

The claimant established that she declined to comply with the employer’s mandatory COVID-19 vaccination policy due to a sincere religious belief and not due to wilful disregard of the employer’s interest. She is eligible for benefits pursuant to G.L. c. 151A, § 25(e)(2).

**Board of Review
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Issue ID: 0073 9497 77

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 December 2, 2021. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on April 20, 2022. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, attended only by the claimant, the review examiner affirmed the agency’s initial determination and denied benefits in a decision rendered on June 10, 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 make further subsidiary findings of fact from the existing record pertaining to the claimant’s religious reason(s) for not getting a mandatory vaccine. Thereafter, the review examiner issued his 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 did not demonstrate that she declined to comply with the employer’s mandatory COVID-19 vaccination policy due to mitigating circumstances, 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 full-time as a compliance officer for the employer, a state agency, from 1987 until December 2, 2021.

2. The claimant's immediate supervisor was the area director (the AD).
3. The employer maintained a policy requiring COVID-19 vaccinations as a condition of employment with a deadline of October 17, 2021. The employer maintained this expectation to protect clients and staff from COVID-19 infections and to comply with an executive order issued by the Governor of Massachusetts. The policy applied to all employees. The policy was communicated to employees through general communications by email. Employees could apply for religious or medical exemptions. Employees who did not meet the requirements were subject to termination.
4. The employer maintained an expectation that employees would be vaccinated against COVID-19. The purpose of the expectation was to protect clients and staff and to comply with the executive order issued by the Governor of Massachusetts. The expectation was communicated through general communications by email. The claimant was aware of the expectation.
5. The claimant's job duties required her to work in person including direct interaction with other individuals.
6. On September 17, 2021, the claimant applied for a religious exemption as a Christian.
7. The claimant objected to taking the COVID-19 vaccine based on her religious beliefs. The claimant sincerely believed that taking a COVID-19 vaccine would interfere with her "interaction with the lord."
8. The claimant has taken other vaccines and uses medications. The claimant has not taken vaccines since reaching the age to make her own medical decisions.
9. The claimant did not discuss vaccination with medical professionals.
10. On October 6, 2021, the claimant spoke with an employer representative about her religious exemption request.
11. On October 20, 2021, the employer requested the claimant to resubmit her request.
12. On November 1, 2021, the claimant spoke with an employer representative about her religious exemption request.
13. On November 3, 2021, the claimant was told by the employer that her exemption request was denied because the employer could not accommodate her request due to hardship.
14. On November 9, 2021, the claimant was not vaccinated against COVID-19. The claimant was placed on a suspension to allow her to comply with the policy.

15. On December 2, 2021, the claimant was discharged for not complying with the employer's vaccine policy.

Credibility Assessment:

The case was remanded for subsidiary findings from the record.

The claimant's testimony that she had a religious objection based on her faith to taking the COVID-19 vaccine was credible and was consistent with pre-hearing documentary evidence. The claimant's testimony that she has not taken a vaccine since being of the age to make her own medical decisions was credible. The claimant's testimony that she does not take any other medications is not credible, as the claimant admitted to taking supplements and did not provide a credible distinction between "medicine" and "supplement."

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 reject the portion of Consolidated Finding # 8, which provides that the claimant uses medications, as it mischaracterizes the claimant's testimony. In adopting the remaining findings, we deem them to be supported by substantial and credible evidence. However, as discussed more fully below, we disagree with the review examiner's legal conclusion that the claimant is not eligible for benefits.

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 Finding # 15. 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 the record lacks the written mandatory vaccine policy and evidence that the policy was uniformly enforced.

Alternatively, the claimant will be disqualified if the employer can show that 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).

There is no question that the claimant did not get the COVID-19 vaccine, as required by the employer's policy. See Consolidated Findings ## 3, 4, and 14. Inasmuch as the policy was implemented to protect clients and staff from COVID-19 infections and to comply with the Governor's Executive Order, we are satisfied that the policy was reasonable. See Consolidated Findings ## 3 and 4. The claimant was aware of the expectation to get the vaccine, as she submitted a request to be exempted from the mandate. See Consolidated Finding # 6. 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 the claimant acted in wilful disregard of the employer's interest. We consider whether, in declining to get the vaccine, the claimant did so in wilful disregard of the employer's interest, or whether it was 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).

The claimant maintained that she declined to get the COVID-19 vaccine due to her religious beliefs. She testified about a personal relationship with her lord and savior, and that she believed taking the vaccine was against personal guidance that she had received directly from the Holy Spirit.¹ The review examiner has found that this belief was sincerely held. See Consolidated Finding # 7. Moreover, she has not taken other vaccines since she was old enough to make her own medical decisions. See Consolidated Finding # 8.

In his credibility assessment, the review examiner rejected the claimant's testimony that she does not take any other medications because she admitted to taking supplements without distinguishing between supplements and medicine. Ordinarily, 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,

¹ Although not explicitly included in the consolidated findings, this portion of the claimant's testimony is 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).

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 on the record before us, we decline to accept this portion of the credibility assessment and the statement in Consolidated Finding # 8 that she uses medication.

The sum and substance of the review examiner’s inquiry about taking medication during the hearing was a single question as to whether the claimant takes medications. She responded, “I take supplements, if needed. I don’t take medication *per se*.”² He did not ask what she meant by “medication *per se*,” nor ask her to explain how she views them differently. Since he did not ask, it is unfair to penalize her for not providing a credible distinction between them. His finding that she, in fact, did take medication is unreasonable in relation to the evidence presented. Given this record, we also decline to draw any negative inference from the claimant’s use of supplements.

Inasmuch as Consolidated Finding # 7 provides that a sincerely held religious belief prevented the claimant from complying with the employer’s mandatory COVID-19 vaccination policy, we are satisfied that the claimant did not act in wilful disregard of the employer’s interest but due to mitigating circumstances. *See Shepherd v. Dir. of Division of Employment Security*, 399 Mass. 737, 740 (1987) (mitigating circumstances include factors that cause the misconduct and over which a claimant may have little or no control).

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).

² This question and answer are also part of the record.

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week beginning December 5, 2021, and for subsequent weeks if otherwise eligible.



Charlene A. Stawicki, Esq.
Member

BOSTON, MASSACHUSETTS
DATE OF DECISION - March 24, 2023



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.

AB/rh