

The claimant met her burden to show that her refusal to get a mandated COVID-19 booster shot was not done in wilful disregard of the employer's interest, but due to mitigating circumstances. Her sincerely held religious objections, which did not come to light until she learned more about the vaccine following a severe reaction to the initial series, rendered her incapable of complying. Held she is eligible for benefits pursuant to G.L. c. 151A, § 25(e)(2).

**Board of Review
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Issue ID: 0077 6717 16

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 was discharged from her position with the employer on July 1, 2022. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on July 21, 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 5, 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, she 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 did not establish that there were mitigating circumstances for her failure to comply with the employer's mandatory requirement to obtain a COVID-19 vaccination booster shot, 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 full-time as a medical secretary II for the employer, a healthcare organization, from July 24, 2017, until July 1, 2022.

2. The claimant's duties included but were not limited to providing patient satisfaction with procedures and guidelines, acting as a role model, and providing general administrative support in a non-clinician role.
3. The claimant earned \$21.00 per hour.
4. The claimant's supervisor was the practice administrator II.
5. On August 2, 2021, the employer instituted a mandatory vaccine policy requiring all employees to be vaccinated against the COVID-19 virus (COVID). The policy allowed employees to apply for an exemption based on medical reasons or religious beliefs.
6. The purpose of the policy was to provide a safe workplace for employees and ensure the safety of patients and their families.
7. The employer discharged employees who did not comply with the policy or receive a medical or religious exemption.
8. The claimant did not request an exemption and received two (2) doses of the original vaccination as required by the policy.
9. The claimant had a poor medical reaction to the second dosage [sic] of the original COVID vaccine to include but not limited to heart palpitations and the return of her menstrual cycle.
10. On January 11, 2022, the employer instituted a written mandatory vaccine policy requiring all employees to be boosted against COVID. The policy was provided to employees by email on multiple occasions. It was also discussed within the department among staff and with the supervisor. The policy also allowed employees to apply for an exemption based on medical reasons or sincerely held religious beliefs. Employees who had already been granted an exemption to the initial COVID policy were exempted from the booster policy automatically without needing to apply for an additional exemption. An initial deadline for compliance with the policy was June 24, 2022.
11. The claimant presented the request for a medical exemption to their doctor. Their doctor did not believe the claimant needed a medical exemption and was unwilling to support the request.
12. The claimant is a lifelong devout Roman Catholic and/or Christian. The claimant does not make a distinction between the Roman Catholic and Christian.
13. The claimant believes God is the only deity and/or entity that provides immunity from illness and that if God wanted someone to become immune to an illness, then their God given immune system would provide protection.

14. The claimant does not agree with the Pope's opinion that Catholics worldwide should be vaccinated against COVID.
15. The claimant submitted a request for a religious exemption on April 21, 2022.
16. The claimant had a follow-up review with a human resources consultant (HR consultant) on April 27, 2022, who recommended the exemption be approved.
17. The claimant's exemption request was denied on May 10, 2022. The Executive Director of HR Talent Operations informed the claimant that the decision was based on careful consideration of the claimant's application for exemption, any submitted supporting document, and the discussions with the HR consultant.
18. On June 24, 2022, the employer extended the compliance deadline to July 1, 2022.
19. The employer provided multiple communication [sic] with all employees informing them they would be terminated if they did not get the vaccine booster. The communications included emails to all staff as well as verbal communications within the department and with the supervisor.
20. The claimant declined to get a COVID booster vaccination even though she knew she would be terminated if she failed to do so.
21. On July 1, 2022, the employer discharged the claimant for failure to either comply with the vaccine booster requirement or obtain a medical or religious exemption.
22. The claimant has complied with all other mandatory vaccination policies imposed by the employer to include but not limited to the annual flu vaccination.

Credibility Assessment:¹

When the employer initially instituted a COVID vaccine policy in 2021, the claimant had the opportunity to apply for either a religious or a medical exemption. The claimant did not apply for either exemption and instead chose to receive a two (2) dose COVID vaccination. The claimant had a poor medical reaction after receiving the second dose of the original vaccination.

After the booster policy was announced, the claimant presented a medical exemption form to their doctor, who was unwilling to support the claimant's need

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

for a medical exemption. The claimant did not submit the exemption form for review.

The claimant applied for a religious exemption from the booster policy. They testified they were a practicing Catholic and in their written exemption request stated they have been practicing for forty-five (45) years. The claimant testified under direct examination they received the original vaccinations because they were compelled to do so by the employer, however they did not apply for a religious exemption during the initial vaccination requirement. The claimant stated that God creates an immune system, and that God would grant the claimant immunity from the virus. Although the claimant's religious leader, the Pope, informed Catholics worldwide they should be vaccinated against COVID, they asserted it was merely the Pope's personal opinion and God would tell them claimant [sic] directly whether or not they should be vaccinated. However, the claimant has received all other mandatory vaccines required by their employer. Not until the employer required a booster did the claimant bring up a religious objection to obtaining a vaccination. Although the claimant asserted they were acting in accordance with their sincerely held religious belief, they have not shown that their belief is sincerely held based on a lack of consistency. . . .

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. Finding of Fact # 13 is incomplete in that it fails to reflect the claimant's full explanation as to her religious beliefs which formed the basis for not complying with the employer's policy. 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 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 this case, the employer discharged the claimant, because she failed to get a COVID-19 booster shot or an approved exemption. *See* Finding of Fact # 21. This was both a policy violation and misconduct in the sense that her refusal to do so violated the employer’s COVID-19 vaccination booster policy. *See* Findings of Fact ## 10 and 20. Moreover, Finding of Fact # 20 makes clear that the claimant’s refusal to comply was a knowing and deliberate act.

However, the employer has not demonstrated 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 was informed that that the employer expected her to get the booster shot in order to keep her job after July 1, 2022. *See* Findings of Fact ## 18–20. We can infer from the record that the employer’s COVID-19 booster policy was implemented for the same reasons as its original COVID-19 vaccine policy, to provide a safe workplace and ensure the safety of patients and their families. *See* Finding of Fact # 6. As a health and safety measure, we believe the policy and the employer’s expectation that employees comply with it to be reasonable. 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 concluded that the claimant did not demonstrate mitigating circumstances. We disagree.

Although the claimant had complied with the employer’s earlier policy by getting the initial series of COVID-19 vaccinations, she sought an exemption from the booster requirement on religious grounds, which the employer denied. Findings of Fact ## 8, 15, and 17. The review examiner concluded that this lack of consistency meant that the religious beliefs behind her refusal to get the booster shot were not sincerely held.

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 the review examiner's assessment is unreasonable in relation to the evidence presented.

Finding of Fact # 13 purports to reflect the religious belief upon which the claimant based her refusal to get the booster shot. To be sure, the claimant did testify that her immune system was created by God and that her immune system naturally fights disease. However, the finding fails to reflect her full explanation for refusing to get the booster shot. During the hearing, she described in detail how she got very sick after the second dose of the Moderna vaccine, including on-going stabbing heart pain. She then did some research and learned that the Moderna and Pfizer vaccines had used aborted fetal cells in the testing phase of the vaccine. She further explained that, due to her religious objection to abortion, she did not want to put anything in her body knowing it was part of an abortion, and that she could tell by how her body responded to the second dose that God did not want her to get the booster.² The religious exemption request that she submitted to the employer on April 21, 2022, echoes her objection to getting the booster shot because of its connection to aborted fetal cells. *See* Exhibit 9.³

As there is nothing in the review examiner's decision which discredits this explanation for not complying with the policy, we assume that the review examiner either ignored or overlooked this aspect of the claimant's religious beliefs. This error renders Finding of Fact # 13 incomplete. It also undermines the review examiner's assessment that the claimant's religious beliefs were inconsistent and not sincerely held.

Given the unique circumstances presented in this appeal, and the claimant's detailed religious basis for not getting the mandated COVID-19 booster shot, we believe that the claimant has met her burden to show that her refusal was not done in wilful disregard of the employer's interest, but due to mitigating circumstances. She may not be disqualified due to deliberate misconduct in wilful disregard of the employer's interest. We further believe that the claimant may not be disqualified for a knowing violation of a reasonable and uniformly enforced policy, because claimant was not capable of complying with the policy for the same reason.

We, therefore, conclude as a matter of law that the employer has not met its burden under G.L. c. 151A, § 25(e)(2).

² While not explicitly incorporated into the review examiner's findings, the claimant's testimony about her religious beliefs and why she refused to get the booster shot 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).

³ Exhibit 9 includes a copy of the claimant's written request for a religious exemption from the employer's booster mandate. It, too, is part of the unchallenged evidence in the record.

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week beginning June 26, 2022, and for subsequent weeks if otherwise eligible.



Paul T. Fitzgerald, Esq.
Chairman

BOSTON, MASSACHUSETTS
DATE OF DECISION - September 29, 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

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