

**Claimant was discharged for deliberate misconduct in wilful disregard of the employer's interest for sleeping while on duty. As the Appeals Court observed, the act of falling asleep, by its very nature, ordinarily has an unintentional aspect to it, but it does not mean the person is eligible for benefits. Terminations due to sleeping are approached differently. Here, the lack of mitigating circumstances showed it was done in wilful disregard of the employer's interest. The claimant is ineligible for benefits pursuant to G.L. c. 151A, § 25(e)(2).**

**Board of Review  
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**Issue ID: 0080 8233 59**

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 July 14, 2023. He filed a claim for unemployment benefits with the DUA, effective July 23, 2023, which was denied in a determination issued on August 11, 2023. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits attended only by the claimant, the review examiner overturned the agency's initial determination and awarded benefits in a decision rendered on September 1, 2023. We accepted the employer's application for review.

Benefits were awarded after the review examiner determined that the claimant neither engaged in deliberate misconduct in wilful disregard of the employer's interest nor knowingly violated a reasonable and uniformly enforced rule or policy of the employer and, thus, was entitled to benefits pursuant to 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 allow the employer to present testimony and other evidence. Both parties were present for the remand hearing on the first day, but no testimony or evidence was presented. Only the employer participated on the second day of the remand hearing. Thereafter, the review examiner issued her consolidated findings of fact and credibility assessment. 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 sleep during his shift while working, 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. On March 2, 2023, the claimant started working for the employer, a non-profit program for individuals with substance abuse dependency, as a Support Staff worker.
2. The claimant was initially hired to work part-time for the employer. In the part-time role, the claimant was scheduled to work on Saturdays from 3 p.m. until 11:30 p.m. and Sundays from 7 a.m. until 3:30 p.m.
3. In June 2023, the claimant started working full-time for the employer on the overnight shift. The claimant requested the full-time role on the overnight shift as a full-time role had opened at the employer's establishment for this shift. In this role, the claimant was scheduled to work Sundays through Thursdays from 11:15 p.m. until 7:15 a.m. This role was an awake position.
4. The claimant was paid \$23.00 per hour.
5. The claimant's supervisor was the Program Director.
6. The employer maintains a Performance and Behavior Expectations Policy within the Employee Handbook prohibiting workers from sleeping on the job. In the policy, the employer writes in part: "Employees are expected to use good judgement and adhere to high ethical standards. Poor work habits, such as arriving late, sleeping on the job, failing to adequately perform your job responsibilities, careless work, a failure to complete work assignments on time or failure to follow instructions, are unacceptable." In this policy, the employer also writes in part: "In addition, any breach of trust or behavior which shows gross misconduct and a serious lack of dependability or good judgment, including but not limited to theft, falsification of the [employer] records, client abuse, destruction of property, etc., may be grounds for immediate discipline, up to and including discharge."
7. The employer prohibits employees from sleeping on the job to ensure safety of the employer's staff and residents.
8. The claimant received the Employee Handbook containing the Performance and Behavior Expectations Policy.
9. The employer was receiving complaints from residents and clients at the employer's recovery house that the claimant was sleeping while on duty.
10. In July 2023, the employer had a verbal supervision with the claimant warning the claimant about falling asleep while working. This was not a formal issued warning.

11. The last shift that the claimant worked for the employer began on July 13, 2023, at 11:15 p.m. and ended on July 14, 2023, at 7:15 a.m.. On the morning of July 14, 2023, the Desk Shift Manager [sic] found the claimant sleeping while on duty in an office. The claimant was sleeping with his face down on the desk. The Front Desk Manager [sic] pounded on the desk and the claimant eventually lifted his head and was disorientated. The Front Desk Manager [sic] reported the claimant's behavior to the employer.
12. On July 14, 2023, the employer discharged the claimant from work. The employer notified the claimant of the discharge during a telephone conversation. On July 14, 2023, the employer also mailed the claimant a letter of termination.
13. The employer discharged the claimant from work because the claimant was sleeping while on duty on July 14, 2023.
14. The claimant filed an initial unemployment claim effective the week beginning July 23, 2023.
15. On a questionnaire the claimant submitted to the Department of Unemployment Assistance (DUA) for consideration, the claimant wrote "Yes, I mean coming off from the day and working the night shift I knotted [sic] off" in response to the following question from the DUA: "You stated that you were discharged due to performance, the employer stated that you were discharged for Performance & Behavioral Expectations then stated that while working your overnight shift you were sleeping. Is the employer statement correct?"

[Credibility] Assessment:

During the initial hearing, the claimant contended that he was not sleeping while on duty. However, the employer's contention to the contrary during the remand hearing session is assigned more weight where on a questionnaire that the claimant submitted to the DUA for consideration, the claimant wrote "Yes, I mean coming off from the day and working the night shift I knotted [sic] off" in response to the following question from the DUA: "You stated that you were discharged due to performance, the employer stated that you were discharged for Performance & Behavioral Expectations then stated that while working your overnight shift you were sleeping. Is the employer statement correct?" It is more likely that the claimant was sleeping on duty where the claimant submitted a questionnaire to the DUA writing that "...I knotted [sic] off." Also, the employer's overall testimony is assigned more weight than the overall testimony of the claimant where the employer's testimony during the remand session was more specific and easier to follow compared to the testimony of the claimant during the initial hearing session.

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 conclusion is free from error of law. After such review, the Board adopts the review examiner’s consolidated findings of fact, although we note that Consolidated Finding # 11 refers to the person who discovered the claimant asleep at work alternately as the “Desk Shift Manager” and the “Front Desk Manager.” While the person in question who found the claimant asleep was a manager, the person’s exact title does not affect the outcome of this decision. In adopting the remaining findings, we deem 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. However, as discussed more fully below, we reject the review examiner’s initial legal conclusion that the claimant is eligible for benefits.

Because the claimant was discharged from his employment, his 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. . . .

“[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. While the employer presented a copy of its policy prohibiting sleeping, the policy language provides for discipline up to and including discharge. *See* Consolidated Finding # 6. Because of the discretion inherent in the policy, the record fails to show that the employer *uniformly enforces* its policy.

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. The employer discharged the claimant for sleeping while on duty. Consolidated Finding # 13. After remand, the review examiner found that prior to the end of the claimant’s last shift on July 14, 2023, the incoming manager found the claimant sleeping with his face down on the desk while on duty. Consolidated Finding # 11. Thus, he engaged in the misconduct for which he was discharged.

As for whether his misconduct was deliberate, the Massachusetts Appeals Court stated, “the unintentional aspect of falling into sleep cannot categorically insulate an applicant from

disqualification for benefits.” Shriver Nursing Services, Inc. v. Comm’r of Division of Unemployment Assistance, 82 Mass. App. Ct. 367, 374 (2012).<sup>1</sup>

Adopting a different approach to terminations resulting from on-the-job sleeping, the Appeals Court further 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. However each such case must be examined individually in light of any mitigating circumstances.” Id. at 373, *quoting* Wedgewood v. Dir. of Division of Employment Security, 25 Mass. App. Ct. 30, 33 (1987). *See also* Garfield v. Dir. of Division of Employment Security, 377 Mass. 94, 97 (1979) (in order to evaluate the claimant’s state of mind at the time of the behavior, 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”). Mitigating circumstances include factors that cause the misconduct and over which a claimant may have little or no control. *See* Shepherd v. Dir. of Division of Employment Security, 399 Mass. 737, 740 (1987).

In this case, the review examiner found that the claimant received the employer’s handbook containing the policy that prohibits sleeping while working. *See* Consolidated Finding # 8. Further, the review examiner found that the employer had expressly warned the claimant about falling asleep while working, after residents and clients had complained that the claimant was sleeping on duty. *See* Consolidated Findings ## 9–10. From this, we can infer that the claimant knew that the employer expected him not to sleep during his shift. That the expectation is reasonable is self-evident. Thus, the employer reasonably expected the claimant to stay awake during his shift, the claimant was aware of this expectation, and yet he fell asleep anyway on the night of July 13 into July 14, 2023.

In this case, there are no mitigating circumstances. At the original hearing, the claimant denied falling asleep at work, and he failed to participate in the remand hearing to offer any additional evidence. The defense of mitigation is not available to employees who deny engaging in the behavior leading to discharge. *See* Lagosh v. Comm’r of Division of Unemployment Assistance, No. 06-P-478, 2007 WL 2428685, at \*2 (Mass. App. Ct. Aug. 22, 2007), *summary decision pursuant to rule 1:28* (given the claimant’s defense of full compliance, the review examiner properly found that mitigating factors could not be found).

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), by sleeping on the job.

The review examiner’s decision is reversed. The claimant is denied benefits for the week ending July 15, 2023, 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.

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<sup>1</sup> The Appeals Court notes that its analysis of on-duty sleeping would apply to both provisions under G.L. c. 151A, § 25(e)(2), deliberate misconduct in wilful disregard of the employer’s interest and knowing violation of a reasonable and uniformly enforced policy. Id. at 372 n. 6.

**BOSTON, MASSACHUSETTS**  
**DATE OF DECISION - August 30, 2024**



Charlene A. Stawicki, Esq.  
Member



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.

JPCA/rh