

The employer denied the claimant's request for a religious exemption to its mandatory COVID-19 vaccination policy, in part, because it did not believe she had sincerely held religious beliefs that prevented vaccination. Held that the record contains sufficient findings that the claimant had sincerely held religious beliefs that constituted mitigating circumstances, and she may not be disqualified for deliberate misconduct in wilful disregard of the employer's interest. Held further that, because of such religious beliefs, she was incapable of complying with the policy, and she could not be disqualified for a knowing violation of a reasonable and uniformly enforced policy. The claimant was eligible for benefits pursuant to G.L. c. 151A, § 25(e)(2).

**Board of Review
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Issue ID: 0073 3588 90

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 reverse.

The claimant was discharged from her position with the employer on October 1, 2021. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on November 12, 2021. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, attended by both parties, the review examiner affirmed the agency's initial determination and denied benefits in a decision rendered on March 1, 2022. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest and 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 afforded the parties an opportunity to submit written reasons for agreeing or disagreeing with the decision. Only the claimant responded. 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's refusal to get a mandatory COVID-19 vaccine constituted deliberate misconduct in wilful disregard of the employer's interest, is supported by substantial and credible evidence and free from error of law, where the findings and overall record show that the claimant's religious beliefs prevented her from receiving the vaccine.

Findings of Fact

The review examiner's findings of fact are set forth below in their entirety:

1. The claimant, a registered nurse, worked full-time for the employer, a health center, as a community liaison, beginning November 15, 2017. The claimant was paid \$80,000.00 annually.
2. The claimant's [job] [description] required the claimant to serve onsite: Clinical Responsibilities
 - As directed, as referral development and [l]iaison activities ebb and flow, serve as resource for onsite health center and or [Employer] needs.
3. The claimant acknowledged and signed the [j]ob [d]escription on June 24, 2021.
4. On August 3, 2021, the President and CEO sent employees an email which stated, in part:

Subject: COVID-19 Updates and Mandatory COVID-19 Vaccine for Current Overlook Team Members and New Hires. We appreciate the sacrifices our [Employer] Family has made the past 17 months. We have taken countless, preventative measures to protect The [Employer] against COVID-19 in an effort to ensure our Residents/Patients/Clients, Team Members, Loved Ones, and other partners remain healthy and safe. We have worked long hours under highly stressful conditions and each of you has helped make it possible for us to continue with our essential operations.

Decision to Mandate COVID-19 Vaccinations for all Overlook Team Members. We are privileged to work in our Residents'/Patients'/Clients' homes and believe our Team Members have a heightened responsibility to ensure this environment remains as safe as possible.

1. In the country, the COVID-19 Delta variant is leading to increasingly alarming and devastating effects on our nation. In fact, last week, the Delta variant infected some of our own [Employer] Team Members, helping solidify our thoughtful and careful decision to move forward and mandate the COVID-19 vaccine, effective October 1, 2021, for all Overlook Team Members (including our Preferred Therapy Services Health Care Services Group Team.)

2. Our goal is to provide a workplace that is free of known hazards. In adopting a Mandatory COVID-19 Vaccine Policy for all existing and new [Employer] Team Members, we believe we can further safeguard the health of our staff and even more importantly, protect those we serve from infectious diseases and life-threatening risks that are proven to be significantly reduced by vaccinations.

COVID-19 Vaccine Exemptions for Medical or Religious Reasons.

1. Unvaccinated Team Members seeking a COVID-19 exemption for either medical or religious reasons from [Employer's] mandatory COVID-19 vaccine requirement should complete a Request for Declination. To provide for sufficient time for [the] [Employer] to review, please submit completed form to People & Culture, on or before September 1, 2021 with supporting documentation.

2. Influenza Vaccine Impact on COVID-19 Vaccine .

1. It is important to recognize that there is a 2-week waiting period required between the receipt of the Influenza and COVID-19 vaccinations.

2. For those opting for a 2-dose COVID-19 vaccine, it's best to complete the entire COVID-19 series prior to receiving an Influenza vaccine.

Next Steps for Current Unvaccinated Overlook Team Members[.]

1. Any current unvaccinated [Employer] Team Member must be fully vaccinated by October 1, 2021 to continue employment at [the] [Employer].

2. Any of the available COVID-19 vaccines are acceptable options for [Employer] Team Members (Pfizer-BioNTech, Moderna, Johnson & Johnson.) The Johnson & Johnson vaccine is not the preferable option, as it proven to be far less effective.

3. Team Members electing to receive the 2-dose vaccine will need to allow sufficient time between the 1st and 2nd dose. Recommended time frame based on CDC guidelines is a minimum of 21 days, between the 1st and 2nd dose for Pfizer-BioNTech and 28 days for Moderna.

3. [sic] Any current unvaccinated Team Member will be removed from the schedule and terminated from the [Employer] on October 1, 2021.

4. An [Employer] Team Member terminated for failure to comply with [the] [Employer's] COVID-19 Mandatory Vaccine Policy may be considered for rehire once fully vaccinated. He or she will be required to reapply for any open position and tenure will not be lost as long as he or she has completed a full year of service and is re-employed within 3 years of termination.

5. The policy is a measure to ensure the safety of patients and staff and to comply with the Massachusetts Department of Health's order requiring all staff be vaccinated by October 1, 2021.

6. All employees are subject to the policy.

7. Current unvaccinated employees who failed to comply were to be removed from the schedule and terminated from the employer on October 1, 2021.

8. Employees who were not granted an exemption and failed to get vaccinated were terminated.
9. The claimant received the August 3, 2021, COVID-19 mandatory vaccination policy email requiring all personnel to be fully immunized against COVID-19 by October 1, 2021.
10. It was the employer's expectation the claimant be fully vaccinated by October 1, 2021.
11. Some "non-medical care facing" positions, such as finance non-patient account personnel and non-contact maintenance personnel were granted a religious exemption.
12. No nurses were granted a religious exemption.
13. On August 12, 2021, the claimant completed, signed, and submitted to the employer a [COVID]-19 Vaccination Declination Form indicating her decision not to be vaccinated.
14. The claimant declined to be vaccinated because it was contrary to her religious beliefs.
15. The claimant submitted to her employer a letter dated October 26, 2021, from her church pastor, which stated, in part:

To whom it may concern, I am writing in reference to [Claimant]. My name is [Name] and I serve as pastor here at [Name] Church in [Name], MA. [Claimant] and her husband, [Name], attend our church. [Claimant] voiced to me that she objects to being forced to get the COVID vaccine. She has said, 'I believe that my body is the temple of the Holy Spirit and that I am called to honor God in how I care for my body. I conscientiously object to being forced to receive this vaccine.' As I have talked with [Claimant] and her husband, for [Claimant], based on what Scripture says, she strongly believes that having these COVID shots would violate her sincerely held religious beliefs. Thank you for considering this matter on [Claimant's] behalf. Sincerely, Rev. [Name]
Pastor
16. On September 2, 2021, the claimant met with the Director of Peoples and Cultures (DPC) to discuss the claimant's request for an exemption from the COVID-19 vaccine based upon her religious beliefs.
17. The claimant expressed in the meeting that getting the vaccine was against her religious beliefs; that she had viewed the movie "Vaxxed"; that there was something sinister in the vaccine; and that it was her personal choice not to get vaccinated.

18. On September 10, 2021, the DPC emailed the claimant indicating the claimant had not provided sufficient information to conclude the claimant held a sincere religious belief that conflicted with the COVID-19 vaccination.
19. The September 10, 2021, email set forth a request the claimant respond to the following inquires by September 14, 2021:
 1. Please identify with particularity how the COVID-19 vaccine would cause you to violate or forego a belief or practice of your religion.
 2. Does your religious belief preclude all vaccinations?
 3. If so, how does that reconcile with your acceptance of flu vaccination in prior years?
 4. If not, what makes the COVID-19 vaccination unique or different from the flu?
 5. Are all members of your religion precluded from vaccination?
20. The claimant, who was working the floor with COVID-19 patients, requested and was granted additional time to submit her response to the employer's September 10, 2021, email request for additional information.
21. On September 22, 2021, the DPC sent the claimant an email denying her request for a religious exemption from the COVID-19 vaccination, stating, in part:

[Claimant]

You have been a valuable unit nurse here at the Overlook and in your new role, contributing to admissions and clinical responsibilities; you remain an important member of die [sic] team where you continue to be involved in direct interaction with our vulnerable residents, as well as other staff.

Among other things, the essential duties of your position include direct work with residents and potential residents including referral meetings, tours[,] and clinical evaluations, in addition to remaining a resource for onsite health center and or [Employer] needs. Accordingly, your role requires a clinical degree, such as an RN degree, and cannot be performed remotely.

As stated, we cannot provide the accommodation you requested, but we are willing to provide an accommodation: you have the choice of either becoming vaccinated – and if you indicate that you intend to do so, we will allow you in extension to the vaccine mandate requirement and would allow you to take an unpaid leave of absence while you become fully vaccinated – or you may voluntarily resign, and if circumstances change, we welcome you to reapply in the future.

As discussed, the mandate has changed the way we are able to do business and allowing you to do things going forward, unvaccinated, as you requested, poses a direct threat to the health and safety of our residents, namely increasing the risk of transmission of COVID-19. In the meantime, I want to assure you that we've given careful consideration to your request and we engaged you in a meaningful dialogue about it, though I appreciate that you disagree with the outcome.

With Regards,

[DPC]

22. The claimant was denied the religious exemption because the employer determined administration of the [COVID]-19 vaccine was [sic] in violation a sincerely held religious belief by the claimant.
23. For safety reasons, because the claimant, as clinical staff, worked directly with patients and could not perform all of her job duties remotely, the employer was unable to allow the claimant to continue to work unvaccinated.
24. The employer offered employees a 30-day leave of absence beginning October 1, 2021, to allow time to see if the vaccine mandate was reversed and to change their position of refusing to be vaccinated.
25. On September 24, 2021, the claimant sent an email to the DPC, stating, in part:

I have cared for patient's [sic] on isolation precautions for many different viral and bacterial infections, Not once have I spread infection to myself, other patients, cohorts, family, and/or friends. I have worked in high risk exposure areas such as, Emergency Department, ICU/CICU, I was Hazmat Trained/Certified, and I was on the Disaster Team at a local community hospital. [Employer] did not and still does not have appropriate PPE, recommended by CDC and WHO to care for a patient with COVID or any aerosol droplet isolation precautions.

*My body is a temple for the Holy Spirit' & I will NOT put a man-made vaccine into my body when God has provided ALL of us with an amazing immune system! I will NOT and DO NOT consent to receiving the COVID 19 or any additional MANDATORY vaccinations, in which this facility is demanding, in order to continue my employment at [Employer].
26. Prior to the August 3, 2021, COVID-19 vaccination mandate, the claimant complied with all Personal Protective Equipment (PPE) requirements and weekly COVID-19 testing.
27. The claimant did not get the COVID-19 vaccination by October 1, 2021.

28. On October 1, 2021, the claimant reported for work.
29. On October 1, 2021, the claimant was escorted from the building because she had not been administered the COVID-19 vaccine.
30. On October 1, 2021, the claimant was terminated for not getting the COVID-19 vaccine.
31. The claimant would not have been terminated had she been administered the first dose of the COVID-19 vaccine by October 1, 2021.
32. On October 1, 2021, the DPC sent the claimant a separation from employment letter, which stated, in part:

Dear [Claimant], Enclosed please find your final pay through October 1, 2021 including your accrued vacation and floating holiday time. As indicated in our communication we do consider those who were not able to comply with the DPH COVID Vaccine Mandate to have voluntarily resigned. Your separation from employment is effective October 1, 2021.
33. The claimant was not medically prohibited from being administered the [COVID]-19 vaccine.
34. The claimant was initially told there were no preservatives or ill effects from the COVID-19 vaccine.
35. The claimant monitored people for 15 to 30 minutes after they were administered the vaccine and looked into whether the vaccine had ill effects or contained preservatives or chemicals.
36. The claimant, as a nurse, used her critical thinking skills and did her own research regarding the COVID-19 vaccine and learned the vaccine contained “polyetholglycol,” which could hurt you.
37. The claimant began her walk with faith 5 or 6 years ago.
38. The claimant follows the scripture the body is a temple for the holy spirit.
39. The claimant objected to being administered the [COVID-19] vaccine because it was against her religious beliefs: “My body is a temple for the Holy Spirit”; “God made us with free will”; “Our body can endure but who can live with a wounded spirit?”; and “God has made us with an immune system to fight off these elements, our body generates our body, and heals, and I just feel that God made not man made.”.
40. The past 2 -3 years the claimant “has come into my faith, grown in my faith, and very strong in my faith.

41. The claimant joined the Baptist church “last year” and was a member when the employer implemented the [COVID]-19 vaccination policy.
42. The claimant is a Bible believing Baptist.
43. The Baptist church does not prohibit vaccinations.
44. Being administered the COVID-19 vaccine does not violate the claimant’s church’s doctrine.
45. The claimant does not have any medical conditions which prevents her from being administered the COVID-19 vaccine.
46. The claimant who had not previously been administered the flu vaccine, was administered the flu vaccine as a condition of employment with the instant employer in 2018, 2018, [sic] and 2020.

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 findings are supported by substantial and credible evidence; and (2) whether the review examiner’s original conclusion is free from error of law. After such review, the Board adopts the review examiner’s findings of fact, except as follows.

First, Finding of Fact # 22 contains an error, as it is an internally inconsistent statement. If the employer had concluded that the claimant had a sincerely held religious belief, then that decision would reasonably be grounds for approval, not denial, of the claimant’s religious exemption request. Further, the employer testified that it did not believe the claimant had a sincerely held religious belief that prevented her from becoming vaccinated against COVID-19.¹

Next, Finding of Fact # 46 also contains an internally inconsistent statement, and likely a mere scrivener’s error, where the review examiner found that the claimant had both been administered, and had not been administered, flu vaccines in the past. However, it is the employer’s undisputed testimony that the claimant had received the flu vaccines during each year in which she was employed. Therefore, we accept that portion of the finding which states the claimant was administered the flu vaccine between the years 2018 and 2020.

¹ We have supplemented the findings of fact, as necessary, with the unchallenged evidence before the review examiner. See Bleich v. Maimonides School, 447 Mass. 38, 40 (2006); Allen of Michigan, Inc. v. Deputy Dir. of Department of Employment and Training, 64 Mass. App. Ct. 370, 371 (2005).

Exhibit 19, an email communication between the claimant and the employer dated September 10, 2021, corroborates the employer’s decision to deny the claimant’s religious exemption request on these grounds. In that email, the employer wrote, in pertinent part, that it felt that vaccination was more against [the claimant’s] personal choice than religious beliefs, and that it did not have sufficient information at that time to conclude that the claimant had sincerely held religious beliefs.

In adopting the remaining findings, we deem them to be supported by substantial and credible evidence. However, as discussed more fully below, we do not agree with the review examiner's legal conclusion that the claimant is ineligible for benefits.

Because the findings show that the claimant was involuntarily terminated from her employment, her 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*

(Emphasis added.) “[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, there is no dispute that the employer implemented a mandatory COVID-19 vaccination policy in August, 2021, which required all staff to be vaccinated or obtain an exemption by October 1, 2021. *See* Finding of Fact # 4. There is also no question that the claimant did not get vaccinated, and that she was terminated for this reason. *See* Findings of Fact ## 27 and 30.

Whether or not the employer made the correct decision to discharge the claimant is not before us. The only question is whether the claimant is eligible for unemployment benefits. The purpose of the unemployment statute is to provide temporary relief to persons who are out of work and unable to secure work through no fault of their own. Connolly v. Dir. of Division of Unemployment Assistance, 460 Mass. 24 (2011) (further citations omitted).

In order to determine whether an employee's actions constitute deliberate misconduct, the proper factual inquiry is to ascertain the employee's state of mind at the time of the behavior. Grise v. Dir. of Division of Employment Security, 393 Mass. 271, 275 (1984). In order to evaluate the claimant's state of mind, 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.” Garfield v. Dir. of Division of Employment Security, 377 Mass. 94, 97 (1979).

The claimant was aware of the vaccination policy and that she was expected to abide by it. *See* Findings of Fact ## 9 and 10. As the purpose of the policy was to protect employees and patients at the employer hospital from exposure to and illness from COVID-19, we agree that the policy was reasonable. *See* Finding of Fact # 5.

The record shows that the claimant sought a religious exemption, and, when that was denied, she ultimately declined to get vaccinated for religious reasons. *See* Findings of Fact ## 13–14 and 21,

27. 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).

Here, the review examiner did not make any specific findings as to whether the claimant had sincerely held religious beliefs that prevented her from becoming vaccinated against COVID-19. Instead, the review examiner makes a tacit credibility assessment in her conclusion that the claimant did not get vaccinated due to a conflict with a sincere religious belief, but because she merely had safety concerns pertaining to the composition of the COVID-19 vaccine. 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). "The 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 this assessment.

It appears as though the review examiner at least partially relied on the fact that the Baptist church, the faith organization to which the claimant belongs, does not prohibit vaccination. Findings of Fact ## 41–44. However, we believe the review examiner analyzed this matter too narrowly, and, in doing so, neglected to consider other findings and salient evidence in the record. For example, the claimant submitted a letter of support from her church pastor and testified extensively about the evolution of her faith in the past year, while also acknowledging that she had taken flu vaccines in the past to keep her job. See Exhibit 14 and Findings of Fact ## 37, 40, and 41. It is the claimant's undisputed testimony that her faith has strengthened to the point where she no longer feels the need to take vaccines unwillingly.

As noted earlier, the review examiner considered the claimant's decision to decline the COVID-19 vaccine as a personal choice that did not amount to mitigating circumstances for the misconduct. While the claimant's mentioning of the movie "Vaxxed;" research into the ingredients of the vaccine; and belief that something "sinister is in the vaccine," align more with concerns that are of a secular nature, the fact that the claimant may hold these opinions does not diminish the fact that she also has sincerely held religious beliefs.

The review examiner's numerous findings about the scope and nature of the claimant's religious beliefs support a conclusion that the claimant had sincerely held religious beliefs that prevented her from receiving the COVID-19 vaccination. See Findings of Fact ##14, and 37–44. Given the extensive record evidence about the claimant's religious beliefs, and the lack of any meaningful evidence that would contradict her assertions, the claimant has sufficiently established mitigating circumstances.

In short, the claimant's sincerely held religious beliefs constituted circumstances over which she had no control. Thus, we disagree with the review examiner's conclusion that the claimant acted in wilful disregard of the employer's interest when she refused to comply with the employer's mandatory vaccine policy. Her refusal was due to mitigating circumstances.

Alternatively, the employer can meet its burden by demonstrating that the claimant knowingly violated a reasonable and uniformly enforced policy. As stated, we believe that the policy was reasonable. Finding of Fact # 8 also provides that it was uniformly enforced, inasmuch as the employer terminated all employees whose religious or medical exemption requests were denied and who declined to get vaccinated.

The review examiner also concluded that the employer established that the claimant's violation of the policy was knowing. We agree. The claimant was aware of the policy terms, and the record reflects that she knew that, if she did not get her exemption, she would be terminated. *See Findings of Fact ## 9 and 25.*

However, the reason that she did not get the vaccine was because her sincerely held religious beliefs rendered her unable to comply with the new mandatory terms of her position. The job had become unsuitable. Stated another way, the policy violation in this case has been shown to be the result of the employee's incompetence. She was incapable of complying with the policy because doing so would be in direct opposition to her religious beliefs. As such, the employer has not met its burden.

We, therefore, conclude as a matter of law that the employer has not demonstrated that it discharged the claimant for deliberate misconduct in wilful disregard of the employer's interest, or for a knowing violation of a reasonable and uniformly enforced 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 September 26, 2021, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - September 19, 2022



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.

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