

Where the claimant's failure to comply with her employer's mandatory COVID-19 vaccination policy was due to sincerely held religious beliefs, the Board held that she did not refuse to comply with the policy in wilful disregard of the employer's interest, but due to mitigating circumstances. Following her discharge, she is eligible for benefits pursuant to G.L. c. 151A, § 25(e)(2).

**Board of Review
100 Cambridge Street, Suite 400
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: 0074 1956 51

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 30, 2021. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on March 8, 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 July 23, 2022. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant knowingly violated a reasonable and uniformly enforced rule or policy of the employer, 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 reasons for the claimant's failure to comply with her employer's vaccination policy. Only the claimant 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 was ineligible for benefits, is supported by substantial and credible evidence and is free from error of law, where the record after remand shows that the claimant's sincerely held religious beliefs prevented her from complying with the employer's mandatory vaccination policy.

Findings of Fact

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

1. The claimant filed an initial claim for unemployment benefits effective November 28, 2021.
2. The claimant worked part time as a radiologic technician for the employer, a medical group, from April 1, 2013, through November 30, 2021, when she was discharged from employment.
3. The claimant worked 24 hours a week and was paid approximately \$39.00 per hour.
4. The claimant's immediate supervisor was the Team Leader.
5. The claimant was not vaccinated against the COVID-19 virus, while she worked for the employer.
6. The claimant wore proper personal protective equipment (PPE), including a facemask, while interacting with patients, staff and others while at the workplace.
7. The employer maintained a Seasonal Influenza and COVID-19 Mandatory Vaccination Policy, which the employer provided to the claimant. The policy stated, "As a condition of employment and/or membership on the medical staff or engagement with [Employer], each [Employer] individual will be required to obtain an annual influenza vaccine, as well as COVID-19 vaccinations within the time parameters set forth by [Employer] for the year or be granted a medical or religious exemption." If the exemption is denied, the employee is required to be vaccinated. The purpose of the employer's policy is to protect staff, patients, and the community it serves from influenza and COVID-19.
8. Prior to October 2021, the employer required all staff to obtain the influenza vaccine annually as a condition of employment.
9. Each year of her employment, the claimant has gotten the influenza vaccine as a condition of her employment.
10. While the claimant was on medical leave from work in October 2021, she was informed by the employer via email that she was required to vaccinate against the COVID-19 virus to continue employment, unless she requested and was approved for a medical exemption or a religious exemption.
11. The employer said that exemptions will be granted on a limited basis.
12. The claimant is on medication for osteoporosis.
13. The claimant had a personal concern that vaccinating against COVID-19 could negatively affect her health due to her medical condition.

14. The claimant was not told by a medical professional that to vaccinate against COVID-19 could present a health risk for her due to her health condition.
15. The claimant did not seek medical advice from a physician about potential health risks if she vaccinated against COVID-19.
16. The claimant did not apply for a medical exemption.
17. The claimant applied for a religious exemption. The claimant's exemption reported: "Based on my sincerely held religious beliefs I am unable to this vaccine as it is a derivative of aborted babies and the MRNA technology is an affront to my creator." The claimant objected to aborted fetal tissue being used in the production of the COVID-19 vaccine.
18. On November 15, 2021, the employer notified the claimant her religious exemption request was denied. The employer placed the claimant on leave without pay.
19. The employer told the claimant that she had until December 1, 2021, to get the COVID-19 vaccine or her employment would be terminated.
20. The employer contacted the claimant between November 15, 2021, and November 30, 2021, to ask if she received the vaccine.
21. The claimant told the employer she did not intend to get the vaccine. As of November 30, 2021, the claimant did not vaccinate against the COVID-19 virus.
22. The employer discharged the claimant for violation of the Seasonal Influenza and COVID-19 Mandatory Vaccination Policy.
23. The claimant had a sincerely held religious belief against taking the COVID-19 vaccine. The claimant sincerely believed that the vaccine was the product of aborted fetal tissue and abortion is contrary to her sincerely held religious beliefs.
24. On March 8, 2022, the Department of Unemployment Assistance issued the claimant a Notice of Disqualification under Section 25(e)(2) of the Law of the claimant's eligibility for unemployment benefits beginning November 7, 2021.

Credibility Assessment:

The claimant testified that one of the reasons she did not get the COVID-19 vaccination was because she was on osteoporosis medications. However, the claimant was not told by a health professional that her health could be at risk if she was to vaccinate. Rather, it was a personal concern of hers. Therefore, it cannot

be concluded that the claimant had a valid medical reason for her refusal to obtain the COVID-19 vaccination.

The claimant also testified that she did not get the COVID-19 vaccination because she had sincerely held religious beliefs that prevented her from doing so. Specifically, the claimant objected to fetal tissue being used in the development of the COVID-19 vaccine. The claimant submitted into evidence the verbiage contained in the religious exemption request which was submitted to the employer. Although the employer denied the claimant's request, the reason for its denial of her request is unknown.

Given the above, this examiner concludes the claimant had a sincerely held religious belief that caused her not to obtain the [COVID]-19 vaccine.

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. 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. We further believe that the review examiner's credibility assessment is reasonable in relation to the evidence presented. However, as discussed more fully below, 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 this case, the employer discharged the claimant because she failed to obtain a COVID-19 vaccination, as required under its mandatory vaccination policy. Consolidated Finding # 22. During the hearing, the claimant argued that she did comply, as she submitted a religious exemption request in accordance with the policy procedures. However, the employer denied her exemption request, and the policy further states that an employee is required to be vaccinated if an

exemption is denied. *See Consolidated Finding # 7.* Thus, we agree that the claimant violated the employer's policy.

We disagree with the review examiner's conclusion that the employer met its burden to prove a knowing violation of a reasonable and uniformly enforced policy, as there is insufficient evidence that the COVID-19 vaccination policy was uniformly enforced. Alternatively, the claimant will be disqualified under G.L. c. 151A, § 25(e)(2), if the record shows that she engaged in deliberate misconduct in wilful disregard of the employer's interest.

There is no question that the claimant was aware that the employer expected her to get the COVID-19 vaccine in order to keep her job. *See Consolidated Findings ## 7 and 10.* The expectation was reasonable, as the policy was adopted in order to protect staff, patients, and the community which the employer serves. *See Consolidated Finding # 7.* There is also no question that the claimant did not get a COVID-19 vaccine, and that this was a deliberate choice. *See Consolidated Finding # 21.*

The question is whether her decision not to get vaccinated was made in wilful disregard of the employer's interest or whether it was due to mitigating circumstances. 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).

After remand, the consolidated findings provide that the claimant did not get the COVID-19 vaccine due to sincerely held religious beliefs. As noted in the credibility assessment, she did not get the COVID-19 vaccine because the vaccine was developed with stem cells from fetal tissue, and this violated her sincerely held religious objections to abortion. *See Consolidated Findings ## 17 and 23.*

As the consolidated findings now show 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. As a result, she may not be disqualified for deliberate misconduct in wilful disregard of the employer's interest pursuant to G.L. c. 151A, § 25(e)(2).

We, therefore, conclude as a matter of law 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 policy within the meaning of 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 November 28, 2021, and for subsequent weeks if otherwise eligible.



Paul T. Fitzgerald, Esq.
Chairman

BOSTON, MASSACHUSETTS
DATE OF DECISION - June 12, 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.

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