

**Held that the claimant demonstrated mitigating circumstances for her failure to comply with the employer’s COVID-19 vaccine mandate by the deadline, and she may not be disqualified pursuant to G.L. c. 151A, § 25(e)(2). The combination of the claimant’s need to temporarily care for a parent undergoing chemotherapy and radiation, concern that the side-effects of getting a COVID-19 vaccine would interfere with her ability to do so, and her medical doctor’s documented advice that she currently had immunity from the virus due to having recently recovered from COVID-19 demonstrated that the claimant was not acting in wilful disregard of the employer’s interest.**

**Board of Review  
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**Issue ID: 0073 7324 21**

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 January 19, 2022. 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 May 14, 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 for the review examiner to consider additional evidence submitted with the claimant’s Board of Review appeal. 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 failure to obtain a COVID-19 vaccine as required by her employer, was deliberate misconduct in wilful disregard of the employer’s interest, 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 are set forth below in their entirety:

1. The claimant worked full-time as a physical therapist for the employer's visiting nurse business from 9/11/17 until 9/30/21. The claimant worked a regular schedule of 32 hours per week and was paid \$85,875.34 per year.
2. The employer issued employees written notice of the requirement that employees be fully vaccinated against COVID-19 by 10/1/21. The written notice reads in part: "In June, we announced the vaccination would be required for all our employees and physicians following the full FDA authorization of a COVID-19 vaccine. Today, however, we have more information about the importance of getting vaccinated now. The COVID-19 Delta variant is more contagious than prior strains and has, therefore, caused rising cases. In some parts of the country, hospitals are overwhelmed. While the FDA has indicated full authorization is likely happening soon, with lives on the line, it is important that we take action now and as such will require vaccination for all employees and physicians by October 1, 2021..."
3. The employer required employees to be fully vaccinated to protect employees and patients.
4. The employer provided an opportunity for employees to request medical or religious exemptions to the requirement. Employees exempted from the requirement were able to apply for remote positions.
5. The claimant did not inform the employer that she had a heart condition. On 9/2/21, the claimant attended a medical appointment for the purpose of checking her blood pressure. During the visit, the claimant informed her physician that she was seeking exemption from the employer's vaccine mandate. The physician noted in the claimant's medical record: "She requests a covid vaccine exemption since she had covid in 3/2021. She works as a home PT and she doesn't want to get the vaccine now due to the possible vaccine side effects." The claimant was caring for her ill parents at the time and could not risk becoming sick. The physician completed the employer's exemption request form, checking off a section that reads: "Other medical reason". The physician wrote: "She had covid virus 3/2021 see attached test report she does not need the vaccine due to her current natural immunity." The claimant and physician did not discuss how long the claimant might be protected by natural immunity; the claimant thought the protection would last for a few months.
6. The claimant's physician signed the exemption form on or about September 2, 2021. The claimant submitted the form to the employer in September 2021, requesting a medical exemption from the employer's vaccine mandate. The employer denied the claimant's request because she did not provide any evidence of a medical condition or disability that prevented her from receiving the vaccine.
7. On 9/30/21, the employer placed the claimant on administrative leave due to her failure to provide evidence of having been vaccinated.

8. On 11/1/21, the employer discharged the claimant for failing to comply with the vaccine mandate.
9. The claimant filed an initial claim for unemployment insurance benefits, effective 10/24/21.
10. On 1/19/22, the DUA issued the claimant a Notice of Disqualification, finding her ineligible for benefits under Section 25(e)(2) of the law.
11. On 1/20/22, the claimant appealed the Notice of Disqualification.

### Ruling of the Board

In accordance with our statutory obligation, we review 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. Upon such review, the Board adopts the review examiner's consolidated findings of fact and deems them to be supported by substantial and credible evidence. However, based upon these consolidated findings, we reject the review examiner's original legal conclusion that the claimant is ineligible for benefits, as outlined 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 relevant 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 . . . .

“[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, the employer discharged the claimant due to her failure to comply with its new requirement that all employees obtain a COVID-19 vaccination or an approved exemption by its deadline. Consolidated Findings ## 2 and 8. We agree with the review examiner's conclusion that the employer failed to show that this was a knowing violation of a uniformly enforced policy, as there was evidence indicating that the new policy may not have been uniformly enforced with all employees.

Alternatively, the claimant will be disqualified if the employer can show it discharged the claimant for deliberate misconduct in wilful disregard of the employer's interest. 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).

Because the employer's new COVID-19 vaccine requirement was implemented to protect employees and patients, we believe the policy was reasonable. *See* Consolidated Finding # 3. There is no question that the claimant was aware of the vaccine mandate, as she submitted a request to be exempted from the requirement. Consolidated Finding # 6. There is also no dispute that she did not get a COVID-19 vaccine by the October 1, 2021, deadline. *See* Consolidated Findings ## 2 and 7. Since the claimant has not suggested that she inadvertently missed the deadline, we further conclude that her failure to get vaccinated at the time was deliberate.

The remaining question is whether the employer has demonstrated that she acted in wilful disregard of the employer's interest. In her decision, the review examiner concluded that the claimant's decision not to get the vaccine was merely a personal choice. After remand, we believe the record shows otherwise.

We are mindful that a person's intent may be adduced from all of the facts and circumstances in the case. Starks v. Dir. of Division of Employment Security, 391 Mass. 640, 643 (1984). In this case, we consider whether the claimant did not meet the vaccination deadline due to mitigating circumstances. 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).

We have previously held that serious family problems may constitute mitigating factors. *See, e.g.*, Board of Review Decision 0020 1404 24 (Dec. 6, 2017) (claimant was unable to go to work, as she was the health care proxy for her grandmother who was hospitalized, and she needed to meet with the health care providers), *citing* Wedgewood v. Dir. of Division of Employment Security, 25 Mass. App. Ct. 30 (1987). In that decision, we concluded that the claimant's failure to show up for work was not done in wilful disregard of the employer's interest but due to mitigating circumstances.

Here, the employer expected the claimant to obtain a COVID-19 vaccine during a period when she was caring for her mother, who was undergoing chemotherapy and radiation treatment for cancer, and her father, who was in and out of the hospital. The evidence shows that the claimant sought to be exempted from the vaccine requirement because she was concerned that the vaccine side effects would interfere with her ability to provide this care *and* because her medical doctor had advised her that she did not need to be vaccinated at that point in time due to a natural immunity from recently having the virus. *See* Consolidate Finding # 5. During the hearing, the claimant further explained that she was just trying to buy more time until her parents' treatment ended before she obtained the vaccination, however, she was unable to reach anyone at the employer who

could speak to her about this.<sup>1</sup> Under these circumstances, we believe that the claimant has demonstrated that she was not acting in wilful disregard of the employer's interest but due to mitigating circumstances.

We, therefore, conclude as a matter of law that the claimant's termination from employment was not due to either a knowing violation of a uniformly enforced policy or deliberate misconduct in wilful disregard of the employer's interest as meant under 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 October 24, 2021, and for subsequent weeks if otherwise eligible.



Charlene A. Stawicki, Esq.  
Member

**BOSTON, MASSACHUSETTS**  
**DATE OF DECISION - December 23, 2022**



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](http://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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<sup>1</sup> 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).