L. c. 151A, § 25(e)(2), as opposed to the knowing policy violation prong. Although the employer presented evidence that it maintains a policy that prohibits employees from sleeping while at work, the employer did not present evidence that it uniformly enforced this policy. Therefore, we cannot conclude that there was a violation of a reasonable and *uniformly enforced* policy. We believe the review examiner properly analyzed this case under the deliberate misconduct prong.

We note at the outset that "the 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

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<sup>1</sup> Hearsay evidence is not only admissible in informal administrative proceedings, but it can constitute substantial evidence on its own if it contains "indicia of reliability." 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).

and persuasion rest with the employer.” Still v. Comm’r of Department of Employment and Training, 423 Mass. 805, 809 (1996) (citations omitted). Thus, it is the employer’s burden to establish that the claimant actually engaged in the alleged conduct, that such conduct violated a reasonable expectation and that the conduct was done deliberately in wilful disregard of the employing unit’s interest. Cantres v. Dir. of Division of Employment Security, 396 Mass. 226, 231 (1985).

In determining whether the claimant engaged in deliberate misconduct in wilful disregard of the employer’s interest, our first inquiry is whether the claimant actually engaged in the misconduct alleged by the employer. Although the parties disputed the events that led up to the claimant’s discharge, the parties did not dispute that the employer discharged the claimant after determining that she slept while at work on July 28, 2019. *See* Consolidated Finding # 8. In this case, the employer’s evidence referred to a photograph it submitted to establish that the claimant had slept while at work, as well as the testimony of the employer’s residential director that the claimant had admitted to him that she had slept while at work. However, the review examiner found that the claimant “did not sleep while at work for the employer on July 28, 2019” and “never slept while at work for the employer.” *See* Consolidated Finding # 6.

In rendering his credibility assessment, the review examiner explained why he viewed the claimant’s testimony denying the allegations to have been more credible. 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). In this case, the review examiner relied on the direct testimony of the claimant that she never slept at work, and that she never admitted to the residential director that she had ever slept at work. In contrast, the employer relied on a photograph to establish that the claimant slept while working, and, as the review examiner noted, the employer did not submit any other material or witnesses to verify that the photograph in evidence depicts the claimant. The employer also relied on a conversation between the residential director and the claimant, where she purportedly admitted to the conduct. Because there were no other witnesses to that conversation, the review examiner could reasonably conclude that this evidence was unreliable. We see no reason to disturb Consolidated Finding # 6.

Since the consolidated findings provide that the claimant did not engage in the alleged wrongdoing of sleeping while at work, the employer has not met its burden to establish misconduct.

We, therefore, conclude as a matter of law that that the claimant was not discharged for deliberate misconduct in wilful disregard of the employer’s interests or for a knowing violation of a uniformly enforced rule or policy, 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 beginning July 28, 2019, and for subsequent weeks if otherwise eligible.



Charlene A. Stawicki, Esq.  
Member

**BOSTON, MASSACHUSETTS**  
**DATE OF DECISION - October 26, 2021**



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  
(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.

JMO/rh