

**When the claimant declined to comply with the employer’s mandatory COVID-19 vaccination policy, it placed her on a two-week administrative leave, then terminated her employment. Held the claimant was ineligible for benefits pursuant to G.L. c. 151A, §§ 29 and 1(r) during her leave, because she received vacation and sick pay as wages. However, inasmuch as the claimant declined to get the COVID-19 vaccine due to sincerely held religious beliefs, the Board held she did not refuse to comply with the policy in wilful disregard of the employer’s interest, but due to mitigating circumstances. Held she is eligible for benefits following her separation 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: 0075 3836 03  
0074 6090 44**

#### Introduction and Procedural History of this Appeal

The claimant has appealed two decisions by a review examiner in the Department of Unemployment Assistance (DUA) to deny unemployment benefits. We have reviewed both pursuant to our authority under G.L. c. 151A, § 41. We reverse the decision in Issue ID # 0075 3836 03, and we affirm the decision in Issue ID # 0074 6090 44.

The claimant was placed on a two-week administrative leave and then discharged from her position with the employer on January 3, 2022. She filed a claim for unemployment benefits with the DUA, effective December 19, 2021, which was denied in separate determinations issued on February 11, 2022. In Issue ID # 0075 3836 03, the claimant was denied benefits pursuant to G.L. c. 151A, § 25(e)(2) (discharge disqualification). In Issue ID # 0074 6090 44, the DUA denied benefits pursuant to G.L. c. 151A, §§ 29 and 1(r) (leave of absence disqualification). The claimant appealed the determinations to the DUA hearings department. Following a hearing on the merits of the discharge disqualification, attended by both parties, the review issued a decision on June 4, 2022, affirming the disqualification. Following a separate hearing on the merits of the leave of absence disqualification, attended only by the claimant, the review examiner affirmed the agency’s determination in a decision also rendered on June 4, 2022. We accepted the claimant’s applications for review in both cases.

Benefits were denied beginning January 2, 2022, because the review examiner determined that the claimant had both engaged in deliberate misconduct in wilful disregard of the employer’s interest and knowingly violated a reasonable and uniformly enforced rule or policy of the employer, and, thus, she was disqualified under G.L. c. 151A, § 25(e)(2). He denied benefits from December 19, 2021 until January 1, 2022, on the ground that the claimant was not in total unemployment within the meaning of G.L. c. 151A, §§ 29 and 1(r), during these two weeks. After considering the recorded testimony and evidence from both hearings, the review examiner’s decisions, and the claimant’s appeals, we remanded the cases to the review examiner to obtain further evidence about the claimant’s reason for not complying with a mandatory vaccine requirement and to consider

any wages paid during her leave of absence. Both parties attended a consolidated remand hearing. Thereafter, the review examiner issued his consolidated findings of fact. Our decision is based upon our review of the entire record.<sup>1</sup>

The issue before the Board is whether the review examiner's decisions, which disqualified the claimant during her administrative leave and following her termination from employment because she was out of work due to refusing to get a mandatory COVID-19 vaccination, are 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 part-time as a health and safety nurse for the employer, a human services program, from May 30, 2018, until January 3, 2022.
2. The claimant worked 25 hours per week.
3. The claimant's immediate supervisor was the health and safety manager (the HSM).
4. The employer maintained a policy requiring COVID-19 vaccinations as a condition of employment with a deadline of January 3, 2022. The employer maintained this expectation to protect clients and staff from COVID-19 infections and to comply with an anticipated program mandate. The policy applied to all employees. The policy was communicated to employees through general communications by email beginning on November 17, 2021. Employees could apply for religious or medical exemptions. The claimant was involved in creating the policy.
5. The employer maintained an expectation that employees would be vaccinated against COVID-19. The purpose of the expectation was to protect clients and staff. The expectation was communicated through general communications by email. The claimant was aware of the expectation.
6. The claimant's job duties involved in person work with children under five-years-old, pregnant mothers, other clients, and coworkers. The claimant worked in facility and in client's homes. The claimant would be required to work directly with clients in emergency situations.
7. On November 1, 2021, and on November 17, 2021, the claimant applied for a religious exemption because she was concerned about whether the vaccine would affect her fertility and because she sincerely believed that the three

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<sup>1</sup> As the review examiner issued the same consolidated findings of fact for both Issue ID # 0075 3836 03 and Issue ID # 0074 6090 44, we have consolidated both of these appeals into one decision.

available vaccines were produced or tested using cell lines originating from aborted fetal tissue. The claimant had sincere beliefs about the origins of the vaccine, and how taking it would affect her sincere religious beliefs.

8. In November 2021, the claimant had a sincere religious belief that using a vaccine developed with fetal tissue would be contrary to her religious belief against abortion. The claimant had a sincere religious belief that interfering with her fertility would be against her religious belief that she should continue to bear children. The claimant sincerely believed that her fertility could be impacted due to her reading of a single medical study. Based [sic] her sincere religious beliefs regarding the origins of the vaccine and her religious beliefs regarding bearing children, the claimant did not take the vaccine.
9. The claimant did not consult a doctor about the vaccine.
10. The claimant believed that she could perform her job by disclosing her vaccine status to individual clients before visits and limiting in facility work to remaining behind a window.
11. On December 14, 2021, the claimant was informed that her exemption was denied due to undue hardship to the employer to accommodate her request. The employer did not agree that the claimant could perform her role effectively without being fully vaccinated.
12. On December 21, 2021, the claimant was placed on a two-week administrative leave for failing to comply with the vaccine policy. The employer did not have remote work available for the claimant. The claimant was paid 60 hours and 29 minutes of sick and vacation pay, totaling \$1536.80.
13. On January 3, 2022, the claimant was not vaccinated against COVID-19.
14. On January 3, 2022, the claimant was discharged for not complying with the employer's vaccine policy.

Credibility Assessment:

The hearing was remanded for subsidiary [sic] findings based on the record.

The claimant's testimony that she did not take the COVID-19 vaccine due to her sincerely held religious belief is credible. The claimant was consistent between her documentary evidence and testimony concerning her religious belief prohibiting any use of aborted fetal tissue and requiring her to maintain her fertility. The claimant credibly testified that she believed the vaccine to be developed through the use of cell lines originating from aborted fetal tissue. The claimant credibly testified that she believed her religion required her to continue to bear children. The claimant credibly testified that she believed the vaccine could interfere with her

fertility based upon her reading of a single medical study which she did not discuss with a medical professional.

The claimant did not receive the COVID-19 vaccine due to her sincerely held religious belief.

### Ruling of the Board

In accordance with our statutory obligation, we review the record and the decision made by the review examiner in both appeals to determine: (1) whether the consolidated findings are supported by substantial and credible evidence; and (2) whether the review examiner's conclusions are 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. As discussed more fully below, we disagree with the review examiner's legal conclusion that the claimant is ineligible for benefits as a result of her discharge from employment. However, we agree that she is ineligible for benefits during her administrative leave but do so on other grounds.

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 claimant was placed on an administrative leave and then fired because she refused to comply with the employer's mandatory COVID-19 vaccination policy. *See Consolidated Findings ## 4, 12, and 14.*

At the outset, we disagree with the review examiner's conclusion that the employer met its burden to prove a knowing violation of a reasonable and uniformly enforced policy, as there is insufficient evidence that the COVID-19 vaccination policy was uniformly enforced. During the hearing, the review examiner asked the employer what happened to other employees who did not get the vaccine. The employer's Human Resources Director answered that some were terminated, and

that others were granted an accommodation because their role was different. However, no explanation was provided as to how their role differed from the claimant's role.<sup>2</sup> Consequently, this evidence fails to demonstrate that similarly situated employees were treated the same as the claimant.

Alternatively, the employer may prove that the claimant engaged in deliberate misconduct in wilful disregard of the employer's interest. There is no question that the claimant was aware that the employer expected her to get the COVID-19 vaccine by January 3, 2022, in order to keep her job. *See Consolidated Findings ## 4 and 5*. We agree that the expectation was reasonable, as the policy was adopted in order to protect clients and staff. *See Consolidated Finding # 5*. There is also no question that the claimant did not get a COVID-19 vaccine, and that this was a deliberate choice. *See Consolidated Findings ## 8 and 13*.

The question is whether her decision not to get vaccinated was made in wilful disregard of the employer's interest, or whether it was due to mitigating circumstances. 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 "[T]ake 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). 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 remand, the consolidated findings provide that the claimant chose not to get the COVID-19 vaccine due to sincerely held religious beliefs. Specifically, the review examiner found that the claimant did not get the COVID-19 vaccine because it was developed using stem cells from fetal tissue, and this violated her sincerely held religious belief against abortion. *See Consolidated Findings ## 7 and 8*. She had also read a medical study, which indicated that the vaccine could jeopardize her efforts to bear children, and this violated her sincerely held religious belief that God had called upon her to have more children. *See Consolidated Findings ## 7 and 8*.<sup>3</sup>

As the consolidated findings now show that sincerely held religious beliefs prevented the claimant from complying with the employer's mandatory COVID-19 vaccination policy, we are satisfied that the claimant did not act in wilful disregard of the employer's interest but due to mitigating circumstances. As a result, she may not be disqualified due to deliberate misconduct in wilful disregard of the employer's interest within the meaning of G.L. c. 151A, § 25(e)(2).

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<sup>2</sup> 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).

<sup>3</sup> During the hearing, the claimant read from Remand Exhibit 4, a detailed statement of her religious beliefs, dated October 29, 2021, which she had submitted to the employer when seeking a religious exemption. This statement is also part of the unchallenged evidence in the record.

We next consider her eligibility during the administrative leave. Where a claimant remains employed, but is on a leave of absence, her eligibility for benefits is governed by other sections of the unemployment statute. G.L. c. 151A, § 29, authorizes benefits be paid only to those in “total unemployment” or “partial unemployment.” These terms are in turn defined by G.L. c. 151A, § 1(r), which provides, in relevant part, as follows:

- (1) “Partial unemployment”, an individual shall be deemed to be in partial unemployment if in any week of less than full-time weekly schedule of work he has earned or has received aggregate remuneration in an amount which is less than the weekly benefit rate to which he would be entitled if totally unemployed during said week; provided, however, that certain earnings as specified in paragraph (b) of section twenty-nine shall be disregarded. . . .
- (2) “Total unemployment”, an individual shall be deemed to be in total unemployment in any week in which he performs no wage-earning services whatever, and for which he receives no remuneration, and in which, though capable and available for work, he is unable to obtain any suitable work.

The consolidated findings indicate that, during her two-week administrative leave, the claimant did not work for the employer, because she had declined to get the COVID-19 vaccine, and she was not permitted to perform her usual job without being vaccinated. *See* Consolidated Finding # 12. From this, we can infer that she was unavailable for her usual work during the administrative leave due to the same sincerely held religious beliefs. In effect, it had become unsuitable. Although the consolidated findings state that the employer did not have remote work that the claimant could perform without being vaccinated, we do not know whether the claimant was available for, or actively seeking, suitable work from other employers. *See* Consolidated Finding # 12.

Nonetheless, she is not eligible for benefits during her administrative leave, because the consolidated findings show that the employer paid her \$1,536.80 in the form of sick and vacation pay for these two weeks. *See* G.L. c. 151A, § 1(r)(3). Since she received remuneration, she does not meet the definition of being in total unemployment pursuant to G.L. c. 151A, § 1(r)(2).

Nor does she meet the definition of being in partial unemployment pursuant to G.L. c. 151A, § 1(r)(1). Based upon the wages earned in her base period, the DUA calculated the claimant’s weekly benefit rate to be \$294. Pursuant to G.L. c. 151A, § 29(b), earnings up to one-third of her weekly benefit rate are disregarded. Here, \$98 in earnings are disregarded. This means that the claimant will be deemed to be in partial unemployment in any week in which she is paid less than \$392 ( $\$294 + \$98 = \$392$ ). As the two-week payment of \$1,536.80 amounts to well over \$392 per week, the claimant is not considered to have been in partial unemployment during these two weeks.

We, therefore, conclude as a matter of law that, during her administrative leave, the claimant was not in unemployment within the meaning of G.L. c. 151A, §§ 29 and 1(r), thus she was ineligible for benefits. We further conclude that, upon her separation, she became eligible for benefits because her separation was not due to a knowing violation of a reasonable and uniformly enforced

policy or 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 in Issue ID # 0075 3836 03 is reversed. We affirm the review examiner's decision in Issue ID # 0074 6090 44. The claimant is denied benefits for the weeks beginning December 19, 2021, and December 26, 2021. The claimant is entitled to receive benefits for the week beginning January 2, 2021, and for subsequent weeks if otherwise eligible.



Paul T. Fitzgerald, Esq.  
Chairman

**BOSTON, MASSACHUSETTS**  
**DATE OF DECISION - May 30, 2023**



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](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.

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