

The review examiner rejected as not credible the claimant's asserted reasons for submitting various false statements to the employer as to when and where he got the COVID-19 vaccine. Held his discharge for submitting false statements and failing to comply with the employer's mandatory COVID-19 vaccine policy was for deliberate misconduct in wilful disregard of the employer's interest. He is ineligible for benefits pursuant to G.L. c. 151A, § 25(e)(2).

**Board of Review
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Issue ID: 0074 5143 40

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 reverse.

The claimant was discharged from his position with the employer on December 15, 2021. He filed a claim for unemployment benefits with the DUA, effective December 19, 2021, which was denied in a determination issued on February 24, 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 overturned the agency's initial determination and awarded benefits in a decision rendered on June 14, 2023. 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, he was not 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 employer's appeal, we remanded the case to the review examiner to afford the employer an opportunity to participate in the hearing, because it appeared that the employer did not receive timely notice of the original hearing. Both parties attended the remand hearing. 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 original decision, which allowed benefits on the ground that the claimant did not intend to misrepresent his vaccination record to the employer, is supported by substantial and credible evidence and is free from error of law in light of the revised consolidated findings after remand.

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 as a civil engineer for the employer, a Massachusetts state agency. The claimant began work for the employer in 2009. He worked full-time and earned an annual salary of \$78,000.
2. The claimant was a union member. The claimant's union entered into a bargaining agreement with the employer that included a code of conduct. The code of conduct states in part: "Employees shall comply with all of the policies and operating procedures of the agency/department in which they work. This requirement includes, but is not limited to, all agency/departmental policies and procedures. Employees shall respond forthrightly and promptly to the work-related directives of their supervisors."
3. The employer maintains an Anti-Fraud Policy that lists actions constituting fraud. The list includes: "Any dishonest act" and "Providing false or misleading information".
4. The claimant was aware of the policies.
5. The employer will always discharge an employee for violation of their Anti-Fraud policy.
6. On May 8, 2021, the claimant received the first part of a two-part COVID-19 vaccination at [Pharmacy] in [Location A], MA.
7. Over the summer of 2021, the claimant attended a concert. The concert organizers requested proof of vaccination. The claimant did not have a complete vaccination card and decided to fabricate one.
8. The claimant created a falsified vaccination card alleging two parts of a Moderna vaccination on May 27, 2021, and June 27, 2021, at [Location B], which he used to attend the concert.
9. The claimant took a photo of the vaccination card he stored on his mobile phone.
10. In August 2021, the employer published a COVID-19 vaccination policy requiring all employees to be fully vaccinated by October 17, 2021. The claimant was aware of the policy.
11. The policy required employees to submit an attestation confirming they were vaccinated.
12. On October 18, 2021, the claimant was in a non-work-related automobile accident. He remained hospitalized for several hours and was discharged.
13. On October 21, 2021, the claimant spoke with a human resources (HR) representative and told them he did not have a vaccine card. He asked what he

- should do. The HR representative suggested the claimant get a vaccine that day and complete the attestation.
14. The claimant completed the employer's attestation representing he received the Johnson and Johnson vaccine.
 15. Also, on October 21, 2021, the claimant sent the photograph of the falsified vaccine card to the employer.
 16. The employer was suspicious of the vaccine card and the claimant's attestation and began an investigation.
 17. On November 3, 2021, a Labor Relations Specialist (Specialist) met with the claimant and a union representative.
 18. The Specialist asked the claimant when he was first vaccinated. The claimant told him he was vaccinated at [Pharmacy] on May 8, 2021, and May 29, 2021. The Specialist asked the claimant about his vaccine card. The claimant told the Specialist he lost the vaccine card in July and had asked [Pharmacy] for a replacement. He told the Specialist [Pharmacy] did not have a record of him.
 19. The Specialist asked the claimant about his attestation that he received the Johnson and Johnson vaccine. The claimant told him it was a mistake. The Specialist asked the claimant if he knew [Location B] had closed when he reported receiving the vaccine. The claimant said the card he sent was not his card.
 20. The Specialist asked the claimant why he did not notice the vaccination types he received were different than the ones on the card he sent in. The claimant told him he did not know why. The Specialist asked the claimant why it looked like the card was printed on thin paper. The claimant told him he did not know why. The Specialist asked the claimant to send proof he received the vaccination. The claimant showed him that he had an appointment to get the vaccine on November 4, 2021.
 21. On November 4, 2021, the claimant received his complete, one-dose Johnson and Johnson COVID-19 vaccination.
 22. The claimant provided the employer's labor relations department copies of his vaccination card from his Johnson and Johnson vaccine on November 4, 2021. He also provided them with a photo of a partially completed [Pharmacy] Vaccine Administration Record (VAR) reporting he received the first dose of the Moderna vaccine.
 23. The Specialist and other staff involved in the investigation were suspicious of the VAR because it was incomplete. Based on the evidence from their

investigation, they believed they should continue to a pre-disciplinary hearing, which was scheduled for November 10, 2021.

24. On November 10, 2021, the employer held a pre-disciplinary hearing concerning the claimant's inconsistent statements regarding his vaccine status. The Specialist and another representative from the labor relations department presented evidence. The claimant's union presented evidence on his behalf.
25. At the hearing, the claimant alleged that he was in the hospital when the photo of the falsified Johnson and Johnson vaccine was sent. He alleged that his girlfriend had his cell phone and that she may have sent the photo. He reported delusions and memory loss due to a concussion for five days after his automobile accident.
26. After the hearing, the claimant's union representation provided the employer with a photo of a vaccination card with one dose of a Moderna vaccine at [Pharmacy] on May 8, 2021. They also gave the employer a hospital record showing the claimant's hospitalization date as October 18, 2021.
27. The hearings officer and the labor relations department concluded that the claimant violated the employer's Anti-Fraud Policy and Code of Conduct by misrepresenting his vaccination status and submitting false documentation.
28. On November 15, 2021, the employer discharged the claimant.

Credibility Assessment:

The claimant and his father, [Father], are not considered credible witnesses.

The claimant alleged at the hearing that he received his first dose of the Moderna vaccine on May 8, 2021. He testified that he returned for his second dose on May 29, 2021. However, there is no record of the second dose. Additionally, the claimant admitted that he fabricated a vaccine card for a concert, which diminishes his credibility. The testimony of the claimant and his father was also inconsistent. The claimant testified at the first hearing that his father erroneously sent his falsified vaccination card to the employer when he was hospitalized on October 21, 2021. The claimant's father made the same allegation. However, when presented with contradictory testimony from the employer that the claimant was hospitalized on October 18, 2021, they both changed their testimony, alleging the falsified vaccination card was erroneously sent to the employer when the claimant was at a doctor's office on October 21, 2021, for a follow-up visit. The record was left open to allow the claimant to provide evidence of the October 21, 2021, follow-up visit. He did not do so. Instead, he submitted a written statement that proposes a third explanation for sending the falsified vaccine card. Also, the claimant alleged to the employer that his girlfriend sent the falsified vaccine card. The statements are not credible because they are self-serving and are varied attempts to explain the same circumstances. The testimony of the claimant and his father was self-serving and

not supported by evidence. Given these facts and additional inconsistencies reported by the employer during the hearing, the claimant and his father are not credible witnesses.

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 original 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 believe the discharge date of November 15, 2021, in Consolidated Finding # 28 is a typographical error, inasmuch as both parties agreed that the claimant was terminated on December 15, 2021.¹ In adopting the remaining findings, we deem 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. Based upon these new consolidated findings, we reject the review examiner's legal conclusion that the claimant is eligible for benefits, as discussed below.

Where a claimant is discharged from employment, his 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).

The employer discharged the claimant for submitting false documents and misrepresenting his COVID-19 vaccination status to the employer in violation of its Code of Conduct and Anti-Fraud policy. *See* Consolidated Findings ## 27 and 28. The Code of Conduct required that employees comply with all policies, and, in this case, the claimant is alleged to have failed to comply with the employer's COVID-19 vaccination policy, which mandated full vaccination by October 17, 2021. *See* Consolidated Findings ## 2, 10, and 11. The Anti-Fraud policy prohibited providing false or misleading information to the employer. Consolidated Finding # 3.

¹ *See also* the December 15, 2021, termination letter, which is entered into evidence as part of Exhibit 7. While not explicitly incorporated into the review examiner's findings, this evidence 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).

Although Consolidated Finding # 5 states that the employer will always discharge an employee for violating their Anti-Fraud policy, this was disputed during the hearing, and the record lacks sufficient evidence to show that it had terminated other employees who engaged in similar conduct as the claimant. As such, the employer has not shown that the claimant was discharged due to a knowing violation of a *uniformly enforced* policy. Alternatively, the claimant will be disqualified pursuant to G.L. c. 151A, § 25(e)(2), if the employer proves that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest.

The consolidated findings show that, in an effort to comply with the employer's COVID-19 vaccination policy, the claimant submitted written documents and responded to the employer's inquiries representing at various times that he had received the Moderna vaccine on four different dates. Specifically, he submitted a photograph of a falsified vaccine card to the employer, purporting to show that he had received the two parts of the Moderna vaccine at [Location B] on May 27 and June 27, 2021. *See* Consolidated Findings ## 8, 9, and 15. But, on November 3, 2021, the claimant told an employer Labor Relations Specialist that he had been vaccinated at [Pharmacy] on May 8 and 29, 2021. Consolidated Finding # 18. On October 21, 2021, the claimant had also presented the employer with an attestation representing that he had received the Johnson and Johnson vaccine. Consolidated Finding # 14. Finally, he presented a vaccination card showing that he actually got the Johnson and Johnson vaccine on November 4, 2021. Consolidated Finding # 22. These inconsistent statements, on their face, demonstrate that the claimant violated the employer's expectation that he not provide false or misleading information to the employer.

In order to determine whether an employee's actions constitute deliberate misconduct in wilful disregard of the employer's interest, the proper factual inquiry is to ascertain his 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 was aware of the employer's policies. Consolidated Findings ## 2, 3, 4, and 10. We believe that an employer's expectation to comply with its employment policies and to present only truthful statements to the employer are self-evidently reasonable. Inasmuch as the employer's COVID-19 vaccination policy was implemented to prevent viral infection and transmission, we also believe that this policy was reasonable.²

During the original hearing, the claimant provided various explanations for providing conflicting vaccine dates, alleging, *inter alia*, that he could not get his original vaccine record from [Pharmacy] due their error and that his father submitted the false [Location B] vaccine card while the claimant was hospitalized and without his knowledge. In effect, he was asserting that the false and conflicting vaccination status statements that were given to the employer were due to circumstances beyond his control. Mitigating circumstances include factors that cause the

² A statement of the purpose of the employer's vaccination policy is included in its COVID-19 Vaccination Verification Policy, which is included in Exhibit 7. This document is also part of the unchallenged evidence in the record.

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).

However, after hearing the employer present detailed testimony about its investigation and the claimant's statements during its investigatory interview and disciplinary hearing, the review examiner determined that the claimant's original explanations were not credible. 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). Based upon the record before us, we believe that the credibility assessment and revised consolidated findings derived from that assessment are reasonable in relation to the evidence presented.

We acknowledge that, during the hearing, the claimant maintained that the attestation on October 21, 2021, which stated that he had already gotten the Johnson and Johnson vaccine was merely a mistake. However, inasmuch as his explanations for presenting the other false and conflicting statements to the employer about the Moderna vaccine have been rejected as not credible, we are satisfied that such statements were made deliberately.

We, therefore, conclude as a matter of law that the employer has met its burden to show that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest within the meaning of G.L. c. 151A, § 25(e)(2).

The review examiner's decision is reversed. The claimant is denied benefits as of the week beginning December 19, 2021, and for subsequent weeks, until such time as he has had at least eight weeks of work and has earned an amount equivalent to or in excess of eight times his weekly benefit amount.

BOSTON, MASSACHUSETTS
DATE OF DECISION - March 21, 2023



Charlene A. Stawicki, Esq.
Member



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.

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