The claimant was discharged 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: 0082 1987 47

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 affirm.

The claimant was discharged from her position with the employer on February 13, 2024. She filed a claim for unemployment benefits with the DUA, effective February 11, 2024, which was approved in a determination issued on March 13, 2024. The employer appealed the determination to the DUA hearings department. Both parties attended the initial hearing on the merits. Following a continued hearing, attended only by the employer, the review examiner overturned the agency's initial determination and denied benefits in a decision rendered on May 21, 2024. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant knowingly violated a reasonable and uniformly enforced rule or policy of the employer 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 give the claimant a further opportunity to testify and present other 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 knowingly violated a reasonable and uniformly enforced rule or policy of the employer by sleeping during her shift, is supported by substantial and credible evidence and is free from error of law, where the claimant is denying that she fell asleep.

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 for the instant employer as a CNA from 3/21/2023 until her last physical day of employment on 2/9/2024.

2. The employer's business is a long-term nursing care facility.

3. The employer has a company policy which states that sleeping on the job could result in immediate termination.

4. The employer has this policy to ensure that employees remain alert for resident safety purposes.

5. The claimant was provided with the employer's policy in writing in the handbook at the time of hire.

6. In the past, the employer has always terminated any employee determined to be sleeping on the job.

7. On 2/8/2024 through 2/9/2024, the claimant was scheduled to work an 11:00 p.m. to 7:00 a.m. shift.

8. The employer allows employees to sit on a chair outside a particular resident's room because the resident is considered high risk.

9. The employer expected the claimant to be always alert to assist the high-risk resident.

10. At 4:15 a.m., the Director of Nursing and the Scheduler arrived at the claimant's assigned floor.

11. Upon arriving, the Scheduler's cell phone alarm went off making a loud noise.

12. The Scheduler and the Director of Nursing both observed the claimant sitting in a chair in the hallway outside a resident's room, and the claimant did not move when the alarm went off.

13. The Scheduler and the Director of Nursing went over to the claimant and noticed that the claimant was sitting in a chair outside a fall risk patient's room with a bedside table in front her.

14. Prior to the arrival of the Scheduler and the Director of Nursing, the claimant had decided to close her eyes for a few minutes and pray for the strength to finish her shift which had been stressful.

15. The claimant had not taken a break during her shift and was not taking her break when she decided to sit and pray.

16. The claimant's eyes were closed with her hands, elbows and head resting on the bedside table.

17. The Scheduler and the Director of Nursing observed the claimant for a 5-minute period and the claimant did not move or pick her head up for the 5-minute period.

18. The Director of Nursing touched the claimant once and she did not move.

19. The Director of Nursing touched the claimant a second time and she sat up in the chair.

20. The claimant told the Director of Nursing that she had been praying.

21. The Director of Nursing told the claimant that she was suspended immediately for sleeping on the job.

22. The Director of Human Resources gathered statements from the Director of Nursing and the Scheduler which confirmed that the claimant was discovered sleeping during her shift.

23. After confirming that the claimant was sleeping on the job, the Director of Human Resources informed the claimant of her termination on 2/13/2024.

[Credibility Assessment:]

The testimony of the Director of Nursing and the Scheduler is accepted as credible in all contested areas since both employer witnesses were forthright in giving detailed and corroborating testimony. The claimant's testimony was evasive [and] lacked recollection at times, thus, causing the claimant's testimony to be less credible in all contested areas.

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. 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.

Where a claimant is discharged from employment, her eligibility 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).

In this case, the employer discharged the claimant for falling asleep during her overnight shift. Consolidated Findings ## 7, and 21–23. The claimant denied that she was sleeping, but Consolidated Findings ## 11–12, and 16–19 reflect the contrary, as the claimant was found sitting with her eyes closed and her hands, elbows and head resting on a bedside table, and she did not move while the employer observed her for five minutes or react when the employer first touched her or when a loud phone alarm went off near her. Thus, the claimant engaged in the misconduct for which she was discharged.

As for whether her 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).[1]

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).

The review examiner found that the claimant received the employer's handbook containing the policy that prohibits sleeping while working. Consolidated Finding # 5. From this, we can infer that the claimant knew that the employer expected her not to sleep during her shift. That the expectation is reasonable is self-evident. Thus, the employer reasonably expected the claimant to stay awake during her shift, the claimant was aware of this expectation, and yet she fell asleep anyway on the night of February 8 into February 9, 2024.

[1] 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.

Further, the claimant has not established any mitigating circumstances. She has maintained throughout the proceedings that she did not fall asleep during her overnight shift. 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).

In this case, the employer has also met its burden to show a knowing violation of a reasonable and uniformly enforced policy. As stated, we believe that the policy prohibiting sleeping during work hours is reasonable, the claimant violated it knowingly, and Consolidated Finding # 6 provides that the employer uniformly enforced the policy by terminating all employees who were found to be sleeping on the job. Moreover, the claimant has not presented any evidence to show the existence of circumstances that rendered her incapable of complying with the policy.

We, therefore, conclude as a matter of law that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest, as well as knowingly violated a reasonable and uniformly enforced policy, as meant under G.L. c. 151A, § 25(e)(2).

The review examiner's decision is affirmed. The claimant is denied benefits for the week beginning February 11, 2024, 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.

Charlene A. Stawicki

BOSTON, MASSACHUSETTS
DATE OF DECISION - December 20, 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

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