The claimant did not present any evidence from a healthcare provider that getting the COVID-19 vaccine would be detrimental to her health. Thus, no mitigating circumstances were presented to excuse the claimant's failure to comply with the employer's vaccine mandate, and she is ineligible for benefits pursuant to G.L. c. 151A, § 25(e)(2).

Board of Review
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Issue ID: 0075 3105 66

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 separated from her position with the employer on February 4, 2022. She filed a claim for unemployment benefits with the DUA, effective February 6, 2022, which was denied in a determination issued on March 26, 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 March 2, 2023. We accepted the employer's application for review.

Benefits were awarded after the review examiner determined that the claimant did not engage in deliberate misconduct in wilful disregard of the employer's interest or knowingly violate a reasonable and uniformly enforced rule or policy of the employer and, thus, 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 testify and present other evidence. Only the employer attended the remand hearing. Thereafter, the review examiner issued her 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 did not engage in deliberate misconduct in wilful disregard of the employer's interest or knowingly violate a reasonable and uniformly enforced rule or policy of the employer when she failed to receive a COVID-19 vaccine, 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. The claimant worked full-time as an Ancillary Contract Manager for the employer, a health plan, from 10/12/21 to 2/4/22.

2. The claimant worked three days from home and two days at the employer's place of business.

3. The claimant received an e-mail from the employer's Human Resources Department on 12/1/21 containing the employer's COVID-19 vaccination policy.

4. Per the policy, employees were expected to have full COVID-19 vaccination by 2/1/22 as a condition of employment. Employees were permitted to request religious and medical exemptions from the vaccine requirement.

5. The policy is in place to promote the health and safety of employees and those the employer serves.

6. The employer considers whether to grant exemptions to the vaccine requirement on a case-by-case basis.

7. On 12/7/21, the claimant made an appointment to receive the first dose of a two-dose COVID-19 vaccine on 1/12/22. She informed the employer's Senior Human Resources Business Partner (SHRBP) of this and that she would receive her second dose after the 2/1/22 deadline.

8. The claimant did not receive the first dose of the two-dose COVID-19 vaccine on 1/12/22.

9. On 1/14/22, the claimant informed the SHRBP that her son tested positive for COVID-19, and she was awaiting the results of her PCR test. She also told the SHRBP that, assuming her test was negative, she was going to schedule an appointment for the one-dose COVID-19 vaccine for 2/1/22.

10. The claimant took a COVID-19 test on 1/27/22. She received a positive result on 1/28/22. She informed her supervisor of the results.

11. On 1/31/22, the claimant told the SHRBP that the earliest she could receive the COVID-19 vaccine would be 14 days from her positive test, per the pharmacy where she scheduled a vaccine appointment. The appointment was for 2/10/22.

12. On 2/1/22, the claimant told the SHRBP she would let her know when she is symptom-free.

13. On 2/4/22, the claimant told her supervisor that her primary care physician recommended waiting ninety days before getting the COVID-19 vaccine. The claimant's supervisor told the claimant to speak with the SHRBP about this.

14. The claimant spoke with her supervisor about working completely remotely until she could receive the vaccine. The claimant's supervisor informed her this was not an option.

15. The nature of the claimant's job required her to work in person part of the week to print and scan documents and to send and receive mail.

16. The claimant's physician did not recommend that the claimant be exempt from the COVID-19 vaccine for medical reasons.

17. The claimant did not request a medical exemption or a religious exemption from receiving the COVID-19 vaccine.

18. The claimant did not ask the SHRBP if she could provide a note from her primary care physician to show that she needed to wait ninety days to receive the COVID-19 vaccine.

19. On 2/4/22, the claimant e-mailed the SHRBP and said that after a lot of thought and discussion with her family, she cancelled her COVID-19 vaccination appointments and was going to wait at least three months before even considering whether she was going to get the COVID-19 vaccine.

20. The claimant said that one of the factors leading her to this decision was that natural immunity is more effective than the single-dose COVID-19 vaccine. She said that she posed virtually no threat to her colleagues because she had COVID-19 twice and did not spread it to anyone, and she worked in the office two days per week, alone, and wears a mask when she is not alone at work.

21. The claimant also said that she hoped the employer would realize that forcing employees to get a vaccine is wrong and potentially harmful and does not protect her or others any more than providing negative testing would. She said the ruling for mandates was overturned by the U.S. Supreme Court, and considering recent policy changes or lack thereof, she's not sure her values align with the company.

22. The claimant then said that if this policy remains in place with no exceptions, the SHRBP should consider the e-mail her two weeks' notice.

23. The SHRBP replied to the claimant's e-mail and said she was going to speak with the claimant's supervisor about next steps.

24. The claimant later spoke with her supervisor, who informed her that 2/4/22 would be her last day, as the claimant did not plan to receive the COVID-19 vaccine.

25. The claimant subsequently e-mailed the SHRBP and said she was disappointed [and] would like it in writing that she was terminated. She said she was unsure

how she could be terminated effective immediately when she was not eligible to receive the vaccine because she was still extremely symptomatic.

26. The claimant said she would be happy to send a letter from her PCP stating that she is still symptomatic.

27. The SHRBP replied to the claimant's e-mail and said that the claimant's supervisor explained to her that she met with the claimant that day to inform the claimant that 2/4/22 was her last day, as the claimant said she was not going to get the COVID-19 vaccine.

28. The claimant started a new full-time job on 3/7/22.

Credibility Assessment:

The employer did not participate in the hearing held on 2/17/23. The claimant did not participate in the remand hearing on 5/2/23. Both parties provided conflicting evidence regarding the events leading to the claimant's separation from employment. The evidence provided by the employer was more credible than the evidence provided by the claimant. The claimant provided detailed testimony on 2/17/23 and provided a copy of her positive COVID-19 test and a screen shot of one of the 2/4/22 e-mails from the SHRBP.

The impression the claimant gave in her fact-finding and in her testimony on 2/17/23 was that she intended to receive the vaccine timely, but could not for medical reasons, and the employer would not consider this and extend the deadline to receive the vaccine, thereby terminating her employment. The documents and testimony provided by the employer show that the claimant omitted relevant information about what happened prior to her separation from employment.

During the hearing on 2/17/23, she did not disclose that on 2/4/22, she told her supervisor and the SHRBP that she cancelled her vaccine appointments and would not even begin to consider whether she was going to receive the vaccine for at least ninety days. She did not disclose that she told the SHRBP that she hoped the employer would realize that forcing employees to get a vaccine is wrong and potentially harmful and does not protect her or others any more than providing negative testing would; that the ruling for mandates was overturned by the U.S. Supreme Court; and considering recent policy changes or lack thereof, she's not sure her values align with the company. She did not disclose that she told the SHRBP if the policy remains in place with no exceptions, to consider this e-mail the claimant's two-week notice.

The parties also provided conflicting evidence about whether the claimant provided medical documentation to show that she should not receive the vaccine at that time. In the claimant's initial fact-finding questionnaire completed on or about 2/7/22, she was asked what she did to violate the employer's policy and she stated that she could not comply with the vaccine mandate of 2/1/22 despite a doctor's note. In the

> claimant's telephone fact-finding completed on 2/28/22, she stated that she gave the employer a letter from her primary care physician saying she should not receive the vaccine for ninety days after having COVID-19, and the employer did not accept it. The claimant did not provide any medical notes prior to or at the 2/17/23 hearing and at the remand hearing on 5/5/23, both employer witnesses, who were sequestered, said that the claimant did not offer any medical documentation to show that she should not receive the vaccine at that time.

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. Upon such review, the Board adopts the review examiner's consolidated findings of fact and deems 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. However, as discussed more fully below, we reject the review examiner's original legal conclusion that the claimant did not engage in deliberate misconduct in wilful disregard of the employer's interest or knowingly violate a reasonable and uniformly enforced rule or policy of the employer.

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, provided that such violation is not shown to be as a result of the employee's incompetence . . . .

"[The] 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 February 1, 2022. Consolidated Finding # 4. 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. Consolidated Finding # 22 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, to show 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. Consolidated Findings ## 3, 4, and 22. Further, the employer required its employees to receive the COVID-19 vaccine to promote the health and safety of those employees and those served by the employer. Consolidated Finding # 5. 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 originally concluded that the claimant demonstrated mitigating circumstances. We disagree.

After remand, the review examiner found that the claimant tested positive for COVID-19 on January 28, 2022. Consolidated Finding # 10. The claimant had rescheduled prior appointments to receive the COVID-19 vaccine and was still unvaccinated at the time she tested positive. Consolidated Findings ## 7–9. On January 31st, the claimant informed the employer that, as a result of her positive test, the earliest she could schedule a vaccine was on February 10, 2022. Consolidated Finding # 11. However, on the day of the employer's vaccine mandate deadline, February 4, 2022, the claimant informed the employer that her primary care physician had recommended that she wait 90 days before getting the COVID-19 vaccine. Consolidated Finding # 13. Additionally, the claimant informed the employer that she had cancelled her vaccination appointment and was going to wait at least three months before even considering whether she was going to get the COVID-19 vaccine. Consolidated Finding # 19.

Notably, the claimant did not present any documentary medical evidence to support her testimony that she needed to wait 90 days after her positive COVID-19 test, to support her assertion that she had natural immunity, or that she should not get the vaccine for another reason. *See* Consolidated Findings ## 13 and 16. Rather, the record indicates that she simply did not believe that she needed the COVID-19 vaccine at all and personally objected to having to get it. *See* Consolidated Findings ## 20 and 21. This may have been the correct personal decision for the claimant, but it does not

rise to a circumstance beyond her control. As such, she did not demonstrate mitigating circumstances for refusing to comply with the employer's policy.

The employer has met its burden to show that the claimant's refusal to comply with the employer's COVID-19 vaccine requirement was done in wilful disregard of the employer's interest and not due to mitigating circumstances. The record also supports that the claimant knowingly violated a reasonable and uniformly enforced policy.[1] Because the claimant has not shown that she was incapable of complying with the vaccine mandate, the employer has met its burden under this provision as well.

We, therefore, conclude as a matter of law that the employer has met its burden under G.L. c. 151A, § 25(e)(2).

The review examiner's decision is reversed. The claimant is denied benefits for the week beginning February 6, 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 - June 26, 2024

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

[1] During the hearing, the employer testified that the policy was uniformly enforced. This was not disputed by the claimant. While not explicitly incorporated into the review examiner's findings, this portion of the employer's testimony 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).

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.

SVL/rh