

The employer denied the claimant's request for a medical exemption to its mandatory COVID-19 vaccination policy, because her physician could not identify any a specific substance in the vaccines which she was allergic to. Given her history of severe allergic reactions to unknown substances, her physician advised against getting this or any other vaccine. Held the claimant's medical reason for declining to comply with the policy constituted mitigating circumstances and she may not be disqualified for deliberate misconduct in willful disregard of the employer's interest. Held further that, because she was incapable of complying with the policy, 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).

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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 November 1, 2021. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on December 17, 2021. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits attended by both parties, the review examiner overturned the agency's initial determination and awarded benefits in a decision rendered on March 26, 2022. We accepted the employer's application for review.

Benefits were awarded after the review examiner determined that the claimant had not engaged in deliberate misconduct in wilful disregard of the employer's interest or knowingly violated a reasonable and uniformly enforced rule or policy of the employer, and, thus, she was not disqualified under G.L. c. 151A, § 25(e)(2). Our decision is based upon our review of the entire record, including the recorded testimony and evidence from the hearing, the review examiner's decision, and the employer's appeal.

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 that policy nor deliberate misconduct in wilful disregard of the employer's interest, because she acted out of a sincere belief based upon medical advice in light of previous severe allergic reactions, is supported by substantial and credible evidence and is free from error of law.

Findings of Fact

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

1. In approximately 2011, the claimant underwent a routine dental procedure, which involved the claimant being injected with Novocain.
2. The claimant had a serious reaction to either the Novocain or something else during the dental procedure, which resulted in the claimant's lips swelling up.
3. The claimant was taken to the emergency room and was put on a steroid for about a week.
4. The claimant consulted with her doctor (doctor) after the reaction to the dental procedure.
5. The exact reason for the claimant's allergic reaction on the day of the dental procedure was never determined.
6. At some point after the dental procedure, the claimant had an MRI, which required the claimant to be injected with a dye substance.
7. The claimant had a reaction to either the dye or something else during the MRI.
8. In 2017, the claimant underwent a skin biopsy, which indicated that the claimant was having an allergic reaction.
9. The claimant's doctor recommended to the claimant that she not receive any vaccinations because of her history with allergic reactions to unknown substances when undergoing routine medical procedures.
10. Since approximately 2011, the claimant has refused to get any vaccinations, including an annual flu vaccination, at the direction of her doctor.
11. The claimant periodically applied for medical exemptions when required due to her medical conditions preventing her from getting any vaccinations.
12. The claimant worked as a full-time residency program coordinator for the employer, a hospital, from February 16, 2021, until November 1, 2021, when she separated.
13. The claimant's direct supervisor was the employer's education programs manager.
14. On or about August 10, 2021, the employer enacted a [COVID]-19 vaccination policy (policy) in response to the [COVID]-19 pandemic. The policy stated, in part, as follows: "As a condition of employment, continued employment or affiliation, all employees and above stated covered individuals must be immunized with the COVID-19 vaccination, have applied for an exemption,

- have an exemption pending resolution, or have been granted an exemption by October 1, 2021. New employees starting on September 7, 2021, or later will also need to be vaccinated with at least one of the two shots or the single dose vaccination. The second shot will need to be received no later than October 1, 2021. Employees who are immunized through services other than [name omitted] vaccination clinics must provide written proof of immunization to Occupational Health Services.”
15. The policy goes on to state, “An individual who cannot receive a COVID-19 vaccination due to medical reasons, may request an accommodation by contacting their local Occupational Health Office and/or Human Resources department, provided the requested accommodation is reasonable and does not create an undue hardship for the company and/or pose a direct threat to the health or safety of others in the workplace and/or to the requesting employee. The individual will be required to complete a formal accommodation request form and will be required to provide medical documentation from their primary care or specialist physician.”
 16. The policy also allowed for individuals to apply for a religious exemption from the policy.
 17. The purpose of this policy is to ensure protection for employees and patients from exposure to and illness from [COVID]-19.
 18. Regarding discipline, the policy states that, “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.”
 19. The claimant was aware of the policy.
 20. The employer had an expectation that all employees would get the [COVID]-19 vaccine.
 21. The purpose of this expectation was to ensure the safety and protection of employees and patients from exposure to and illness from [COVID]-19.
 22. The claimant was aware of this expectation.
 23. The claimant sought advice from her doctor, who advised the claimant that she could experience a severe allergic reaction to the [COVID]-19 vaccine and advised the claimant not to get the [COVID]-19 vaccination or that the claimant could face an allergic reaction if she does get the [COVID]-19 vaccination.
 24. On August 31, 2021, the claimant’s doctor filled out and signed a form, which, in part, stated, “Patient has had severe angioedema and urticaria from unknown causes after a dental procedure and CT scan in the past.”

25. The claimant submitted a request for a medical exemption from the policy and gave the employer a copy of the form filled out by her doctor.
26. The employer granted the claimant a temporary medical exemption from the policy and requested that the claimant have her doctor fill out a specific form (form) and return it to the employer by October 8, 2021.
27. The questions on the form were:
 - “1. Please list any vaccination(s) that caused the patient to experience an allergic reaction.
 2. For any vaccination listed above, please indicate when the patient experienced the allergic reaction, the type/extent of the allergic reaction, and the ingredient(s) that caused the allergic reaction.
 3. Please list any ingredient(s) present in the available COVID-19 vaccination(s) that caused the patient to suffer a past allergic reaction.
 4. For any allergic reaction listed in response to Question 3, please indicate when the patient experienced the allergic reaction and the type/extent of the allergic reaction.
 5. Please list any alternative accommodation(s) that would allow the patient to receive one of the available COVID-19 vaccinations.”
28. The claimant gave the form to her doctor.
29. The doctor told the claimant that they did not feel comfortable filling out the form because the doctor did not know exactly what was causing the claimant’s allergic reactions in the past.
30. The claimant had a sincere belief that receiving the [COVID]-19 vaccine could pose a serious threat to her health, given her history with allergic reactions and her conversations with her doctor.
31. The claimant informed the employer that her doctor could not complete the requested form.
32. On October 15, 2021, the employer denied the claimant’s medical exemption request because she failed to return the completed form and place[d] the claimant on an unpaid leave of absence.
33. The claimant did not get the [COVID]-19 vaccine because of her fears for her health, given her doctor’s advice and medical history.
34. The claimant felt that she had no choice, but to turn down getting the [COVID]-19 vaccine to protect her health.
35. On November 1, 2021, the claimant was discharged from her employment for failing to comply with the employer’s vaccine mandate.

36. The employer terminated all employees whose religious or medical exemptions were denied and who refused to comply with the vaccine policy.

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. Upon such review, the Board adopts the review examiner's findings of fact and deems them to be supported by substantial and credible evidence. While we believe that the review examiner's findings of fact support the conclusion that the claimant is eligible for benefits, we do so for the reasons set forth below.

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 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* Findings of Fact ## 14–15, and 20. There is also no question that the claimant did not get vaccinated, and that she was terminated for this reason. *See* Findings of Fact ## 33 and 35.

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 # 19, 20, and 22. 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 # 21.

The record shows that the claimant sought a medical exemption, and, when that was denied, ultimately declined to get vaccinated for health reasons. *See* Findings of Fact ## 25 and 34. 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 history of severe allergic reactions to unknown substances in connection with recent medical and dental procedures. *See* Findings of Fact ## 1–8. Consequently, her physician advised her not to get any vaccines, and, in fact, she has refused the annual flu vaccine since 2011. *See* Findings of Fact ## 9 and 10. In response to the employer’s mandatory COVID-19 vaccination policy, the claimant reached out to her physician, and she was advised not to get the vaccine because she could, again, experience a severe allergic reaction. *See* Finding of Fact # 23.

In short, the claimant’s susceptibility to severe allergic reactions to unknown substances constituted circumstances over which she had no 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 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 the policy was reasonable. Finding of Fact # 36 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 concluded that the employer failed to demonstrate that the claimant’s violation of the policy was knowing. We disagree. The claimant was aware of the policy terms, and the record reflects that she knew that, if she did not get her medical exemption, she would be terminated. *See* Findings of Fact ## 19 and 22.¹ However, the reason that she did not get the vaccine was because of her history of severe allergic reactions to unknown substances. In other words, 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 posed a substantial risk to her health. 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

¹ The claimant testified that when her supervisor informed her on November 1, 2021, that she was being terminated, she had been expecting it. 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).

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 31, 2021, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - July 29, 2022



Paul T. Fitzgerald, Esq.
Chairman



Charlene A. Stawicki, Esq.
Member



Michael J. Albano
Member

**Member 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