

A claimant was discharged by her employer hospital for refusing to comply with the employer's mandatory COVID-19 vaccination policy. The Board awarded benefits under G.L. c. 151A, § 25(e)(2), as she demonstrated mitigating circumstances for deliberately violating the policy. In its decision, the Board rejected an adverse credibility assessment as unreasonable in relation to the combination of documentary and testimonial evidence presented, which showed a sincerely held religious basis for refusing to comply.

**Board of Review
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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 November 1, 2021. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on November 26, 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 July 2, 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, thus, she 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 remanded the case to the review examiner to obtain further evidence about the claimant's asserted religious objection to complying with the employer's policy. Both parties attended the remand hearing.¹ 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 failed to show that she had a sincerely held religious belief that constituted mitigating circumstances for her refusal to comply with the employer's mandatory COVID-19 vaccination policy, is supported by substantial and credible evidence and is free from error of law.

Findings of Fact

¹ We note that the employer's agent participated in the first session scheduled for the remand hearing, but neither the employer nor its agent attended the continued remand hearing.

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 Clinical Behavioral Social Worker for the employer, a hospital, from August 26, 2002, until November 1, 2021, when she separated.
2. The claimant's direct supervisor was the employer's Manager of Business Operations for General Surgery.
3. On August 10, 2021, the employer enacted a COVID-19 policy (policy) which required all employees to receive the COVID-19 vaccination, unless they were approved for a religious or medical exemption.
4. The purpose of this policy is to ensure protection for employees, patients, and the community from exposure to and illness from COVID-19.
5. The policy stated, in part, "If after November 1st the employee still has not been immunized or granted an exemption, the employee will be found not in compliance with the policy and will be terminated."
6. The claimant received the policy by email.
7. The employer had an expectation that all employees would get the COVID-19 vaccine.
8. The purpose of this expectation was to ensure the safety and protection of employees, patients, and the community from exposure to and illness from COVID-19.
9. The expectation was communicated to the claimant through email.
10. The claimant was aware of the employer's expectation to obtain the COVID-19 vaccination.
11. The discipline for violation of the expectation was termination.
12. The claimant religiously identifies as a lifelong Catholic, and as such, does not believe in abortion.
13. As a Catholic, the claimant believes that abortion is a mortal sin, which will separate her from God.
14. Since the claimant began employment with the employer in 2002, the claimant received multiple vaccinations and never applied for any type of vaccination exemption or declination.

15. From 2002 until 2021, the claimant never investigated the manufacturing process or contents of any vaccines that she had received.
16. The claimant did online research herself to investigate the contents of the COVID-19 vaccine because she heard general concerns voiced about the connection between the COVID-19 vaccine and aborted fetal cells.
17. The claimant spoke to her local parish priest about the vaccination.
18. The priest did not instruct the claimant to refuse the vaccine.
19. The priest told the claimant to follow her conscience.
20. The claimant never spoke to her own doctor, a doctor, or a scientist about the development process or the contents of the COVID-19 vaccination.
21. The claimant did not get the COVID-19 vaccination due to her own personal objections to receiving the vaccine.
22. The claimant applied for a religious exemption with the employer related to the COVID-19 vaccine requirement.
23. The claimant found a boiler plate affidavit online and attached it to her religious exemption request.
24. On September 14, 2021, the employer denied the claimant's request for a religious exemption from getting the COVID-19 vaccination.
25. On October 1, 2021, the employer placed the claimant on an unpaid leave of absence for failing to obtain the COVID-19 vaccination.
26. On November 1, 2021, the claimant was discharged from her employment for failing to comply with the employer's vaccine mandate.

Credibility Assessment:

The claimant submitted a copy of her affidavit that accompanied her request for an exemption from receiving the COVID-19 vaccination. With regard to the claimant's affidavit that accompanied her request for an exemption from the vaccine, the claimant testified that she did not know if she wrote the affidavit or found the affidavit online. Given that the contents of the document and the presence of what appear to be fill-in areas, such as the document saying, "[name]" where it was clearly intended for the person filling out the form to insert their own name, and the claimant's name being listed in parenthesis, it is concluded that the claimant did not write this document herself. Furthermore, it is not reasonable that the claimant would not know whether she wrote or found a document. As such, it is concluded that this is a boiler plate affidavit that the claimant found online. As

such, the purported affidavit is not found to be credible evidence of the claimant's sincerely held religious belief.

The Board of Review asked the claimant to submit any articles or web pages that she read while conducting her own research, and which she relied upon in determining that the COVID-19 vaccine was derived from aborted fetal cells. The claimant failed to submit any credible documents that the claimant could have reasonably relied on in making her decision to refuse the COVID-19 vaccine in August 2021, when she applied for a religious exemption. The document entitled, "A Lone Bureaucrat Denied Due Process And Unemployment Benefits to Massachusetts' Unvaxxed," although was admitted into the record, is dated March 8, 2023, therefore, is not relevant to the claimant's research at the time she refused to obtain the COVID-19 vaccine. This document was not considered in evaluating the sincerity of the claimant's beliefs. The claimant submitted a document entitled, "Department of Unemployment Assistance UI Policy & Performance Interoffice Memorandum" dated October 14, 2021, which also was not considered a document relevant to the claimant's research at the time that she refused the [COVID]-19 vaccine. This is a document created by the DUA and does not contain any information relevant to the claimant's refusal of the COVID-19 vaccine.

The [Organization A] document submitted by the claimant has a date of 11/2/21 listed on it, which was after the claimant's decision to refuse the vaccine and subsequent separation. As such, it cannot be concluded that the claimant relied on this document when she refused to obtain the COVID-19 vaccine. The document the claimant submitted from "Life Facts" entitled, "COVID-19 Vaccine Various concerns, including rushed development, aborted fetal cell lines, and mandatory vaccination" does not appear to be a substantive article about the claimant's reasons, religious or otherwise, about her refusal to get the COVID-19. The document appears to only list links to other articles. Nor does this document contain a date. As such, it cannot be concluded that the claimant relied on this document in making her decision to not receive the COVID-19 vaccine.

The document that the claimant submitted entitled, "The COVID-19 vaccination debate: chains of evil" is dated April 19, 2021. Although this document fits in with the timeline of the claimant's object to the COVID-19 vaccine, it is nonsensically written and fails to make a clear connection between what the claimant purported were her religious views and her reasons for refusing the COVID-19 vaccine. The article cites concerns for medical ramifications from receiving the COVID-19 vaccine and concerns over large-scale depopulation, which the claimant failed to mention as a reason for her refusal of the COVID-19 vaccine. As such, it cannot be logically concluded that this document is credible evidence that the claimant relied on when deciding to refuse the COVID-19 vaccine for her purported religious reasons.

The claimant submitted two documents from the [Organization B], one dated July 2, 2021, and one dated April 28, 2022. As a preliminary matter, it cannot be concluded that the claimant relied on this document in making her decision to refuse

the COVID-19 vaccine, given the date of the April 28, 2022, document. These documents do not contain information that aligned with what the claimant testified to at the hearing regarding her reasons for refusing the COVID-19 vaccine. The article written on July 2, 2021, states that it is permissible for individuals to accept or reject the use of vaccines produced and/or tested using abortion-derived fetal cell lines and takes issue only with the mandated portion of a vaccine requirement. The claimant failed to state at any hearing date that she had issue with the requirement of the vaccine itself. As such, it cannot be concluded that, given the differences between what the article stated and the claimant's stated reasons for refusal of the vaccine at the hearing, it cannot be concluded that [sic] the claimant relied on the July 2, 2021, article in forming her opposition to the COVID-19 vaccine.

The claimant provided direct and credible testimony that she opposes abortion. There is no evidence in the record to the contrary. As such, it is concluded that the claimant's testimony regarding religious belief against abortion is credible.

However, the claimant was vague and evasive regarding the connection between her opposition to abortion and the connection to [sic] her refusal to obtain the COVID-19 vaccine. Ultimately, it cannot be concluded that the claimant's reason for refusing the COVID-19 vaccine was a sincerely held religious belief, including her opposition to abortion. Although the claimant identified herself religiously as a lifelong Catholic at the hearing and stated that her religious beliefs prevented her from getting vaccinated, the COVID-19 vaccination was the first vaccine the claimant ever looked into regarding its contents or manufacturing process. The claimant had taken multiple vaccines before, including ones for the employer, but never looked into these. Furthermore, the claimant never spoke to any doctor or scientist when refusing to obtain the COVID-19 vaccine. The claimant testified that she relied on her own "internet research" to conclude that the vaccine violated her religious beliefs. Given the contents of the documents that the claimant submitted as her internet research, it cannot be concluded that she reasonably relied on these documents in forming her opinions about the COVID-19 vaccine. The claimant's local parish priest did not directly tell the claimant to refuse the vaccine on the basis of religion. Furthermore, the claimant was inconsistent with specific details between the original hearing date and her testimony at the remand hearing date. At the initial hearing date, the claimant stated that her beliefs prevented her from getting a vaccine that was derived from and tested on aborted fetal cells. At the remand hearing dates, the claimant stated that she could not take a vaccine that had been tested on aborted fetal cells. As such, it is concluded that the claimant refused the COVID-19 because of a personal decision and not because of a sincerely held religious belief.

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 except as

follows. We note that Consolidated Finding # 21, which states that the claimant did not get the COVID-19 vaccine due to her own personal objections to receiving the vaccine, is not supported by the record, as discussed below. In adopting the remaining findings, we deem them to be supported by substantial and credible evidence. However, we disagree with the review examiner's legal conclusion that the claimant is ineligible for benefits.

Where a claimant is discharged from 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).

In the present case, there is no question that the employer implemented a mandatory COVID-19 vaccination policy, which provided that employees had to get the vaccine or an approved exemption by November 1, 2021, or they would be terminated. Consolidated Findings ## 3–5. There is also no question that the claimant was aware of the policy and that the employer fired her, because her religious exemption request was denied, and she did not get the vaccine by the deadline. *See* Consolidated Findings ## 6, 10, 22, 24, and 26. The issue before us is not whether the employer made the appropriate decision to terminate the claimant's employment, but whether the claimant is entitled to unemployment benefits.

Inasmuch as the record fails to show that the employer terminated all employees who refused to get the COVID-19 vaccine under similar circumstances, we agree that the employer has not sustained its burden to prove that the claimant knowingly violated a *uniformly enforced* policy. Alternatively, the employer may show that the claimant's refusal to get the vaccine was deliberate misconduct in wilful disregard of the employer's interest.

We believe the employer's expectation for all of its employees to get a COVID-19 vaccine was reasonable, as its purpose was to ensure the safety and protection of employees, patients, and the community from the COVID-19 virus. *See* Consolidated Finding # 8. Further, the consolidated findings indicate that the claimant's decision not to get the vaccine was deliberate in the sense that her failure to comply was not inadvertent. She consciously chose not to get the vaccine.

The claimant's eligibility for benefits in this case boils down to whether her refusal to get the COVID-19 vaccine was done in wilful disregard of the employer's interest. In order to determine whether an employee's actions were in wilful disregard of the employer's interest, 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) (citation omitted).

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). The absence of mitigating factors for the claimant's [misconduct] indicates that the claimant acted in wilful disregard of the employer's interest. See Lawless v. Department of Unemployment Assistance, No. 17-P-156, 2018 WL 1832587 (Mass. App. Ct. Apr. 18, 2018), *summary decision pursuant to rule 1:28*.

Here, the claimant asserts that her sincerely held religious objection to abortion rendered her unable to get the COVID-19 vaccine, because the vaccine had been tested using fetal cell lines. See Consolidated Findings ## 12, 13, and 16.² In a lengthy credibility assessment, the review examiner rejected this as the basis for the claimant's refusal to get the vaccine. Instead, the review examiner found that the claimant refused the vaccine for personal reasons and not due to a sincerely held religious belief. See Consolidated Finding # 21.

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 Consolidated Finding # 21.

Remand Exhibit 12 is a copy of the claimant's August 18, 2021, religious exemption request that she submitted to the employer. It includes a notarized affidavit.³ On remand, the Board had asked the claimant to present copies of any articles or web pages that she relied upon in determining that the COVID-19 vaccine was derived from fetal cells. In response, the claimant submitted several documents that she downloaded from the internet. To the extent that the dates on most of the documents indicate that they were posted on the internet after the claimant submitted her request

² During the hearing, the claimant testified that her religious faith required her to follow her conscience. She explained that her moral objection to abortion, which she believed violated the commandment "thou shalt not kill," prevented her from using a product that in any way, shape, or form, was related to ending human life. While not explicitly incorporated into the review examiner's findings, the claimant's testimony in this regard and the further portions of her testimony noted below are part of the unchallenged evidence introduced at the hearing and placed in the record, and it is thus properly referred to in our decision today. 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).

³ Portions of this exhibit and the exhibits discussed below are also part of the unchallenged evidence in the record.

for a religious exemption, we agree with the review examiner that those exhibits should be given little evidentiary weight.⁴

However, we believe the review examiner's refusal to attribute any weight to Remand Exhibit 10, a statement from the [Organization B], and to Remand Exhibit 12, the sworn affidavit submitted with her exemption request, is unreasonable in relation to the evidence presented.

Remand Exhibit 10 shows that the [Organization B] statement was first issued on July 2, 2021, which preceded the claimant's exemption request. However, the review examiner attributed no weight to this document, asserting that the statement takes issue only with the mandated aspect to the vaccine requirement and the claimant did not testify that she had an issue with the vaccine requirement itself. This is too narrow a reading of this evidence. In the document, the organization also states that, for reasons of conscience, it is permissible for individuals to decline vaccines dependent on abortion-derived cell lines. This is exactly the reason offered by the claimant in her exemption request and during the remand hearing.

Turning to Remand Exhibit 12, we also believe that the review examiner unreasonably disregarded the affidavit. We agree that the fill-in-the-name nature of this affidavit, on its face, indicates that the claimant did not write it. In fact, she conceded during the hearing that it was a template that she downloaded from the internet. However, we see nothing unusual about an affiant relying upon someone else to draft an affidavit. This is routinely done by attorneys for clients. What matters is whether the affidavit reflects the claimant's own thoughts and beliefs. Since the claimant's clear testimony describing her religious basis for declining the COVID-19 vaccine is reflected in the written affidavit, we believe that the review examiner erred in failing to consider the document as credible, corroborating evidence of the claimant's state of mind on August 18, 2021.

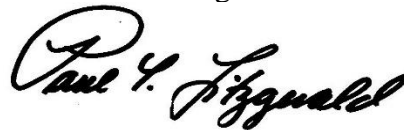
Finally, the review examiner's assessment that the claimant was vague and evasive regarding the connection between her opposition to abortion and refusing the COVID-19 vaccine is not supported by the transcript. To be sure, the claimant initially had difficulty understanding the kind of detail the review examiner asked of her, but ultimately, she carefully described the connection between her religious basis for objecting to abortion, the religious dictate to follow her conscience, and her decision not to get the vaccine.

Thus, we reject the review examiner assessment that the claimant did not have a sincerely held religious belief which prevented her from getting the COVID-19 vaccine. The claimant has met her burden to show that her sincerely held religious beliefs constituted mitigating circumstances for refusing to comply with the employer's policy.

We, therefore, conclude as a matter of law that the employer has not met its burden to show that the claimant knowingly violated a reasonable and uniformly enforced policy or engaged in deliberate misconduct in wilful disregard of the employer's interest within the meaning of G.L. c. 151A, § 25(e)(2).

⁴ During the remand hearing, the claimant admitted that she did not rely on these specific documents in deciding to decline the vaccine, but that she offered them to show the places she looked to gather information at the time.

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week beginning October 31, 2021, and for subsequent weeks if otherwise eligible.



Paul T. Fitzgerald, Esq.
Chairman

BOSTON, MASSACHUSETTS
DATE OF DECISION - July 14, 2023



Charlene A. Stawicki, Esq.
Member

Member Michael J. Albano 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.

AB/rh