

Although the claimant asserted that she had both medical and religious reasons that prevented her from complying with the employer’s mandatory COVID-19 vaccination policy, her own medical records and recent history of getting the influenza vaccine did not support this assertion. Held she failed to demonstrate mitigating circumstances, and she is disqualified due to deliberate misconduct in wilful disregard of the employer’s interest pursuant to G.L. c. 151A, § 25(e)(2).

**Board of Review
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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 affirm.

The claimant was discharged from her position with the employer on January 19, 2022. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on March 31, 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 November 19, 2022. We accepted the claimant’s application for review.

Benefits were denied after the review examiner determined that the claimant had engaged in deliberate misconduct in wilful disregard of the employer’s interest and, thus, 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 prove that her refusal to comply with the employer’s mandatory COVID-19 vaccination policy was due to mitigating circumstances, 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 for the employer as a full-time registered nurse from September 6, 2011, until her separation on January 19, 2022.

2. The employer is a health care system.
3. The claimant reported to the nurse manager.
4. For several years, the employer required employees to obtain an annual influenza vaccination.
5. The claimant received an influenza vaccination in 2016 in order to complete her clinical studies for her nursing degree.
6. The claimant received an influenza vaccination on November 24, 2020 in order to comply with the annual influenza vaccination requirement because she had missed the deadline for requesting an exemption from the requirement.
7. The claimant had never requested an exemption from the requirement for the influenza vaccination.
8. The claimant had never been disciplined for non-compliance with the requirement to receive the vaccination for the annual influenza.
9. On September 15, 2021, the employer announced a COVID-19 vaccination policy (policy) requiring all employees to either receive the first dose of the COVID-19 vaccine by November 1, 2021 or file for an exemption, based upon either medical or religious reasons, before October 10, 2021 and obtain approval of the exemption by December 15, 2021.
10. The policy did not have any provisions regarding allowance of additional time to obtain information and/or documents or the allowance of deferments.
11. The purpose of the policy is to ensure the health and safety of patients and employees as well as to comply with federal and state statutes and regulations.
12. The policy was distributed to all employees, including the claimant, via email on September 15, 2021. The email announced the vaccine and exemption requirements, procedures, and deadlines.
13. The employer expected the claimant to either receive the first dose of the COVID-19 vaccine or obtain an approved exemption.
14. The purpose of expectation was to ensure the health and safety of the claimant, coworkers, and patients because she was working in a clinical setting in close contact with others.
15. The employer communicated the expectation to the claimant through the September 15, 2021 email.

16. On September 12, 2021, the claimant submitted a typed request to the employer requesting an exemption from the policy based upon her religious beliefs.
17. On September 16, 2021, the claimant filed a request for an exemption from the policy based upon her medical condition.
18. On October 5, 2021, the employer's Medical Exemption Committee informed the claimant that additional information was required from her doctor before it could make a determination and gave her a 10-day deferment through October 10, 2020.
19. On October 18, 2021, the employer's Medical Exemption Committee informed the claimant that additional evaluation by an allergist was necessary before it could make a determination and gave her until November 29, 2021 to obtain and submit the information.
20. On November 8, 2021, the claimant was evaluated by an allergist who noted the claimant "had hives and throat tightness following influenza vaccination last year. This is not considered a contraindication to COVID vaccines."
21. On November 27, 2021, the claimant completed and filed the necessary form for requesting an exemption from the policy based upon her personal religious beliefs.
22. The claimant maintains a religious belief that her body is a temple of God, that she must maintain purity by avoiding the introduction of foreign substances into her body, and that God will protect her from disease.
23. The employer did not respond to the claimant's request for an exemption to the policy based upon her religious beliefs. The claimant did not ask further about the status of her request for a religious exemption.
24. On November 30, 2021, the employer's Medical Exemption Committee requested the claimant submit un-redacted medical records for its consideration and extended her deferral to December 14, 2021.
25. On December 21, 2021, the employer's Medical Exemption Committee denied the claimant's request for a medical exemption from the policy and informed her that she had until December 29, 2021 to obtain a COVID-19 vaccination.
26. At no point did the employer grant the claimant a religious exemption from the COVID-19 vaccine.
27. On December 23, 2021, the claimant's manager verbally warned the claimant that failure to obtain the COVID-19 vaccination by midnight on December 29, 2021 would result in termination of her employment.

28. The claimant did not take the vaccine for COVID-19 because of her religious beliefs.
29. The claimant continued to work in her usual capacity up to January 19, 2022.
30. On January 21, 2022, the employer discharged the claimant effective January 19, 2022, for failing to receive the vaccine for COVID-19 or having an approved exemption.

[Credibility Assessment:]¹

The claimant underwent an evaluation by an allergist as part of the employer's assessment of the claimant's request for an exemption based upon her medical condition. The allergist found the claimant's reaction to the influenza vaccine was not a contraindication to receipt of the COVID-19 vaccine and the employer's Medical Exemption Committee, relying upon that opinion, reasonably denied the claimant's request for an exemption based upon her medical condition.

Although the claimant did not receive a response from the employer to her request for an exemption based upon religious her religious beliefs, the claimant failed to inquire as to the status of her request during the pendency of her request for an exemption based upon her medical condition and the repeated deferrals of her vaccination deadline. The claimant was not expressly granted a religious exemption at any time and was clearly told by her manager that failing to get the COVID-19 vaccine would result in termination. The claimant made an intentional, purposeful, deliberate choice to not get the COVID-19 vaccination with full knowledge that failure to do so would result in termination of employment. The claimant's stated reason for not getting the COVID-19 vaccine was that putting foreign substances into her body was contrary to her beliefs, that her body is a temple, and that God would protect her from disease. However, the claimant's recent act of complying with the influenza vaccination requirement contradicted her professed beliefs. It is concluded the claimant acted in deliberate misconduct in willful disregard of the employing unit's interest with no medical exemption or sincerely held religious belief to mitigate her intent.

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. In light of Findings of Fact ## 5 and 6, Exhibit 16 (discussed below), as well as the observations about the claimant's religious objections noted in the review examiner's credibility assessment, we accept Finding of Fact # 28 only insofar as it reflects what the claimant *asserted* as her reason for not

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

getting the COVID-19 vaccine. 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. We also agree 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 the present case, the employer implemented a mandatory COVID-19 vaccination policy, which provided that employees had to get the first dose of the vaccine by November 1, 2021, or an approved exemption by December 15, 2021. Finding of Fact # 9. As the claimant submitted a request for medical exemption, and the employer sought additional medical documentation, her deadline for getting the first dose of the vaccine was ultimately extended to December 29, 2021. Findings of Fact ## 17–19 and 24–25. After the employer denied her medical exemption request, she did not get vaccinated. For this reason, she was fired. *See* Findings of Fact ## 28–30. The issue before us is not whether the employer made the appropriate decision to terminate the claimant's employment, but whether the claimant is entitled to unemployment benefits.

Inasmuch as the record fails to show that the employer similarly disciplined employees who refused to get the COVID-19 vaccine under similar circumstances, we agree that the employer has not sustained its burden to prove that the claimant knowingly violated a *uniformly enforced* policy. Alternatively, the employer may show that the claimant's refusal to get the vaccine was deliberate misconduct in wilful disregard of the employer's interest.

There is no question that the claimant's failure to get the vaccine by the employer's extended deadline of December 29, 2021, was misconduct in the sense that her failure to act was contrary to what the employer's expected her to do. It is also evident that she deliberately chose not to comply with the vaccine requirement. *See* Finding of Fact # 28.

However, the Supreme Judicial Court (SJC) has stated, “Deliberate misconduct alone is not enough. Such misconduct must also be in ‘wilful disregard’ of the employer's interest. 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). 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).

Findings of Fact ## 15, 18, 19, 24, and 25 show that the claimant was aware of the employer's COVID-19 vaccine requirement and the deadline for complying. She was also aware that if she did not comply, she would be terminated, as her manager said this to her on December 23, 2021. Finding of Fact # 27. Inasmuch as the purpose of the policy was to protect the health and safety of patients and employees, as well as to comply with federal and state statutes and regulations, we believe the policy was reasonable. The review examiner concluded that the claimant failed to demonstrate mitigating circumstances. We agree.

We consider both the claimant's medical and religious reasons for not complying with the COVID-19 vaccine mandate. The findings show that the employer's Medical Exemption Committee looked carefully at her request, relying not just on a letter from her doctor, but asking for an evaluation by an allergist. See Findings of Fact ## 18 and 19. Although noting a prior reaction to the influenza vaccine, the allergist wrote on November 8, 2021, that such reaction was not considered a contraindication to COVID-19 vaccines. Finding of Fact # 20. Given this medical evidence, we agree that the claimant has not demonstrated that she was medically unable to get the COVID-19 vaccine in late 2021, as required by her employer.

The claimant has also asserted that she was unable to get the COVID-19 on religious grounds. Specifically, she believes that her body is a temple of God, that she must maintain its purity by avoiding introducing foreign substances into her body, including any medication or vaccines, as God will protect her from disease. Finding of Fact # 22.² However, a medical record submitted as part of Exhibit 16 shows that the claimant was taking Ibuprofen in 2021 and took diphenhydramine and Benadryl in 2020.³ Moreover, as the review examiner noted in his decision, the claimant took the influenza vaccine in 2016 and 2020. See Findings of Fact ## 5 and 6.

During the hearing and on appeal, the claimant asserts that she was "coerced" to take the influenza vaccine. She maintains that in 2016, she got the influenza vaccine because she could not complete her nursing clinicals without it, and in 2020, she got it because she missed the deadline to submit an exemption request and would have lost her job. In our view, what the claimant characterizes as coercion, we view as reasonable school and employer directives for working in a health care setting. We fail to see a distinction between the choice confronting the claimant in 2016 and 2020, and that posed by the employer's COVID-19 policy in 2021. In 2016, she chose to get a vaccine

² During the hearing, the claimant explained that her religious belief and practices do not support the introduction of any medication, chemicals, or foreign substances such as vaccines into her body. While not explicitly incorporated into the review examiner's findings, this testimony and the portion of her 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).

³ The medical records contained in Exhibit 16 are also part of the unchallenged evidence in the record.

so that she could get her nursing degree. In 2020, she chose to get a vaccine so that she could continue working for the employer. Similarly, in 2021, she was told to get a vaccine in order to keep her job, but this time she decided not to.

Based upon this evidence, the review examiner determined that the claimant did not have a sincerely held religious belief which rendered her unable to get the COVID-19 vaccine in late 2021. 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 his determination was reasonable.

Because the claimant has failed to demonstrate circumstances which rendered her unable to comply with the employer's mandatory COVID-19 policy, we conclude as a matter of law that her discharge is attributable to deliberate misconduct in wilful disregard of the employer's interest pursuant to G.L. c. 151A, § 25(e)(2).

The review examiner's decision is affirmed. The claimant is denied benefits for the week beginning January 23, 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 - September 15, 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.

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