The Commonwealth of Massachusetts

SUFFOLK, SS.

BOSTON MUNICIPAL COURT DEPARTMENT
OF THE TRIAL COURT FOR CIVIL BUSINESS
CENTRAL DIVISION.

CIVIL ACTION NO. 2010 01 CV 002825

To: MARY C CONNAUGHTON
Boston University Civil Litigation Program
197 Friend Street
BOSTON, MA 02114

FRANK J HOGAN
Plaintiff(s)

DIRECTOR OF THE DUA/ JUDITH L. CICATIELLO
Defendant(s)

JUDGMENT ENTERED AFTER FINDING

(FOR CLERK'S USE ONLY)

AFTER MEMORANDUM OF DECISION BY THE COURT, (FIANDACA J.,) JUDGMENT IS HEREBY ENTERED FOR THE PETITIONER FRANK J HOGAN. THE DECISION OF THE BOARD OF REVIEW IS REVERSED. THE MATTER IS REMANDED TO THE DIVISION WITH AN ORDER THAT BENEFITS BE PAID AT THE RATE SET BY LAW. NOTICE SENT TO ALL PARTIES. PWM.

Dated at Boston, Massachusetts, this 12/21/2010.

DANIEL J. HOGAN
Clerk/Magistrate

By ..... Assistant Clerk/Magistrate

COMMONWEALTH OF MASSACHUSETTS
THE TRIAL COURT

SUFFOLK, SS

BOSTON MUNICIPAL COURT
CENTRAL DIVISION
DOCKET NO. 1001 CV 2825

FRANK J. HOGAN,
Plaintiff

V.

JUDITH L. CICATIELLO, IN HER CAPACITY AS DIRECTOR OF DIVISION OF UNEMPLOYMENT ASSISTANCE
and
SECURITAS SECURITY SERVICES USA, INC.,
Defendants

MEMORANDUM OF DECISION

This is an action for judicial review pursuant to G.L. c. 151A, § 42. The plaintiff claims to be aggrieved by a decision of the Board of Review made pursuant to G.L. c. 151A, § 41 which denied him benefits. The Board of Review adopted the findings of fact made by the review examiner as being supported by substantial evidence, and affirmed the decision of the review examiner to deny the plaintiff benefits based on the finding that the plaintiff's separation was a discharge for deliberate misconduct in wilful disregard of the employer's interest, in accordance with G.L. c. 151A, § 25(e)(2). For all of the following reasons, the decision by the Board of Review denying the plaintiff benefits is **REVERSED**.

LAW

Pursuant to § 14 of G.L. c. 30A, this Court –

> "The court may affirm the decision of the agency, or remand the matter for further proceedings before the agency; or the court may set aside or modify the decision, or compel any action unlawfully withheld or unreasonably delayed, if it determines that the substantial rights of any party may have been prejudiced because the agency decision is—
> (a) In violation of constitutional provisions; or
> (b) In excess of the statutory authority or jurisdiction of the agency; or
> (c) Based upon an error of law; or
> (d) Made upon unlawful procedure; or
> (e) Unsupported by substantial evidence; or
> (f) Unwarranted by facts found by the court on the record as submitted or as amplified under paragraph (6) of this section, in those instances where the court is constitutionally required to make independent findings of fact; or
> (g) Arbitrary or capricious, an abuse of discretion, or otherwise not in accordance with law."

G.L. c. 30A, § 14(7).

The Court is required to make such determinations "upon consideration of the entire record, or such portions of the record as may be cited by the parties." *Id.* The Court must also give "due weight to the experience, technical competence, and specialized knowledge of the agency, as well as to the discretionary authority conferred upon it." *Id.* However, the Court is not required to affirm an agency's decision "merely on a finding that the record contains evidence from which a rational mind might draw the desired inference"; instead, the "determination must be made 'upon consideration of the entire record. . . . The substantiality of evidence must take into account whatever in the record fairly detracts from its weight.'" *Edward E. v. Department of Social Servs.*, 42 Mass. App. Ct. 478, 480-481 (1997), quoting *Cohen v. Board of Registration in Pharmacy*, 350 Mass. 246, 253 (1966).

An employee who is discharged from employment for deliberate misconduct in wilful disregard of his employer's interest is not eligible for unemployment compensation. G.L. c. 151A, § 25(e)(2). Deliberate misconduct in wilful disregard of the employer's interest is intentional conduct or action that the employee knew was contrary to the employer's interest. *Goodridge v. Director of the Div. of Employment Sec.*, 375 Mass. 434 (1978). As the Legislature's choice of the words "deliberate" and "wilful" suggest, the employee's state of mind is critical to the determination. "The cases are legion to the effect that the director, the hearing examiners and the board (G.L.c. 151A, §§ 1[d], 40 & 41) are all under a duty to explore and make findings of fact as to the employee's state of mind at the time of his misconduct whenever an employer attempts to invoke the provisions of G.L. c. 151A, § 25(e)(2), to defeat the employee's claim for unemployment benefits." *Kinch v. Director of the Div. of Employment Sec.*, 24 Mass. App. Ct. 79, 81 (1987) and cases cited therein. The burden of persuasion in establishing wilful misconduct, including state of mind, is on the employer. *Shepherd v. Director of the Div. of Employment Sec.*, 399 Mass. 737 (1987). As is the burden of production. *Still v. Director of the Div. of Employment Sec.*, 423 Mass. 805, 809 (1996).

DISCUSSION

The facts are taken from the record. The plaintiff was employed as a patrol officer for the defendant, Securitas Security Services USA, Inc. ("Securitas"). He began working for Securitas in October, 2002, and was employed full-time on April 9, 2009, at the time of the incident which resulted in his termination. His work schedule was from midnight to 8 o'clock in the morning, Thursday through Monday. His duties included using a company vehicle to conduct inspections and respond to alarms at Securitas' customers' locations. In the early morning hours of the day

in question, just before the scheduled end of his shift, the plaintiff, driving a company vehicle, left Securitas' Boston office and drove the roughly six miles toward a bank parking lot in Medford, the location he was to return the vehicle. He stopped in a Starbucks parking lot about 1/8 of a mile from the bank lot. He fell asleep, and did not wake until after one o'clock in the afternoon. He then drove the 1/8 of a mile and returned the car to Securitas.

The plaintiff was terminated and filed a claim for unemployment benefits. A representative of the Division approved the claim, explaining that the proffered reason for termination, personal use of company property in violation of company policy, was not uniformly enforced, and so the plaintiff was not subject to the disqualification of G.L. c.151A, §25(e)(2). The employer appealed and a review examiner held two days of hearings, made detailed and thorough findings of fact and overturned the original determination. The review examiner agreed that the company policy had not been uniformly enforced, but found Securitas had met its burden to prove that the plaintiff was discharged for deliberate misconduct in wilful disregard of the employer's interest.

The Division concedes that the employer had not met its burden of proving, by substantial and credible evidence, that the plaintiff was discharged for a knowing violation of a reasonable and uniformly enforced policy or rule of the employer, G.L. c.151A, §25(e)(2). The only issue, then, is whether the employer met its burden of proving, by substantial and credible evidence, that the discharge of the plaintiff was attributable to deliberate misconduct in wilful disregard of the employer's interest. *Id.*

The review examiner found important parts of the plaintiff's testimony doubtful and unreasonable. As discussed above, of course, the burdens, both of production and persuasion, are

on the employer, and the burden is proof by substantial and credible evidence. ("To disqualify the employee from the receipt of benefits, the employer has the burden to present substantial evidence demonstrating both "deliberate misconduct" and "wilful disregard" of the employer's interest. The employee's state of mind at the time of the misconduct is an issue in both parts of the requisite analysis. Ibid. In ascertaining the employee's state of mind from all the facts and circumstances in the case, a reviewing tribunal must focus on "the worker's knowledge of the employer's expectation, the reasonableness of that expectation and the presence of any mitigating factors." *Gupta v. Deputy Director of the Division of employment & Training,* 62 Mass. App. Ct. 579 (2004) (internal citations omitted). The *Gupta* court acknowledged that "[a] person's knowledge, intent, or any other state of mind is rarely susceptible of proof by direct evidence, but rather is a matter of proof by inference from all the facts and circumstances in the case, and may rest on "findings of specific acts or omissions of the worker which adversely affect the employer's interest." *Id at fn.5* (internal citations omitted).

The issue is not whether the review examiner ought to have credited the plaintiff's testimony; she did not, and those determinations of fact are properly hers. The issue is whether the plaintiff's actions, unexcused as the review examiner found them to be, constitute wilful misconduct in deliberate disregard of the employer's interest. On the facts found, they do not.

As both the initial reviewing representative and the review examiner found, Securitas' rule regarding improper use of company vehicles was not uniformly enforced. Not only does that finding preclude the employer's reliance upon the "reasonable and uniformly enforced rule" provision of G.L. c.151A, §25(e)(2), it is also relevant to the plaintiff's state of mind as to whether his actions constitute wilful misconduct in deliberate disregard of Securitas' interest.

The "board must take into account the employer's expectations of the employee, the notice to the employee of these expectations, and the reasonableness of the expectations." *Cantres v. Director of the Div. of Employment Sec.*, 396 Mass. 226 at 231 (1985).

The record here is that the plaintiff was terminated for "failing to immediately return the company's patrol vehicle to the designated location on the morning of April 3, 2009." *Review Examiner's Decision, Findings of Fact 5.* The review examiner found that the "employer established an expectation that the claimant would not use the patrol vehicle unless working or otherwise authorized to do so." *Review Examiner's Decision, p.5.* She found that the expectation was reasonable and that the plaintiff was aware of the expectation. *Id.*

But there is no evidence in the record sufficient to support the review examiner's conclusion that the plaintiff's act of remaining in the vehicle after the end of his shift was deliberate or in wilful disregard. The plaintiff pulled off the road to await the end of his shift. The review examiner did not credit his testimony that he did so for safety reasons, but that does not end the inquiry. Securitas did not terminate the plaintiff for falling asleep. It terminated him for remaining in, or using, the company vehicle after his shift had ended. There was no evidence that the plaintiff intended to do so. His act of falling asleep, occasioned by virtue of mitigating factors, as suggested by the plaintiff, or not, as found by the examiner, was not the cause of his termination. The post-shift occupancy of the car was. And there was no evidence at the hearing from which the review examiner could have concluded that plaintiff's remaining in the car after eight o'clock in the morning was either deliberate or wilful. "[T] the act of falling asleep, by its very nature, ordinarily has an unintentional aspect to it..." *Wedgewood v. Director of the Div. of*

Employment Sec., 25 Mass. App. Ct. 30 (1987) (where, unlike the instant case, the plaintiff had been terminated for falling asleep while on duty)[1].

The decision of the Board of Review was unsupported by substantial evidence and unwarranted by facts found by the court on the record as submitted, and is **REVERSED.** The matter is remanded to the Division with an order that benefits be paid at the rate set by law. See G.L. c.151A, §42.

Kenneth J. Fiandaca
Associate Justice

Date: December 21, 2010

[1] The court in *Wedgewood* went on to add "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 compensation benefits. However, each such case must be examined individually in light of any mitigating circumstances." *Id at 33.* In that case, the Board found that Wedgewood was "in full control of his actions and failed to protect his employment status," *Id.*, implying that the plaintiff there chose to sleep while at work. There is no such evidence in this case, the examiner did not so find, and, as noted above, the plaintiff here was not terminated for sleeping while at work.