The claimant security guard was discharged for sleeping while on duty. He was aware he was experiencing substantial fatigue but there was no indication he took steps to try to remain awake. Although his fatigue was a result of circumstances beyond his control, his actions show he deliberately chose to put himself in a warmer and more comfortable environment outside his permitted break area where he was more likely to fall asleep. Held the claimant did not fall asleep as a result of circumstances beyond his control, and he is ineligible for benefits due to deliberate misconduct in wilful disregard of the employer's interest pursuant to G.L. c. 151A, § 25(e)(2).

Board of Review
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Issue ID: 334-FHHM-9PV4

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 separated from his position with the employer on January 10, 2025. He filed a claim for unemployment benefits with the DUA, effective January 26, 2025, which was denied in a determination issued on March 28, 2025. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits attended by both parties, the review examiner overturned the agency's initial determination and awarded benefits in a decision rendered on May 30, 2025. 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 or knowingly violate a reasonable and uniformly enforced rule or policy of the employer 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 remanded the case to the review examiner to obtain additional evidence pertaining to the reason for the claimant's separation. Only the employer attended the remand hearing. Thereafter, the review examiner issued her 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 was entitled to benefits because he did not intend to fall asleep while on his shift, 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 July 2, 2024, the claimant began working full-time for the employer as a security specialist. His schedule was set by a shift supervisor. He typically worked the midnight to 8:00 a.m. shift. His most recent rate of pay was $21.00 per hour.

2. The claimant's duties included walking around the property and checking into each building.

3. The employer has a policy which prohibits security guards from sleeping or lying down while on duty. The purpose of this is to ensure that employees are awake and alert so they can respond immediately if there is an incident on site.

4. The policy is contained in the employee handbook.

5. The claimant received the handbook in the onboarding process. He signed it on June 28, 2024.

6. The employer addresses violations of the policy on an individual basis and reserves the right to impose whatever form of discipline it chooses. (Remand Exhibit 5).

7. The employer expects that employees remain awake and aware while on duty on company or client property so that they can ensure the safety of the client's property and respond appropriately to any emergency situations.

8. The employer expects that security officers will follow the client-specified rules while on site. These rules are provided in writing to the security officers.

9. If a security officer falls asleep or is otherwise negligent while on duty, this could represent a breach of contract by the employer. The employer could lose a client as a result of a security officer falling asleep.

10. Security officers were only allowed to use their personal devices at limited times and for limited purposes, and only if approved by the point of contact and shift supervisor. They are provided with a cellphone, a tablet, and laptop for reporting purposes.

11. If a security officer is not feeling well and cannot perform their duties, they are expected to notify the employer before their shift.

12. On January 7, 2025, the claimant was scheduled to work from midnight to 8:00 a.m. for one of the employer’s clients.

13. This client required that security officers sit at the employer entrance and monitor the parking lot, actively perform rounds, and only take breaks in the approved break area – the kitchen/cafeteria. The client’s rules specified that

security officers could not sleep on site and that they could not take breaks in a lobby or conference room. (Remand Exhibits 7 and 8).

14. Security officers were required to maintain a daily activity report ("DAR"). Security officers were required to complete the DAR as accurately as possible during their shifts and provide it to the client at the end of the shift.

15. The claimant lives with his children, young triplets, and his partner/co-parent. His partner works full-time from 3:00 p.m. – 11:00 p.m. While she is at work, the claimant cares for the children.

16. During the first week of January of 2025, the claimant, his partner/co-parent, and their triplets were recovering from the flu.

17. On January 6, 2025, and January 7, 2025, the claimant felt sick and exhausted.

18. The claimant informed his supervisor that he was not feeling well. He decided to work and see if he could complete his duties.

19. The claimant had sufficient paid time off to call out of work that night without repercussions.

20. The claimant could have called the employer during his shift if he did not feel well enough to continue.

21. At the beginning of his shift, the claimant signed the client-issued deployment post orders. These orders stated that the claimant could only take a break at his work desk or the kitchen/cafeteria, that he needed to fill out the DAR "completely and neatly", and that sleeping while on duty would result in automatic termination. (Remand Exhibit 8).

22. At around 4:25 a.m., the claimant sat down on a couch in the front lobby area.

23. The area where the claimant sat down was not an approved break area or an area where security officers were assigned to work.

24. After the claimant sat down, he fell asleep. He did not lie down or use any blankets.

25. At around 6:10 a.m., the client manager walked onto the property and saw the claimant was asleep in the front lobby area.

26. The client manager took a photograph of the claimant. (Remand Exhibit 4).

27. The client manager woke up the claimant. The claimant completed his shift.

28. The claimant filled out his DAR for January 7, 2025. The claimant wrote in the DAR that from 4:21 a.m. to 5:21 a.m. he was on post, that from 5:21 a.m. to 5:28 a.m. he was doing a round and checking buildings, and that from 5:58 a.m. to 6:58 a.m., he was on post. These statements were false. (Remand Exhibit 9).

29. The client manager reported the incident to the claimant's supervisor and human resources, along with the photograph (Remand Exhibit 4).

30. The photograph sent to the employer shows a man in khaki pants and a hooded sweatshirt sitting on the couch, with his arms crossed over his body and his head tilted backwards. The hood over his head is over his head. Under his left arm was a pillow from the back of the couch.

31. There were three electronic devices positioned near the man. At his right, on the arm of the couch was a cell phone which was plugged into a socket on the wall. On a small table to the right of the couch was an open laptop. At his feet was a space heater.

32. On the couch, to the left of the man, was a clipboard.

33. The hooded sweatshirt was not part of the approved security officer uniform.

34. The client was extremely upset by the claimant falling asleep on duty and falsifying his DAR. They refused to be billed for the claimant’s shift.

35. When the client manager reported the incident, the employer’s shift supervisor opened an investigation. They reviewed the CCTV footage from the front lobby, the photograph, and the claimant’s DAR. (Remand Exhibits 4 and 9). The CCTV footage showed that the claimant was asleep from 4:25 a.m. to 6:10 a.m.

36. After his shift, the claimant spoke to his shift supervisor about him falling asleep while on duty. The supervisor told the claimant that this was his first offense and that they would see what they could do. The supervisor told the claimant that they would speak on January 10, 2025.

37. On January 8, 2025, a representative from human resources attempted to contact the claimant to interview him about what had happened. The representative was not able to reach the claimant. The claimant was not aware that the employer was trying to reach him.

38. On January 9, 2025, the shift supervisor decided to discharge the claimant.

39. The determinative factor that led to the employer’s decision to discharge the claimant was the claimant’s falling asleep.

40. If the claimant had only taken a break in the wrong area, he would have been moved to another client and would not have been fired.

41. The employer was also concerned about the claimant's falsification of the DAR.

42. On January 10, 2025, the claimant was discharged for sleeping on duty.

43. On January 10, 2025, the claimant apologized to the shift supervisor for sleeping and said that he did not feel well.

44. On April 28, 2025, the claimant and the employer attended an appeal hearing. The review examiner reversed the initial decision, finding the claimant eligible for benefits under Section 25(e)(2).

Credibility Assessment:

The claimant and the employer attended a hearing on April 28, 2025. The claimant, his witness (his partner and co-parent), and the employer's witness (a human resources generalist) attended the initial hearing. Only a witness for the employer (a different human resources generalist) attended the remand hearing on July 24, 2025.

After the initial hearing, the review examiner made the determination that the claimant had fallen asleep while on duty, which was deliberate misconduct, but given that he was recovering from the flu and given the position in which he was found sleeping, he did not have the state of mind necessary to have done so in willful disregard of the employing unit's interests.

There was no evidence or testimony given during the remand hearing that calls into question that the claimant fell asleep while on duty. In addition, although the claimant and his witness did not appear, there was no evidence or testimony submitted by the employer demonstrating that the claimant was not recovering from the flu and not feeling well on January 7, 2025. The central issues here are whether the employer had a uniformly enforced policy or a reasonable expectation and whether the claimant had the state of mind necessary to violate either the policy or the expectation.

Based on the testimony of the employer's witness in the remand hearing and the documentation provided, the initial determination that this policy was not uniformly enforced. Although the employer's witness testified that sleeping while on duty results in termination, and although the Deployment Post Orders state that sleeping on duty results in automatic termination (Remand Exhibit 8), both employer's witnesses testified that there could possibly be exceptions made for medical emergencies. In addition, the discharge paperwork provided to the claimant includes selections from the employer's written policy regarding violations of rules of conduct which state that sleeping or lying down while on duty is a violation but that the employer addresses violations on an individual basis and reserves the right

to impose whatever form of discipline it chooses. (Remand Exhibit 5). Given that the policy is not uniformly enforced on its face, it is determined that the claimant was discharged for going against the employer's expectations and interests.

Determining whether or not the claimant had the state of mind necessary to have willfully disregarded the employing unit's interest is more difficult. During the initial hearing, the employer did not submit any additional supporting documents. However, they did submit multiple relevant documents for the remand hearing, including the photograph sent to the employer by the client, the discharge paperwork, the deployment orders, and the claimant's DAR. The claimant did not appear for the remand hearing and could not affirmatively confirm the authenticity of these documents or provide any explanations for their contents and the employer's additional testimony. It is determined that the documents submitted by the employer are authentic and that the man sleeping in the photograph (Remand Exhibit 4) is the claimant, where the details of the image aligned with the testimony from the parties in the first hearing.

During the initial hearing, the claimant testified that he was simply taking a break and had not intended to fall asleep while on duty. The employer contended that based on the evidence, there are multiple indications that the claimant intentionally fell asleep.

First, the employer pointed out that this client required that employees only take breaks at their desk or in the kitchen/cafeteria, but that the claimant had chosen to sit down on a couch in a small room off the lobby. While this could indicate that the claimant was planning on sleeping, it could also mean that he wanted a more comfortable and warmer seat as he was recovering from sickness, especially as it was the middle of the winter.

Second, the employer pointed out that the claimant did move a pillow from the back of the couch to a position under his left arm when he sat down on the couch and that he had worn an unapproved hooded sweatshirt with the hood up, which could indicate an intention to find a comfortable seat and to fall asleep. However, again, these factors could also show that the claimant was seeking a comfortable and warmer seat given his sickness and the fact that it was the middle of the winter.

Third, during the first hearing, the claimant had testified that he had not laid down and had fallen asleep sitting upright due to his exhaustion. The photograph shows that the sleeping claimant was slumped to his left with his arm on the pillow and had his head tilted back but was not laying down.

Fourth, the claimant was surrounded by three electronic devices, including a cell phone, a laptop, and a space heater. Both the phone and the laptop appear to be plugged in. The laptop was open. The employer's witness during the second hearing did not know if these were the claimant's personal devices, or if these were the devices provided to him by the client at the start of his shift. The space heater suggests that the claimant was attempting to make the room warmer and likely more

comfortable, perhaps for sleeping or just because he felt sick and cold. The open laptop could indicate that the claimant was attempting to work from the small room or, if it was his own device, that he was watching a video. Without the claimant present to explain these actions, the review examiner could not ask him for an explanation of the specific details seen in the photograph, and thus the review examiner could not infer a specific reason why the claimant took these actions. However, the claimant had credibly testified, and his witness had corroborated that he was exhausted based on caring for his triplets and getting over the flu.

During the first hearing, the claimant testified that he had spoken to a supervisor before the start of his shift about his exhaustion, but ultimately decided that he was able to work and did not want to call out. During the remand hearing, the employer's witness testified that she had spoken to the supervisor, and he denied that the claimant informed him about his sickness before his shift. The employer's witness's testimony is hearsay, and although hearsay testimony is admissible in an administrative hearing, as the supervisor was not present for examination, the claimant's testimony based on firsthand knowledge is determined to be more credible. However, the claimant was not present to address why he had not called out, as he had enough time off to cover this shift.

During the initial hearing, the employer's witness testified that the determinative factor that led to the claimant's discharge was the fact that he had fallen asleep on duty. During the remand hearing, however, the employer's witness raised another concern – that the claimant had falsified his DAR by reporting that he had done his rounds while he was asleep. Overall, it cannot be determined that the claimant's falsification of the DAR was a major factor in his discharge, especially as the employer did not bring up this issue before the remand hearing and as the discharge paperwork did not mention this fact. In addition, there is no indication on the face of the DAR of when the claimant filled it out. If the claimant had entered the falsified information before falling asleep, he could have been preparing to sleep, but if he had done it after falling asleep, he could have been trying to cover up a mistake.

In a discharge issue under Section 25(e)(2), it is the employer's burden to demonstrate that the claimant was discharged for deliberate misconduct in willful disregard of the employing unit's interest. Here, the employer has fallen just short of this burden. Overall, the claimant's testimony that he was sick and exhausted and fell asleep accidentally is determined to be credible. The factors that cut against this are the claimant's decision to sit down in an area where he was not allowed to take a break and his falsified DAR, but neither of those factors definitively show that that claimant intended to fall asleep. The claimant's testimony that he was sick and exhausted does show that the claimant did not have the state of mind necessary to act in willful disregard of the employing unit's interest.

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. However, as discussed more fully below, we reject the review examiner's legal conclusion that the claimant is entitled to benefits.

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

Under this provision of the statute, "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).

The employer maintains a policy prohibiting employees from sleeping or lying down while on duty. Consolidated Finding # 3. However, it retains discretion as to what disciplinary action may be imposed for violation of this policy. Consolidated Finding # 6. Absent evidence the employer discharged all other similarly situated employees who fell asleep while on shift, it has not met its burden to show a knowing violation of a reasonable and *uniformly enforced* policy under G.L. c. 151A, § 25(e)(2).

We next consider whether the employer has shown the claimant was discharged for deliberate misconduct in wilful disregard of the employer's expectation. To meet its burden the employer must first show that the claimant engaged in the misconduct for which he was discharged.

In this case, the claimant was discharged for sleeping while on duty. Consolidated Finding # 42. As the claimant conceded that he had fallen asleep during his shift on January 7, 2025, his own testimony confirms that he engaged in the misconduct for which he was discharged. Consolidated Finding ## 24, 35, 36, and 43.

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).[1]

[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.

"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. 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).

Because the claimant was feeling ill and tired, he testified that he took time to assess whether he could complete his duties prior to the start of his shift. Consolidated Finding # 18. As he also signed off on deployment post orders at the start of his shift, we can reasonably infer that the claimant knew that the employer expected him not to sleep during his shift. Consolidated Finding # 21.

The review examiner awarded the claimant benefits because she accepted as credible the claimant's testimony that he did not intentionally fall asleep while on shift that night. Following remand, although not explicitly stated in the consolidated findings, the review examiner again accepted as credible the claimant's assertion that he did not intend to fall asleep. 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).

As an initial matter, it appears the review examiner applied a higher burden of proof when on remand. Specifically, the review examiner explained that she concluded the employer had "fallen just short" of meeting its burden to show the claimant was discharged for deliberate misconduct in wilful disregard of the employing unit's interest because neither of the factors weighing against the claimant's testimony "*definitively* show that the claimant intended to fall asleep." (Emphasis added). This was in error. The appropriate "test is whether the finding is supported by 'substantial evidence.'" Lycurgus v. Dir. of Division of Employment Security, 391 Mass. 623, 627 (1984) (citations omitted). "Substantial evidence is 'such evidence as a reasonable mind might accept as adequate to support a conclusion,' taking 'into account whatever in the record detracts from its weight.'" Id. at 627–628, *quoting* New Boston Garden Corp. v. Board of Assessors of Boston, 383 Mass. 456, 466 (1981) (further citations omitted). Based upon the record before us, we cannot accept the review examiner's assessment as to the credibility of the claimant's testimony.

The Appeals Court in Shriver set forth some of the circumstances to be considered in evaluating the "sleeping lapse." According to the court, "the first and dominant circumstance is the importance of the employee's responsibility." Id. at 374. The Appeals Court noted a distinct difference between the consequent interruption of a school maintenance worker's custodian chores in Wedgewood, and a Licensed Practical Nurse's (LPN) responsibility to monitor life sustaining medical equipment in Shriver, observing that a lapse in the LPN's attention could have catastrophic consequences. Id. at 374, n. 9. Although the claimant's responsibilities were not as emergent as those of the LPN in Shriver, his job duties required him to monitor and secure the client's property,

and he was expected to be available to respond to any emergencies throughout the duration of his shift. Consolidated Finings ## 3, 7, and 13. Accordingly, the record shows 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.

The second circumstance identified by the court in Shriver is whether a claimant had some warning of a susceptibility to drowsiness. Id. at 375. In this case, the claimant was aware he was at increased risk of drowsiness as he reported to his supervisor that he was feeling sick and exhausted. Consolidated Findings ## 17 and 18. However, there was no evidence from the record that the claimant took any measures to stay awake during his shift.

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. at 375. The review examiner found that the claimant was fatigued because he was recovering from the flu and had been caring for his children, who were also recovering from the same illness. Consolidated Findings ## 16 and 17.

Although the claimant's increased fatigue was understandable, the record indicates that he engaged in actions indicative of his intention to sleep. *See, e.g.,* Board of Review Decision 0022 8337 59 (May 31, 2018) (accepting the review examiner's credibility assessment finding the claimant deliberately fell asleep where the record showed she was "lying down across several chairs with her head on a pillow in a dark room, with her glasses off . . . ."). When the employer's client discovered the claimant asleep on the morning of January 7, 2025, the claimant was sitting slouched on the couch, in an unauthorized area to take a break, wearing unapproved clothing, with his hood up, using a cushion as an armrest, and having moved a space heater to point at his feet. Consolidated Findings ## 25, 26, 30, and 31. The review examiner noted in her credibility assessment that the claimant's decision to position himself in that way demonstrated he was seeking to create a more comfortable and warmer environment in response to the fact that he was feeling tired and unwell. Inasmuch as the claimant knew he was exhausted from caring for his children, we can reasonably infer that he knew his decision to create this environment for himself would necessarily exacerbate the risk that he would fall asleep. *See* Consolidated Findings # 17.

The claimant's decision to sit on the couch rather than going to any of the approved break areas also indicates that he chose that location for a purpose other than taking his normal break. Consolidated Findings ## 22 and 23. Further, although the review examiner declined to comment on the claimant's decision to set up a cell phone and laptop near the couch in her credibility assessment, we believe that his actions in so doing indicated that he intended to remain on the couch for an extended period. Consolidated Finding # 31. Had he intended to sit on the couch only briefly, he likely would not have and set up both the phone and the laptop around himself.

The evidence shows the claimant chose to create a warmer and more comfortable environment for him to settle despite knowing he was at increased risk of falling asleep. As such, the review examiner's decision to accept the claimant's self-serving testimony as credible is unreasonable in relation to the evidence presented. *See* McDonald v. Dir. of Division of Employment Security, 396 Mass. 468, 470 (1986) (a review examiner is not required to believe self-serving, unsupported,

evidence, even if it is uncontroverted by other evidence). Therefore, the claimant has not shown that he fell asleep on the couch as a result of circumstances beyond his control.

We, therefore, conclude as a matter of law that the employer has met its burden to show the claimant was discharged for deliberate misconduct in wilful disregard of the employer's interest within the meaning of G.L. c. 151A, § 25(e)(2).

The review examiner's decision is reversed. The claimant is denied benefits for the week of January 26, 2025, 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.

Charlene A. Stawicki

BOSTON, MASSACHUSETTS
DATE OF DECISION - August 29, 2025

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.

LSW/rh