

Dietician for a skilled nursing facility declined to comply with the employer’s mandatory COVID-19 vaccine requirement due to her sincerely held religious belief. This belief constitutes mitigating circumstances such that her deliberate misconduct in refusing to get the vaccine was not done in wilful disregard of the employer’s interest. Inasmuch as her sincerely held religious belief rendered her incapable of complying with the employer’s policy, she is also not disqualified for a knowing violation of the policy. Held the claimant is eligible for benefits pursuant to G.L. c. 151A, § 25(e)(2).

**Board of Review
19 Staniford St., 4th Floor
Boston, MA 02114
Phone: 617-626-6400
Fax: 617-727-5874**

**Paul T. Fitzgerald, Esq.
Chairman
Charlene A. Stawicki, Esq.
Member
Michael J. Albano
Member**

Issue ID: 0073 4319 07

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 affirm.

The claimant was discharged from her position with the employer on October 11, 2021. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on December 9, 2021. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, attended only by the claimant, the review examiner overturned the agency’s initial determination and awarded benefits in a decision rendered on March 15, 2022. 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 give the employer an opportunity to testify and present other evidence. Both parties 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’s refusal to get a mandatory COVID-19 vaccine was neither a knowing violation of an employer policy nor deliberate misconduct in wilful disregard of the employer’s interest, because she acted in accordance with her religious belief, 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. The claimant worked as a full-time licensed and registered dietitian for the employer, a skilled nursing facility, between October 10, 2010, and October 10, 2021, when she separated.
2. The claimant worked Monday through Friday from 8:30 a.m. until 5:00 p.m., earning \$53.52 per hour.
3. The claimant's immediate supervisor was the executive director (supervisor).
4. In 2021, the employer was required to comply with a mandatory COVID-19 Policy, put in place by the Massachusetts Department of Public Health. The exact the [sic] contents and provisions of the policy are unknown.
5. In 2021, the employer expected employees to get the COVID-19 vaccine to comply with state law and policies.
6. In August, 2021, the claimant received correspondence from the employer informing her that she needed to be vaccinated by October 10, 2021.
7. Employees were allowed to apply for exemptions from the mandatory COVID-19 vaccine based on their sincerely held religious beliefs.
8. The claimant, who is Catholic, holds the religious belief that she is created in the image of God and her body is perfect, so she should not put processed food or chemicals in the body. The claimant leads an organic lifestyle.
9. The claimant did not take the COVID-19 vaccine because she believes that the vaccine is a chemical that should not be put in her body.
10. The claimant has never taken a vaccine since becoming an adult because of her religious belief.
11. Beginning in 2010, the employer had been accommodating the claimant's religious belief by allowing her an exemption from any employee-related vaccination requirements.
12. When the COVID-19 vaccine became available and recommended for employees, the claimant was allowed to wear personal protective equipment, to take a COVID-19 rapid test daily and a PCR test every week, instead of getting the COVID-19 vaccine.
13. In September, 2021, the claimant was told that there would be no alternatives to the mandatory COVID-19 vaccine after October 10, 2021.

14. On September 1, 2021, the claimant applied for a religious exemption from the mandatory COVID-19 vaccine based on her religious belief.
15. On September 9, 2021, the supervisor informed the claimant that her exemption request was denied. The claimant was not given a reason for the denial.
16. No religious exemption request applied for by any of the employer's employees was approved by the employer.
17. The employer does not dispute that the claimant sincerely holds a religious belief which informs her decisions about what she puts into her body. The denial of the religious exemption was not based on the employer disbelieving that the claimant had a religious belief. The employer decided to deny the exemption based on the safety and well-being of the employer's residents.
18. On October 6, 2021, the supervisor sent a letter to the claimant informing her that if she had not received the vaccine by October 10, 2021, or received an accommodation from the employer, then she would be considered to have voluntarily resigned.
19. On October 10, 2021, the claimant had still not taken the COVID-19 vaccine.
20. The claimant worked on October 10, 2021.
21. On October 11, 2021, the claimant was taken off the payroll by the payroll coordinator.
22. On October 11, 2021, the employer discharged the claimant from her employment because she had not received the COVID-19 vaccine or had a workplace accommodation by October 10, 2021.
23. The claimant did not quit or intend to quit her job.
24. After the claimant filed for unemployment, the employer completed a fact-finding questionnaire for the Department of Unemployment Assistance (DUA). In the questionnaire, the employer indicated that the claimant "voluntarily quit due to refusing the COVID-19 vaccination."

Credibility Assessment:

The employer failed to submit a copy of the written policy during the first and remand hearings.

During the remand hearing, the executive director testified that the claimant voluntarily resigned because she did not receive the mandatory COVID-19 vaccine or have an accommodation by October 10, 2021. However, she also testified that the claimant was taken off the payroll by the payroll coordinator on October 11,

2021. The claimant testified that she did not quit or intend to quit her job. The employer initiated the separation by denying the claimant's religious exemption application and removing her from the payroll on October 11, 2021.

The evidence established that the employer offered employees, including the claimant, the option of applying for a religious exemption based on their sincerely held religious belief. The evidence established that the claimant applied for that exemption based on her sincerely held religious belief. During the remand hearing, the executive director testified that the sincerity of claimant's religious belief was not disputed and the decision to deny her application was not based on the sincerity of her belief; instead, it was based on the employer's decision and need to protect the residents. Given that the sincerity of the claimant's religious belief is undisputed, findings of fact were made that the claimant's beliefs prevent her from taking vaccines (at least as an adult).

At the remand hearing, the executive director also testified that she has no first[hand] knowledge of the claimant's previous approved religious exemptions because she was not employed at that time. The claimant's testimony about this is deemed credible, as her testimony was consistent, reasonable and logical.

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 original conclusion is free from error of law. After such review, the Board adopts the review examiner's consolidated findings of fact except as follows. We set aside any part of the consolidated findings or credibility assessment referring to the employer's witness as the Executive Director, as the employer's witness testified during the remand hearing that she is the Administrator.¹ We also set aside the portion of the credibility assessment stating that the Executive Director (Administrator) was not employed when the claimant received prior exemptions from taking other vaccines, as the specific testimony given during the remand hearing was that the Administrator had worked for the employer for five years, but only began at the facility where the claimant worked in June of 2021. In adopting the remaining findings, we deem 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.

Because the claimant was 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

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).

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, in August, 2021, the employer informed all employees that they were required to take the COVID-19 vaccine or obtain an exemption by October 10, 2021, to remain employed. *See Consolidated Findings ## 6–7*. There is also no question that the claimant did not get vaccinated by the deadline, and that she was terminated for this reason. *See Consolidated Findings ## 19 and 22*.

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 requirement and that she was expected to abide by it. *See Consolidated Findings ## 5–6*. As the purpose of the requirement was to ensure the safety and well-being of the residents at the employer skilled nursing facility, we agree that the requirement was reasonable. *See Consolidated Findings ## 1 and 17*.

The record shows that the claimant sought a religious exemption and, when that was denied, ultimately declined to get vaccinated due to her religious beliefs. *See Consolidated Findings ## 8–10 and 14–15*. 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 findings show that the claimant had a sincerely held religious belief that has prevented her from receiving vaccines of any kind for years. *See Consolidated Findings ## 8–10*. The claimant had specifically refused to take vaccines required by the employer since 2010, and, prior to this last instance, she had always been accommodated by the employer. *See Consolidated Finding # 11*.

We believe that the claimant’s sincerely held religious belief, which prevented her from getting the vaccine, constituted a circumstance over which she had little control. Thus, we agree with the review examiner that the claimant did not act in wilful disregard of the employer’s interest when

she refused to comply with the employer's vaccine requirement. 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. The review examiner here found that the employer did not present a relevant written policy regarding its COVID-19 vaccine requirement, and that its expectation that employees receive the COVID-19 vaccine was based on a requirement of the Massachusetts Department of Public Health, the exact content of which was unknown. *See* Consolidated Finding # 4 and the credibility assessment. While we agree that the employer did not provide a written policy, the consolidated findings and the employer's testimony show that, based on the state's COVID-19 vaccine requirement for personnel in nursing homes, the employer implemented a policy requiring all of its employees to either obtain a medical or religious exemption or be vaccinated by October 10, 2021, in order to remain employed.

As previously stated, we believe that the employer's requirement and policy were reasonable. Consolidated Findings of Fact ## 13 and 16–17, and the employer's testimony that all exemption requests were denied, and only those who were fully vaccinated against COVID-19 remained employed further show that the policy was uniformly enforced. Finally, the record shows that, based on the employer's communications, both verbal and written, the claimant was aware that, if she did not get a religious exemption or take the vaccine by the deadline, she would be terminated. *See* Consolidated Findings ## 6–7 and 18. Because the reason that the claimant did not get the vaccine was her sincerely held religious belief, her policy violation in this case has been shown to be the result of her incompetence. She was incapable of complying with the policy because doing so went against her sincerely held 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 affirmed. The claimant is entitled to receive benefits for the week beginning October 10, 2021, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - September 26, 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.

SVL/rh