Board rejected the review examiner's assessment that the claimant unreasonably believed she could not get the mandated COVID-19 vaccine for medical reasons, as it was based upon a number of factual errors that were not supported in the record. Held the claimant met her burden to show that her refusal to comply with the employer's policy was due to mitigating circumstances. Her previous severe medical reactions to the flu and pneumonia vaccines, and a medical specialist, who was sympathetic but would not advise the claimant one way or the other about the COVID-19 vaccine, rendered her incapable of applying for a medical exemption. The claimant is eligible for benefits pursuant to G.L. c. 151A, § 25(e)(2).

Board of Review
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Issue ID: 0074 3130 83

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 October 24, 2021. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on April 16, 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 July 29, 2023. 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 knowingly violated a reasonable and uniformly enforced rule or policy of the employer. Thus, she was 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 claimant's appeal.

The issue before the Board is whether the review examiner's decision, which concluded that the claimant failed to present mitigating circumstances for her failure 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

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

1. The claimant worked full time as a patient service coordinator for the employer, a hospital, from April 2, 2001, until October 15, 2021.

2. The claimant's immediate supervisor was the administrative manager (the AM).

3. The employer maintained a COVID-19 vaccination policy requiring vaccination or an approved religious or medical exemption by October 15, 2021. The claimant was aware of the policy through emails. Employees could apply for a religious or medical exemption to the policy. Violations of the policy were subject to termination on November 5, 2021.

4. The employer maintained an expectation that employees would be vaccinated or exempt by October 15, 2021. The claimant was aware of the policy through emails.

5. The claimant is diabetic.

6. The claimant has had reactions to the flu and pneumonia vaccines in the past.

7. The claimant did not want to receive the COVID-19 vaccination for medical reasons because she was concerned that she might have a reaction to the vaccine.

8. At an unknown time, the claimant spoke to her primary care physician about her vaccine concerns. The claimant's physician told her that the flu and pneumonia vaccines were different because they contained live virus, which the COVID-19 vaccine did not. The physician advised the claimant that many people with her reaction to the flu vaccine received the COVID-19 vaccine without a reaction. The physician recommended that the claimant be vaccinated for COVID-19.

9. At an unknown time, the claimant spoke to her endocrinologist about her vaccination concerns. The endocrinologist told the claimant that her underlying condition of diabetes made her more susceptible to complications from COVID-19.

10. Neither the claimant's primary care physician nor the claimant's endocrinologist would approve a medical exemption for the claimant.

11. The claimant did not apply for a medical exemption to the COVID-19 vaccination policy because she did not have a doctor's recommendation that she should not be vaccinated.

12. The employer did not require a doctor's recommendation to apply for a medical exemption.

13. The claimant did not seek a different opinion on whether she should not be vaccinated.

14. The claimant was aware that if she was not vaccinated by the deadline, she would be discharged on November 5, 2021.

15. On August 26, 2021, the claimant gave the AM notice that she was quitting effective October 15, 2021, because of the COVID-19 vaccination policy.

16. The claimant continued to work for the employer after October 15, 2021.

17. On October 24, 2021, the AM told the claimant she could not continue working because she was unvaccinated.

18. On October 24, 2021, the claimant was discharged for violating the COVID-19 vaccination policy.

[Credibility Assessment:][1]

It was undisputed that the claimant notified the AM that she did not intend to be vaccinated by the October 15, 2021, deadline. The claimant testified that she did not want to be vaccinated for medical reasons. However, the claimant admitted that she spoke to two doctors who advised her that she should be vaccinated given her medical conditions. The claimant admitted that her primary care physician told her that her reaction to other vaccines was unlikely to happen with the COVID-19 vaccine due to differences in the vaccines. Further, the claimant did not apply for a medical exemption to the vaccination policy. The claimant did not seek an additional opinion to confirm her belief that she should be medically exempted from the vaccination policy. Given the claimant's doctors' advice, the claimant's belief that she should not receive the vaccine for medical reasons was not reasonable.

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 conclusion is free from error of law. After such review, the Board adopts the review examiner's findings of fact except as follows. Finding of Fact # 1 incorrectly reports October 15, 2021, to be the claimant's last date of employment. Findings of Fact ## 16–18 show that her last day was October 24, 2021. We reject the portion of Finding of Fact # 8, which states that the claimant's physician told her that there was a difference between the COVID-19 vaccines and the flu and pneumonia vaccines, as this is not supported by the record. We reject a portion of Finding of Fact # 10, which mischaracterizes the position of the claimant's endocrinologist in discussing the COVID-19 vaccine with her, as this, too, is not supported by the

[1] We have copied and pasted here the portion of the review examiner's decision which includes his credibility assessment.

record. We also reject Finding of Fact # 12, which states that the employer did not require a doctor's recommendation to apply for a medical exemption, because this is contradicted by the employer's written vaccination policy. Finally, we reject Finding of Fact # 13 insofar as it suggests that the claimant did not seek a different opinion about whether she should get the COVID-19 vaccine, as it conflicts with Findings of Fact ## 8 and 9. 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 ineligible 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 policy for all employees to obtain a COVID-19 vaccination or an approved exemption by its deadline of October 15, 2021. Findings of Fact ## 3, 4, and 18. 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).

Not getting the required COVID-19 vaccination was both a policy violation and misconduct in the sense that the claimant's refusal to get the vaccine violated the employer's COVID-19 vaccination policy. Finding of Fact # 15 indicates that the claimant's refusal to comply was a knowing and deliberate act, as she was willing to resign because of the vaccine requirement.

However, the employer has not demonstrated deliberate misconduct in wilful disregard of the employer's interest. "Deliberate misconduct alone is not enough. Such misconduct must also be in 'wilful disregard' of the employer's interest." Goodridge v. Dir. of Division of Employment Security, 375 Mass. 434, 436 (1978) (citations omitted). 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).

There is no question that the claimant knew that she had to get the COVID-19 vaccine in order to keep her job. *See* Findings of Fact ## 3, 4, and 14. Although the review examiner did not ask the employer's witness about the reason for the employer's mandatory COVID-19 vaccine policy, it is plainly stated in Exhibits 1 and 2, the employer's broadcast email announcement and updated copy of the policy, that the vaccination requirement is a measure to increase safety for employees, patients, and visitors.[2] We believe that this was a reasonable health and safety requirement. The issue is whether there were mitigating factors for the claimant's behavior.

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 review examiner concluded that the claimant did not demonstrate mitigating circumstances. We disagree.

The review examiner found that the claimant did not want to get the COVID-19 vaccine because she had reactions to the flu and pneumonia vaccines and was concerned that she might have a reaction to the COVID-19 vaccine. *See* Findings of Fact ## 6 and 7. This is accurate, but it fails to capture the claimant's more explicit, uncontested testimony that her reaction to the last two flu vaccines caused her to be sick for a week on both occasions, and her reaction to the pneumonia vaccine was so severe that she needed to be hospitalized for a week, twice in a six-month period.

Despite this, the review examiner concludes that the claimant's belief that she should not get the COVID-19 vaccine was unreasonable. 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). The review examiner's conclusion is unreasonable in relation to the evidence presented, because it is based upon an inaccurate statement of the facts.

First, it is inaccurate to say that both of the claimant's doctors advised her to get the vaccine. The claimant testified that the endocrinologist said that, as a diabetic, getting the COVID-19 virus would be worse for her, but the endocrinologist said that she would not tell the claimant that she should or should not get the vaccine — it was a personal choice. As nothing in the credibility assessment states that this testimony was not credible, we assume that the review examiner merely made a mistake is stating the endocrinologist advised her to get the vaccine.

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[2] Exhibits 1 and 2, as well as the portions of the claimant's testimony referenced below, are part of the unchallenged evidence introduced at the hearing and placed in the record, and they are 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).

He appears to have made another mistake by stating that the claimant's primary care physician told her that she would not likely have a similar reaction to the COVID-19 vaccine as she had with the flu and pneumonia vaccines due to differences in the vaccines. The claimant testified that her primary care physician never talked about the differences in the vaccines.[3]

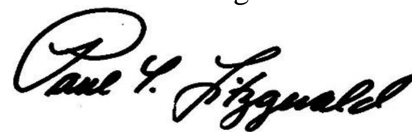
Another stated basis for his assessment that the claimant unreasonably believed that she should not get the vaccine for medical reasons is that the claimant did not apply for an exemption. During the hearing, the claimant explained several times that she did not apply for a medical exemption because she did not have a medical doctor to back it up, and she understood that this was required as part of the exemption request. Her understanding is supported by the employer's COVID-19 policy.[4] Thus, it is incorrect to state that a doctor's recommendation was not required to apply for a medical exemption. *See* Finding of Fact # 12.

In short, the undisputed record before us shows that the claimant had severe medical reactions to the employer's mandated flu and pneumonia vaccines. Given this history, we believe her fear surrounding taking another vaccine was real and reasonable. In an effort to comply with the employer's COVID-19 vaccine policy by seeking a medical exemption, she consulted with two physicians to discuss her concerns of a similar reaction to the COVID-19 vaccine. Although her primary care doctor wanted her to get the vaccine, her specialist would not advise her either way. Without their documented medical recommendation to avoid the COVID-19 vaccine, she could not apply for an exemption to the employer's policy. These facts present circumstances that were beyond her control.

The claimant has met her burden to show that her refusal to comply with the employer's COVID-19 vaccine requirement was not done in wilful disregard of the employer's interest but due to mitigating circumstances. Further, she may not be disqualified for a knowing violation of a reasonably and uniformly enforced policy, because the same combination of circumstances rendered the claimant incapable of complying with the policy.

We, therefore, conclude as a matter of law that the employer has not met its burden 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 November 7, 2021, and for subsequent weeks if otherwise eligible.



[3] The claimant testified that her physician said that, with the flu and pneumonia vaccines, they have some parts of live things in it so it made her sick. In response to the review examiner's next question as to whether the doctor told her that there was a difference between the flu and COVID-19 vaccine, the claimant stated that the doctor did not say there was a difference, just that there were so many people who had taken it and they did these trials, and they were fine.

[4] Exhibit 2, the employer's updated COVID-19 vaccination policy, states, "Workforce members who seek a medical exemption due to medical contraindications (e.g., a previous severe or immediate allergic reaction to a vaccine or the components of a COVID-19 [sic]) must complete an exemption form *and provide documentation from a qualified health care provider* that will be subject to review by OHS." (Emphasis added.)

BOSTON, MASSACHUSETTS
DATE OF DECISION - October 18, 2023

Paul T. Fitzgerald, Esq.
Chairman

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