

The consolidated findings show that the claimant was sleeping while on an approved break and not while on duty. Because the employer failed to show that the claimant stole company time by sleeping while on duty, the misconduct for which she was fired, it has not carried its burden and the claimant may not be denied benefits under G.L. c. 151A, § 25(e)(2).

**Board of Review
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Issue ID: 334-FHJP-9J6R

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. Benefits were denied on the ground that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest pursuant to G.L. c. 151A, § 25(e)(2).

The claimant had filed a claim for unemployment benefits, effective October 27, 2024, which was denied in a determination issued by the agency on January 14, 2025. The claimant appealed to the DUA Hearings Department. Following a hearing on the merits attended by both parties, the review examiner affirmed the agency's initial determination in a decision rendered on March 8, 2025. The claimant sought review by the Board, which denied the appeal, and the claimant appealed to the District Court pursuant to G.L. c. 151A, § 42.

On June 16, 2025, the District Court ordered the Board to obtain further evidence. Consistent with this order, we remanded the case to the review examiner to take additional evidence concerning the event leading to the claimant's separation. Only the claimant attended the remand hearing. Thereafter, the review examiner issued her consolidated findings of fact.

The issue before the Board is whether the review examiner's decision, which concluded that the claimant should be disqualified from receiving benefits because she stole company time by sleeping when she was supposed to be working, is supported by substantial and credible evidence and is free from error of law.

After reviewing the entire record, including the recorded testimony and evidence from the hearing, the review examiner's decision, the claimant's appeal, the District Court's order, and the consolidated findings of fact, we reverse the review examiner's decision.

Findings of Fact

The review examiner's consolidated findings of fact, which were issued following the District Court remand, are set forth below in their entirety:

1. The claimant worked as a merchandising supervisor for the employer, a retail store, from 10/1/12 until 10/29/24, when she became separated.
2. The claimant was hired to work full-time, 40 hours a week, earning \$24.64 an hour.
3. The claimant was discharged [for] stealing company time by sleeping on the job. The employer has no written, uniformly enforced policy or rule, accompanied by specific consequences, which addresses this behavior. Whether an employee is terminated for this reason is left to the discretion of associate relations.
4. The employer maintains a code of conduct and code of ethics and expects employees to refrain from stealing company time by sleeping on the job. This is necessary for the employer to protect its financial interests and to maintain the integrity of its workforce.
5. The claimant was aware of the employer's expectations in this regard; she received a copy of the handbook at onboarding.
6. On 8/11/24, the employer had been informed by a part-time associate that the claimant was witnessed sleeping on the job. The claimant denied sleeping on the job and the employer took the claimant's word for it, not issuing formal discipline.
7. On 10/2/24, the store manager was informed that the claimant was witnessed sleeping in the fitting room with a jacket. He spoke with the claimant on 10/29/24 about sleeping on the job and told her to consider their conversation a verbal warning.
8. The claimant never presented any medical documentation to the employee [sic] regarding any medical condition that would cause her to fall asleep at work.
9. On 10/16/24, the store manager bought lunch for the team. At 12:15 p.m., when the store manager walked into the breakroom to set up the lunch, he witnessed the claimant sleeping in the breakroom.
10. The store manager checked the time clock and noticed that the claimant had clocked out at 11:15 a.m., then clocked back in at 12:00 p.m., before he found her in the breakroom at 12:15 p.m., asleep.
11. The claimant only had an hour left of her shift. She had punched out for her half-hour lunch break and ate some pizza that the store manager had bought for the employees. After eating the pizza, the claimant wasn't feeling well, she had an upset stomach. The claimant has issues with her gallbladder. She placed her

head down during her break because she was experiencing stomach pain at the time.

12. The claimant is entitled to two 15-minute breaks, in addition to a half-hour lunch break. The claimant was observed with her head down while on her approved break. She was not required to clock out for her two 15-minute breaks, but she was required to clock out for her half-hour lunch break.
13. The claimant's head was down, and her arms were covering her face. The claimant did not respond to him being in the room. The store manager left for approximately 5 to 10 minutes and when he returned, the claimant had left the breakroom.
14. The claimant never indicated she did not feel well, nor did she ask the employer to go home on this day.
15. The store manager informed associate relations, who took a statement from the store manager.
16. On 10/29/24, the claimant was discharged by the store manager for stealing company time by sleeping on the job. The claimant's experience of stomach pain would mitigate her actions on the day in question.

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, with the exception of Finding of Fact #16, to the extent it contains a mixed statement of fact and law. "Application of law to fact has long been a matter entrusted to the informed judgment of the board of review." Dir. of Division of Employment Security v. Fingerman, 378 Mass. 461, 463–464 (1979). In adopting the remaining findings, we deem them to be supported by substantial and credible evidence. However, as discussed more fully below, we now disagree with the review examiner's legal conclusion that the claimant is ineligible for benefits.

Because the claimant was discharged from her 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).

Consolidated Finding # 4 establishes that the employer expected its employees to refrain from stealing company time by sleeping on the job, so that it may protect its financial interests and maintain the integrity of its workforce. Therefore, we believe this expectation to be self-evidently reasonable. However, Consolidated Finding # 3 shows that the employer, through its associate relations department, retains discretion as to whether an employee is terminated for this conduct. Since the employer failed to provide any evidence showing that it discharged all employees who allegedly violated its expectation under similar circumstances, it has failed to meet its burden to show that the claimant violated a reasonable and *uniformly enforced* policy. Alternatively, the employer may show that the claimant’s actions constitute deliberate misconduct in wilful disregard of the employer’s interest.

We next consider whether the employer has met its burden to show that the claimant engaged in deliberate misconduct in wilful disregard of the employer’s interest. To meet its initial burden, the employer is required to show that the claimant engaged in the conduct for which she was discharged.

The employer discharged the claimant for stealing company time by sleeping on the job. Consolidated Finding # 3. After remand, the review examiner has now made consolidated findings indicating that, although the claimant had been asleep in the breakroom on October 16, 2024, she had slept during a fifteen-minute break that she had been entitled to take. Consolidated Findings ## 9, and 11–12.

During the initial hearing, the employer’s witness, who was the store manager and claimant’s former immediate supervisor, never disputed the claimant’s testimony that, in addition to a half-hour lunch period, she had also been entitled to two fifteen-minute break periods during each shift and did not need to clock in and out to take them. *See* Consolidated Finding # 12. Additionally, none of the findings indicate that the claimant was prohibited from taking a fifteen-minute break after clocking in from her half-hour lunch break. Because it is not clear from this record what time the claimant left to go on her fifteen-minute break, we cannot conclude that the employer has shown that the claimant was on her break for more than the allotted time of fifteen minutes when the store manager witnessed her asleep in the breakroom. We also cannot conclude from this record that the claimant slept in the breakroom during a time that fell outside of her approved break period.

Consolidated Finding # 9 suggests that the store manager thought the claimant was sleeping while on duty, when he saw her in the breakroom at 12:15 p.m. on October 16, 2024. However, because the claimant had taken her fifteen-minute break, he mistakenly believed that the claimant was on duty at that time. Moreover, nothing in the record, including the employer’s testimony from the initial hearing, indicates that the act of sleeping while on a break, as opposed to sleeping while “on duty,” was prohibited in any way by the employer. Thus, the employer has not shown that the claimant engaged in the alleged misconduct at issue.

We, therefore, conclude as a matter of law that the employer has not met its burden to show that the claimant was 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 October 27, 2024, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - August 29, 2025



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
(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.

JMO/rh