

The claimant failed to present credible evidence that at the time she was required to get the COVID-19 vaccine mandated under the employer’s policy, she had a sincerely held religious belief that prevented her from complying. Held she engaged in deliberate misconduct in wilful disregard of the employer’s interest and knowingly violated a reasonable and uniformly enforced policy. Therefore, she is ineligible 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 7082 98

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 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 March 2, 2022. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits attended by both parties, the review examiner overturned the agency’s initial determination and awarded benefits in a decision rendered on August 19, 2022. 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, nor knowingly violated a reasonable and uniformly enforced rule or policy of the employer, and, thus, she was not 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 employer’s appeal.

The issue before the Board is whether the review examiner’s decision, which concluded that the claimant established that a sincerely held religious belief prevented the claimant from complying 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 are set forth below in their entirety:

1. The claimant worked as a full-time patient liaison for the employer, a hospital, from December 3, 1999, until December 2, 2021, when she separated.

2. The claimant's immediate supervisor was the manager of the ambulatory clinic.
3. On September 15, 2021, the employer enacted a written policy in response to the COVID-19 pandemic. The policy was required to receive federal funding.
4. The policy stated that all employees were required to be vaccinated against COVID-19. By November 1, 2021, employees were required to have at least once dose of the vaccine, or they would be placed on unpaid administrative leave for one month. By December 15, 2021, if the employee had not received at least one dose of the vaccine or an approved exemption, their employment would be "subject to successive levels of discipline up to and including termination of employment...."
5. The purpose of this policy was to ensure protection for hospital patients and staff from exposure to COVID-19.
6. The claimant received the policy by email.
7. The employer terminated all employees whose religious or medical exemptions were denied and who refused to comply with the vaccine policy.
8. The employer had an expectation that all employees would receive at least one dose of the COVID-19 vaccine by November 1, 2021.
9. The purpose of this expectation was to ensure protection for hospital patients and staff from exposure to COVID-19.
10. The claimant was notified of the expectation by email.
11. The claimant self-identifies as Christian.
12. The claimant applied for a religious exemption on October 7, 2021.
13. The employer denied the claimant's exemption application because it determined that the claimant did not have a sincerely held religious belief that prevented vaccination against COVID-19, and because the claimant had previously received the influenza vaccine.
14. The claimant received the influenza vaccine in the past because it was required by her employer. The employer's offered alternative to the influenza vaccine was to wear a mask, and the claimant did not want to wear a mask because she has asthma.
15. The claimant believes that God will protect her from illness or death if it is His will.

16. The claimant believes that abortion is a sin, that the COVID-19 vaccine was created with the use of aborted fetus matter from 1972, and that taking the vaccine will encourage abortion.
17. The claimant did not put the abortion related reason on her religious exemption application because she believes that the issue is controversial and believes that many people do not agree that abortion is a sin.
18. On November 13, 2021, the claimant was placed on an unpaid administrative leave of absence from her employment for failing to comply with the employer's vaccine mandate.
19. On December 2, 2021, the claimant was discharged from her employment for failing to comply with the employer's vaccine mandate.
20. The claimant and the employer submitted written responses and documents to factfinding issued by the Department of Unemployment Assistance (DUA).

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. We reject Finding of Fact # 14 insofar as it purports to explain the claimant's reasons for getting the flu vaccine in the past, as it is unreasonable in relation to the evidence presented. For the same reason, we reject the explanation in Finding of Fact # 17 as to why the claimant did not put the abortion relation reason on her religious exemption application. 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 eligible 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 fired the claimant because she did not get the mandatory COVID-19 vaccine or an approved exemption. *See* Findings of Fact ## 13 and 19. This was both a policy violation and misconduct in the sense that her refusal to do so violated the employer’s COVID-19 vaccination policy. *See* Finding of Fact # 4. There was also no dispute that the claimant’s refusal to comply was a knowing and deliberate act.

In order to prove that she engaged in 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).

Findings of Fact ## 6 and 10 provide that the claimant was made aware of the employer’s expectation that she get at least one dose of the COVID-19 vaccine by November, 1, 2021. We believe that the policy’s purpose, to protect hospital patients and staff from exposure to COVID-19, was a reasonable health and safety measure. *See* Findings of Fact ## 5 and 9.

The review examiner concluded that the claimant was not acting in wilful disregard of the employer’s interest, but due to mitigating circumstances. This was based on what the review examiner determined to be the claimant’s credible testimony that a sincerely held religious belief prevented her from getting the COVID-19 vaccine. We disagree.

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, 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). In our view, the weight of the evidence demonstrates that the claimant’s reason for refusing to get the COVID-19 vaccine was, at the time, driven by personal, not religious beliefs.

Findings of Fact ## 15 and 16 reflect the two religious bases for refusing to get the COVID-19 vaccine, which the claimant provided during her hearing testimony. One is that the natural immunity against illness which God provided to her is sufficient, and she does not need the COVID-19 vaccine. *See* Finding of Fact # 15. The other is that the development of the COVID-19 vaccine was derived from a line of fetal cells that stemmed from a 1972 abortion, and that taking the vaccine would encourage abortion, which she believes to be a sin. *See* Finding of Fact

16. We do not question these religious beliefs. However, the issue before us is the claimant's state of mind at the time that she engaged in the misconduct. Specifically, why the claimant refused to get the vaccine between announcement of the policy on September 15, 2021, and its deadline of November 1, 2021. *See* Finding of Fact # 4.

We believe that the evidence from that time period more reliably reflects the claimant's state of mind at the time. Notably, the religious exemption request form which she submitted to the employer on October 7, 2021, does not mention abortion or fetal cells as the belief, practice, or observance that prevents her from receiving the COVID-19 vaccine. The only religious basis offered refers to her belief about the immune system which God gave to her. *See* Exhibit 7.¹

Finding of Fact # 17 states that the claimant did not put the abortion-related reason on her religious exemption request because she believes the issue is controversial. Considering that the claimant's job of 22 years was in jeopardy if her exemption was denied and she did not get vaccinated, we believe this to be an implausible explanation for not including it at the time.

As for the abortion-related reason, the claimant's own testimony suggests that this objection came later, *after* the employer rejected her initial religious basis for refusing to get the vaccine. During the hearing, when asked when she learned that fetal cells might be used in the making of the COVID-19 vaccine, the claimant responded vaguely that there was information on the internet when they were testing the vaccine. What she does not say is when she became aware of such internet information. Nor has she presented any contemporaneous documentary evidence to indicate that she had seen these alleged postings at the time. The claimant did testify to a conversation that she had with an infectious disease physician about using fetal cell lines in connection with the vaccines. But, when pressed for a date, she testified that this conversation took place in early November. This was after her religious exemption request had been submitted and denied. *See* Findings of Fact ## 12, 13, and Exhibit 7. Given this timeline and the claimant's failure to demonstrate that her objection to abortion was a basis for not getting the COVID-19 vaccine *at the time*, we reject the review examiner's assessment that this religious belief prevented her from complying with the employer's policy.

Separately, we consider the religious belief that was given to the employer for seeking an exemption from the COVID-19 vaccine. On October 7, 2021, she wrote on her exemption request that God's natural immunity will protect her. *See* Exhibit 7. When asked during the hearing to explain how the natural immunity from God conflicted with taking the COVID-19 vaccine, the claimant testified, "Because what I put in my body would be scientifically developed, not the protection that God gave me." Yet, the claimant had received an annual flu vaccine from 2009 until 2020, a fact that she does not dispute. *See* Finding of Fact # 14. When asked to explain how she could take the scientifically developed flu vaccine, but not the COVID-19 vaccine, she testified that she has asthma. *See* Finding of Fact # 14. She explained that if she did not get the flu vaccine, she would have had to wear a mask for months, and when she wore the mask, she felt like she was

¹ Exhibit 7 includes copies of the employer's COVID-19 vaccination policy announcement, the claimant's religious exemption request, and the employer's letter denying her exemption request. Although not explicitly incorporated into the review examiner's findings, the statements in this exhibit 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).

getting “asphyxiated.”² If true, this could explain why the claimant complied with the employer’s flu vaccine policy up until 2019. It does not explain why she got the flu vaccine in 2020.

The COVID-19 public health emergency was declared in March, 2020.³ The claimant received the flu vaccine in October, 2020. We can reasonably infer that by October, 2020, the employer’s hospital had been mandating for months that all personnel wear personal protective equipment, including face masks, in order to prevent the spread of the deadly COVID-19 virus. The claimant effectively confirms this. She testified that, once COVID hit, she felt, okay, she could wear a mask. She offers no explanation as how wearing a mask felt asphyxiating at the time she decided to get the flu vaccine, but she did not feel that way wearing a mask during the COVID-19 pandemic. It discredits the claimant’s explanation that she only got the flu vaccine in order to avoid wearing a mask.⁴ A reasonable view of this evidence is that whatever strong beliefs the claimant may have felt about the immunity provided by God, such beliefs did not prevent her from taking the annual, scientifically developed flu shot. Accordingly, the review examiner’s conclusion that this belief prevented her from taking the COVID-19 vaccine a year later is unreasonable in relation to the evidence presented.

The review examiner seems to have overlooked the claimant’s more plausible explanation for not getting the COVID-19 vaccine, which she discussed during her testimony. That explanation is that the side effects to the COVID-19 vaccine were not known, and she did not know how it was going to interact with her immune system that had already fought off the COVID-19 virus. While choosing not to get the COVID-19 vaccine at the time for this reason may have been the correct personal decision, it does not rise to mitigating circumstances.

Because the claimant has not presented substantial and credible evidence to show that she violated the employer’s mandatory COVID-19 vaccination policy due to mitigating circumstances, it is deemed to have been done in wilful disregard of the employer’s interest.

In this case, the employer has also met its burden to show a knowing violation of a reasonable and uniformly enforced policy. As stated, we believe that the mandatory COVID-19 vaccination policy was reasonable, the claimant violated it knowingly, and Finding of Fact # 7 provides that the employer uniformly enforced the policy by terminating all employees whose exemption requests were denied and did not get the vaccine. Moreover, the claimant had not shown that her personal reasons for not getting the vaccine rendered her incapable of complying with the policy.

We, therefore, conclude as a matter of law that the claimant engaged in deliberate misconduct in wilful disregard of the employer’s interest, as well as knowingly violated a reasonable and uniformly enforced policy, as meant under G.L. c. 151A, § 25(e)(2).

² The claimant’s statements referenced here and below were part of her testimony during the hearing. They are not included here for the truth of the matter asserted.

³ On March 10, 2020, Governor Baker declared a state of emergency in the Commonwealth of Massachusetts due to the outbreak of COVID-19.

⁴ We also note that the claimant wrote on her religious exemption request that she felt “bullied” into getting the flu vaccine. *See* Exhibit 7. However, she walked this back during the hearing, testifying that maybe that was a strong word. She stated that she really did not want to get the flu vaccine, and, when it was mandated, a very nice nurse who she worked with encouraged her.

The review examiner's decision is reversed. The claimant is denied benefits as of the week beginning January 2, 2022, and for subsequent weeks, until such time as she has had at least eight weeks of work and has earned an amount equivalent to or in excess of eight times her weekly benefit amount.

BOSTON, MASSACHUSETTS
DATE OF DECISION - November 8, 2023



Paul T. Fitzgerald, Esq.
Chairman



Michael J. Albano
Member

Member Charlene A. Stawicki, 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