

**The claimant was discharged because she failed to comply with the employer's COVID-19 vaccination policy after the employer denied her request for a religious exemption. Held that the record contains sufficient findings that the claimant had sincerely held religious beliefs that constituted mitigating circumstances, and she may not be disqualified for deliberate misconduct in wilful disregard of the employer's interest.**

**Board of Review  
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**Issue ID: 0074 8702 80**

### 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 separated from her position with the employer on November 9, 2021. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on February 23, 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 23, 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, 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 subsidiary findings of fact regarding the reason the claimant declined to comply with the employer's COVID-19 vaccination policy. 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 engaged in deliberate misconduct when she refused to comply with the employer's COVID-19 vaccination mandate, 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. On November 23, 2020, the claimant began working as a *per diem* nurse for the employer, a health care organization.

2. The employer announced a mandatory COVID-19 vaccination policy which required all staff to receive a COVID-19 vaccine by October 15, 2021.
3. The purpose stated in the employer's COVID-19 vaccination policy is to "achieve the highest levels of workforce vaccination and increase safety for all employees, patients, and visitors to health care settings."
4. The policy allowed individuals to request a religious or medical exemption to the COVID-19 vaccine policy.
5. Prior to September 9, 2021, the claimant requested a religious exemption to the employer's COVID-19 vaccine policy.
6. On September 9, 2021, the employer requested additional information from the claimant explaining how her religious beliefs prevent her from receiving a COVID-19 vaccine.
7. On September 11, 2021, the claimant replied to the employer's email stating, "based on my 54 years as a Catholic prevents me from receiving the vaccine, because as a Catholic, I do not believe in abortion, and I am forbidden to have an abortion, this is the basis of my decision on not accepting the vaccine that has used/tested aborted fetal cell lines."
8. None of the COVID-19 vaccines contain cells from an aborted fetus. While the J&J vaccine used a fetal cell line that was developed in the 1970s and 1980s to produce and manufacture the vaccine, the vaccine itself does not contain fetal cells. Moreover, Pfizer and Moderna's mRNA vaccines did not use a fetal cell line to produce and manufacture the vaccine.
9. Multiple faith organizations have publicly supported COVID-19 vaccination.
10. On September 12, 2021, the employer informed the claimant it denied her request for a religious exemption to its COVID-19 vaccine policy.
11. The claimant did not receive a COVID-19 vaccine.
12. The claimant is misinformed about the role of fetal cell lines in the testing or production of the available COVID-19 vaccines.
13. On October 20, 2021, the employer placed the claimant on administrative leave. The employer informed the claimant, "if you fail to meet the policy requirements by Friday, November 5, your employment will be terminated."
14. The claimant did not receive a COVID-19 vaccine.

15. On November 9, 2021, the employer terminated the claimant's employment for non-compliance with its COVID-19 vaccination policy.
16. On February 23, 2022, the Department of Unemployment Assistance (DUA) issued the claimant a Notice of Disqualification effective November 7, 2021, stating she was not eligible for benefits.
17. The claimant appealed the determination.

Credibility Assessment:

The claimant testified credibly that she is a Catholic and her beliefs prevent her from having or supporting abortions. This belief is credible. However, the claimant did not present sufficient evidence to show that all COVID-19 vaccines contained ingredients from aborted fetal cell lines which precluded her from receiving them. The employer informed the claimant that multiple faith-based organizations support COVID-19 vaccines. The claimant did not rebut this with any evidence that the Catholic Church prohibits followers from receiving the vaccines.

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 Finding of Fact # 12 which states the claimant was misinformed about the use of fetal cell lines in testing the vaccines because, in the absence of reliable scientific or medical evidence in the record, the review examiner is not competent to reach such a finding. In adopting the remaining findings, we deem them to be supported by substantial and credible evidence. However, as discussed more fully below, we reject the review examiner's legal conclusion that the claimant is not entitled to benefits.

Because the claimant was discharged from her employment, her qualification 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).

As an initial matter, there is insufficient evidence in the record for us to conclude that the employer’s policy, which the claimant violated, was uniformly enforced. Therefore, it has not met its burden to show a knowing violation of a reasonable and *uniformly enforced* policy. As such, we consider only whether the claimant engaged in deliberate misconduct in wilful disregard of the employer’s interest.

There was no dispute that the employer introduced a mandatory COVID-19 vaccination policy requiring all employees get vaccinated by October 15, 2021. Consolidated Finding # 2. There was also no dispute that the claimant chose not to get vaccinated by that deadline and, as a result, was terminated for failing to comply with the employer’s policy. Consolidated Findings ## 14 and 15. However, the employer’s decision to discharge the claimant is not a matter at issue in this case.

The only question before the Board is whether the claimant is entitled to unemployment benefits under G.L. c. 151A, § 25(e)(2). 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). Accordingly, the dispositive issue in this case is whether, in engaging in the misconduct in question, the claimant acted deliberately and in wilful disregard of the employer’s interest.

“Deliberate misconduct in wilful disregard of the employer’s interest suggests intentional conduct or inaction which the employee knew was contrary to the employer’s interest.” Goodridge v. Dir. of Division of Employment Security, 375 Mass. 434, 436 (1978) (citations omitted). This analysis turns on an examination of the claimant’s state of mind at the time of the misconduct. 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).

As the purpose of the employer’s vaccination policy was to protect patients and employees from exposure to and illness from COVID-19, we agree that the employer’s policy was reasonable. *See* Consolidated Finding # 3. The claimant was aware of this policy and understood that the employer expected her to comply with this policy. Consolidated Findings ## 2, 10, and 13. Since there is no indication that she missed the deadline inadvertently, it is evident that her decision not to get the COVID-19 vaccine was deliberate.

Even though the employer denied her request for a religious exemption, the claimant maintained that she ultimately declined to get vaccinated because it was contrary to her religious beliefs. *See* Consolidated Findings ## 7, 11, and 14. Therefore, in considering whether the claimant engaged in deliberate misconduct, we must examine whether her religious beliefs constituted mitigating circumstances for her failure to comply with the employer’s COVID-19 vaccination policy. 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).

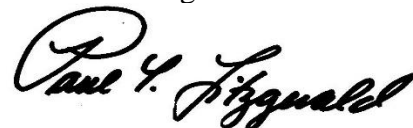
After a thorough assessment of the evidence in the record, the review examiner accepted as credible the sincerity of the claimant's religious beliefs regarding abortion and anything associated with abortion. Such assessments are within the scope of the fact finder's role, and, unless they are unreasonable 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). Upon review of the record, we have accepted the review examiner's credibility assessment as being supported by a reasonable view of the evidence.

The claimant requested a religious exemption from the employer's COVID-19 vaccination policy because her religious objection to abortion prevents her from getting these vaccines, which she understands used and were tested on aborted fetal cell lines. *See Consolidated Finding # 7. Consolidated Findings ## 8 and 12* provide that none of the COVID-19 vaccines contain aborted fetal cells. In rendering these finding, the review examiner relied upon the employer's September 12<sup>th</sup> email, marked as Exhibit 1, in which the employer informed the claimant they had denied her request for a religious exemption. However, this email does not address the claimant's specifically articulated concerns about the use of aborted fetal cells in the testing process.<sup>1</sup> There is no indication the review examiner had the requisite evidentiary foundation to make a conclusion about the mRNA vaccine testing process. For this reason, we believe the record does not support the portion of Consolidated Finding # 12, which states that the claimant was misinformed about the role of fetal cell lines in testing the mRNA vaccines.

In deference to statutory guidance instructing that the law be construed liberally in favor of the unemployed individual, and in the absence of any evidence detracting from the claimant's religious objection to the use of fetal cell lines in the testing of the COVID-19 vaccines, we believe the claimant has met her burden to show she had mitigating circumstances for her conduct. *See G.L. c. 151A, § 74*. She was not acting in wilful disregard of the employer's interest, but pursuant to her sincerely held religious belief.

We, therefore, conclude as a matter of law that the claimant was not discharged for 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 entitled to receive benefits beginning the week of November 7, 2021, and for subsequent weeks if otherwise eligible.



Paul T. Fitzgerald, Esq.  
Chairman

**BOSTON, MASSACHUSETTS**  
**DATE OF DECISION - January 25, 2023**

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<sup>1</sup> Exhibit 2 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).



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](http://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.

LSW/rh