
COMMONWEALTH OF MASSACHUSETTS

Supreme Judicial Court

WORCESTER COUNTY

No. SJC-13440

FALLON COMMUNITY HEALTH PLAN, INC.,
Plaintiff-Appellant,

v.

SHANIKA JEFFERSON AND KATIE DISHNICA, ACTING DIRECTOR, DIVISION OF
UNEMPLOYMENT ASSISTANCE,
Defendants-Appellees

ON APPEAL FROM A JUDGMENT OF THE DISTRICT COURT

**BRIEF OF DEFENDANT KATIE DISHNICA, ACTING
DIRECTOR, DIVISION OF UNEMPLOYMENT ASSISTANCE**

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May 26, 2023

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QUESTIONS PRESENTED

1. Whether co-appellee Shanika Jefferson's refusal to receive a coronavirus vaccination based on her sincerely held religious beliefs constituted deliberate misconduct in disregard of the interest of her employer, plaintiff Fallon Community Health Plan ("Fallon"), so as to disqualify her for unemployment assistance benefits under the first clause of G.L. c. 151A, § 25(e)(2).
2. Whether Fallon's vaccination policy was reasonable, so as to disqualify Ms. Jefferson for unemployment assistance benefits under the second clause of G.L. c. 151A, § 25(e)(2).

STATEMENT OF THE CASE

On November 8, 2021, plaintiff Fallon Community Health Plan, Inc. ("Fallon") discharged the defendant Shanika Jefferson from her job as a home health aide. RA44-45.¹ Ms. Jefferson then applied for unemployment assistance benefits. See RA123-29, 133-37.

After being notified by the Department of Unemployment Assistance that she was disqualified from receiving such benefits, RA130, Ms. Jefferson appealed to a Department review examiner pursuant to G.L. c. 151A, § 39(b). RA131-32. The examiner convened a hearing on March 16, 2022, at which Ms. Jefferson and two representatives of Fallon testified. See RA33-80 (transcript). The examiner then issued a decision concluding that Ms. Jefferson was not disqualified from receiving such benefits under either clause of

¹ Fallon's brief is cited as "(p. [page])", and the one-volume Record Appendix as "RA [page]".

G.L. c. 151A, § 25(e)(2) (which, respectively, disqualify claimants who are discharged for “deliberate misconduct in wil[1]ful disregard of the [employer’s] interest” and those who are discharged for a “knowing violation of a reasonable and uniformly enforced rule or policy of the employer”). RA99-102.

Fallon sought further review by the Department’s Board of Review, RA88-98, but that Board summarily affirmed the examiner’s decision as having been “based on substantial evidence and free from any error of law affecting substantive rights.” RA81-85.

Fallon then petitioned the Worcester District Court for review of the decision pursuant to G.L. c. 151A, § 42. RA4, 6-28. After a non-evidentiary hearing, see RA146-66 (transcript), the District Court (LoConto, J.) denied Fallon’s petition and entered judgment for the Department and Ms. Jefferson on October 7, 2022. RA4, 167-70. Fallon noticed its appeal from that judgment on November 1, 2022, RA4, 171-72. This Court transferred the case sua sponte from Appeals Court on May 22, 2023.

STATEMENT OF THE FACTS

Fallon Employs Ms. Jefferson as a Home Health Aide

Fallon is a “big insurance company” that owns a smaller organization called Summit ElderCare. RA59. Summit ElderCare provides care to frail elders--called program “participants”--in all aspects of their health

and well-being. RA59-60. Such care is provided at a "base location" in Springfield, as well as in other settings such as assisted living facilities and participants' homes. RA77. Beginning in 2017, Ms. Jefferson worked for Fallon as a home health aide at Summit ElderCare, providing such care. RA100.

Fallon Adopts a Coronavirus Vaccination Policy

In October 2021, Fallon received a bulletin from the Commonwealth's Executive Office of Health and Human Services requiring Fallon's employees to become vaccinated against the coronavirus. RA100. In response, Fallon updated its coronavirus vaccination policy ("Vaccination Policy"). RA100.

The updated Vaccination Policy--which appears in both the Record Appendix (RA108-114) and this brief's addendum (Add. 39-45)--required Fallon's employees "who provide direct care or have any physical contact or are in proximity with our participants to provide evidence of vaccination against COVID-19 by November 8, 2021." RA112 (Add. 43). The Vaccination Policy then stated:

Exemptions:

Consistent with other Massachusetts COVID-19 vaccination requirements, an individual will not be required to provide proof of vaccination:

- 1) If the vaccine is medically contraindicated and the individual's job is such that the employer can offer a reasonable accommodation to

avoid risk of contracting or transmitting COVID-19 on the job; or

2) If the individual objects to vaccination based on a sincere religious belief and the individual's job is such that the employer can offer a reasonable accommodation to avoid risk of contracting or transmitting COVID-19 on the job.

RA112-13 (Add. 43-44). The Vaccination Policy also set forth a process for the consideration of exemption requests, which contemplated that:

- The employee would submit a particular form "contain[ing] the necessary detail and documentation to establish an exemption" including, for medical exemption requests, the signature of a physician or nurse practitioner, RA113 (Add. 44) ¶¶ 1-3;
- Fallon's human resources staff would "consult with medical or scientific experts/specialists and may seek additional information/documentation from the health care provider who completed the staff member's exemption request,"² RA113 (Add. 44) ¶ 5;
- "The decision will be made by [Fallon's] Chief Human Resources Officer. This decision will be final with no additional review or appeal option," RA113 (Add. 44) ¶ 6;
- If a medical exemption is granted, Fallon's human resources staff would "engage in an interactive process to determine what, if any, reasonable accommodation is appropriate under the circumstances, considering various factors, including but not limited to the nature of the

² The Vaccination Policy contained no comparable provision for verification of facts submitted in support of a request for religious exemption.

staff member's duties,"³ RA113 (Add. 44) ¶ 7(a); and

- If a medical exemption is denied, the employee would "be required to comply with the mandate or be deemed to have resigned their employment for failure to comply with this condition of employment."⁴ RA113 (Add. 44) ¶ 7(b).

Fallon Denies Ms. Jefferson's Request for a Religious Exemption and Terminates Her

In October 2021, Fallon distributed the updated Vaccination Policy by email to its employees, including Ms. Jefferson.⁵ RA100. Ms. Jefferson

³ The Vaccination Policy contained no comparable provision for the process for determining a reasonable accommodation if a religious exemption is granted.

⁴ The Vaccination Policy contained no comparable language relating to the denial of a religious exemption. The Vaccination Policy did, however, contain the blanket statement that "the vaccination is mandatory. Failure to comply with the requirement will be considered a resignation from employment with Fallon Health." RA113 (Add. 44).

⁵ Fallon's evidence as to the exact timing and sequence of events was muddled. One Fallon witness, Agnieszka Potoczniak, testified that this email was sent to employees on October 7, see RA62, a date that the review examiner credited and cited in her findings of fact. RA100. But it is not clear how that aspect of Ms. Potoczniak's testimony squares with the fact that the Vaccination Policy submitted by Fallon at the hearing, and marked as an exhibit, is dated October 19. See RA108.

Fallon's other witness, Lisa DeWitt, testified that this email was sent to employees on October 27. RA48. But it is not clear how this aspect of Ms. DeWitt's testimony squares with her testimony that: (1) she met with Ms. Jefferson on October 8 to discuss Ms. Jefferson's compliance with the policy; RA49; and (2) Ms. Jefferson submitted a request for a religious exemption on October 19. RA50.

The timing and sequence of these events, however, were not central to the examiner's conclusions.

requested a religious exemption on October 19, and she met with representatives of Fallon's human resources staff to discuss her request on or about October 26. RA101. During that meeting, Ms. Jefferson volunteered to wear full personal protective equipment and to frequently get tested for coronavirus if she were exempted from the vaccination requirement. RA67-68,74,101.

After meeting with other employees who had requested exemptions, Fallon's human resources staff convened on October 29 and November 2 to discuss the requests and possible accommodations. RA65-66. Without "question[ing] the sincerity of anyone's belief," the human resources staff concluded that "we weren't able to make [] accommodation for any of those employees, including [Ms. Jefferson]." RA66-67; see also RA101. Fallon thus denied every request for a religious exemption under the Vaccination Policy.⁶ RA101; see RA51-52,64-65,75.

Ms. Jefferson was notified later on November 2 that her request for a religious exemption had been denied. RA67. She was informed that, unless she

⁶ The record does not reveal whether the intra-HR meetings on October 29 and November 2 addressed employees who had requested medical exemptions in addition to those who had requested religious exemptions. Nor does it reveal whether Fallon also denied every request for a medical exemption under the Vaccination Policy.

obtained vaccination by November 8, she would be terminated. RA67. She did not do so, and was terminated effective November 8. RA101, 68-69.

The Department's Review Examiner and Board of Review Both Deem Ms. Jefferson Qualified for Unemployment Benefits

Ms. Jefferson requested unemployment benefits, RA 123-29, but the Department initially deemed her disqualified under both G.L. c. 151A, § 25(e)(2)'s first clause (i.e., discharged for "deliberate misconduct in wil[l]ful disregard of the [employer's] interest") and its second clause (i.e., discharged for "knowing violation of a reasonable and uniformly enforced rule or policy of the employer"). RA130.

Ms. Jefferson then appealed to a Department review examiner. RA131-32. The examiner concluded that Ms. Jefferson was not disqualified under either clause of § 25(e)(2). RA99-102. Specifically, as to the first clause, the examiner concluded that Ms. Jefferson "was not getting vaccinated for sincerely held religious beliefs and this was not deliberate misconduct or willful disregard of [Fallon's] interest." RA102. As to the second clause, the examiner concluded that Ms. Jefferson had "complied with [the Vaccination Policy] by submitting a timely request for the religious exemption." RA102.

On Fallon's application for further review, the Department's Board of Review summarily affirmed the

examiner's decision as having been "based on substantial evidence and . . . free from any error of law affecting substantive rights." RA82.

The District Court Deems Ms. Jefferson Qualified for Unemployment Benefits

Fallon filed a petition in the Worcester District Court for review of the decision. RA6-28. The district court concluded that, because the Vaccination Policy had been applied in a way that "obliterated" the religious exemption and "could not have resulted in an exemption," the Vaccination Policy "was not reasonable on [its] face and in the manner in which it was implemented." RA169. The district court also concluded that Ms. Jefferson's act of refusing vaccination based on sincerely held religious beliefs "was not deliberate misconduct or willful disregard of [Fallon's] interest." RA169.

ARGUMENT

A person is disqualified from receiving unemployment benefits if she has been discharged from her job either due to "deliberate misconduct in wil[l]ful disregard of the [employer's] interest" or due to a "knowing violation of a reasonable and uniformly enforced rule or policy of the employer." G.L. c. 151A, § 25(e) (2).

These two disqualification provisions, like other aspects of the Chapter 151A, are "construed liberally

in aid of its purpose, which purpose is to lighten the burden which now falls on the unemployed worker and his family." G.L. c. 151A, § 74. The employer bears the burden to show that the grounds for disqualification set forth in § 25(e)(2) apply. Cantres v. Dir. of Div. of Emp. Sec., 396 Mass. 226, 229-33 (1985) (first clause); Still v Comm'r of Dep't of Emp. and Training, 39 Mass. App. Ct. 502, 508-09 (1995) (second clause) ("Still I"), aff'd by 423 Mass. 805 (1996) ("Still II").

The Department's decision concerning an individual's qualification for unemployment benefits is reviewed pursuant to the standards of G.L. c. 30A, § 14. See G.L. c. 151A, § 42 (incorporating those standards). As such, this Court must give "due weight to the [Department's] experience, technical competence, and specialized knowledge," and the Court is "highly deferential to the agency." Lincoln Pharm. v. Comm'r of Div. of Unemp. Assistance, 74 Mass. App. Ct. 428, 431 (2009). "A decision by the [Department] will be reversed only if it is based upon an error of law or is unsupported by substantial evidence." City of Boston v. Deputy Dir. of Div. of Emp. and Training, 59 Mass. App. Ct. 225, 228 (2003).

Here, contrary to Fallon's argument, Ms. Jefferson did not commit deliberate misconduct in disregard of Fallon's interest, and thus she was not

disqualified under the first clause of § 25(e)(2).
See pp. 15-19 below. Moreover, Fallon's Vaccination Policy was not reasonable, and thus Ms. Jefferson was not disqualified under the second clause of § 25(e)(2). See pp. 19-27 below.

I. Ms. Jefferson Did Not Commit Deliberate Misconduct in Disregard of Fallon's Interest.

Under the first clause of § 25(e)(2), a person is disqualified from receiving unemployment benefits if she has been discharged due to "deliberate misconduct in wil[l]ful disregard of the [employer's] interest." "Deliberate misconduct" and "willful disregard" are distinct criteria, both of which must be present to warrant disqualification. Jean v. Dir. of Div. of Emp. Sec., 391 Mass. 206, 208-09 (1984).

Deliberate misconduct connotes "purposeful and wrongful action or inaction on the part of the employee." Still I, 39 Mass. App. Ct. at 512-13. It is not present where "a worker is ill-equipped for his job or has a good faith lapse in judgment or attention"; in that circumstance, a discharge "is not the worker's intentional fault, and there is no basis under § 25(e)(2) for denying benefits." Garfield v. Dir. of Div. of Emp. Sec., 377 Mass. 94, 97 (1979).

Willful disregard, for its part, focuses on "the employee's state of mind at the time of the misconduct," and takes account of "the worker's

knowledge of the employer's expectation, the reasonableness of that expectation, and any mitigating factors." Shepherd v. Dir. of Div. of Emp. Sec., 399 Mass. 737, 739 (1987). Mitigating factors standing alone, however, will not excuse conduct that otherwise amounts to willful disregard of the employer's interest.⁷ Gupta v. Deputy Dir. of Div. of Emp. and Training, 62 Mass. App. Ct. 579, 587-88 (2004), citing Still II, 423 Mass. at 815.

Here, the examiner concluded that, even though Fallon reasonably expected its employees to receive the coronavirus vaccine, Ms. Jefferson's refusal to do so was grounded in "sincerely held religious beliefs and this was not deliberate misconduct or willful

⁷ Fallon asserts (p. 25 n. 5) that "both [clauses] of Section 25(e)(2) turn on the same factors." But, although the clauses' respective state of mind elements have been analyzed using the same factors, see Allen of Mich., Inc. v. Deputy Dir. of Div. of Emp. and Training, 64 Mass. App. Ct. 370, 380 (2005), this assertion ignores the statutory requirements: (1) that, as to the first clause, Ms. Jefferson engaged in misconduct; and (2) that, as to the second clause, the Vaccination Policy was reasonable. It was Fallon's burden to prove both of those requirements, in addition to Ms. Jefferson's state of mind.

Indeed, Fallon throughout its brief places great emphasis on Still II, Allen of Michigan, and Shriver Nursing Services, Inc. v. Commissioner of Division of Unemployment Assistance, 82 Mass. App. Ct. 367 (2012). But each of those decisions was chiefly concerned with § 25(e)(2)'s state of mind element. As such, they have little bearing on the real issues in this appeal, namely: (1) whether Ms. Jefferson's actions constituted misconduct in the first instance; and (2) whether the Vaccination Policy was reasonable.

disregard of the employer's interest." RA102. The evidence established that Fallon did not question the sincerity of Ms. Jefferson's beliefs. RA66-67. And the examiner noted Ms. Jefferson's good faith, in the form of her offer to wear masks, goggles, and other personal protective equipment, and also to frequently be tested for coronavirus. RA102. On these facts, the examiner did not err in viewing Ms. Jefferson's principled refusal of the vaccine as not "purposeful and wrongful," and thus not "deliberate misconduct." Indeed, the leading decisions finding deliberate misconduct feature conduct that was plainly wrongful in a way that Ms. Jefferson's conduct was not.⁸

⁸ See, e.g., City of Boston, 59 Mass. App. Ct. at 228-29 (police officer used drugs while on unpaid suspension for previously having used drugs); So. Central Rehab. Resources, Inc. v. Comm'r of Div. of Emp. and Training, 55 Mass. App. Ct. 180, 185 (2002) (residential supervisor withheld personal property from disabled resident, after having been specifically told to not do so); Grise v. Dir. of Div. of Emp. Sec., 393 Mass. 271, 274-75 (1984) (cook left work to avoid working with a supervisor with whom he did not get along); Hoye v. Dir. of Div. of Emp. Sec., 394 Mass. 411, 414-16 (1985) (hospital security officer failed to report to work despite numerous prior absences and warnings about potential consequences of further unexcused absences); Jorgensen v. Dir. of Div. of Emp. Sec., 394 Mass. 800, 804-05 (1985) (payroll supervisor organized scheme to falsify employee time sheets and payroll records in attempt to mitigate impending budget cut); Wardell v. Dir. of Div. of Emp. Sec., 397 Mass. 433, 437-38 (1986) (professor admitted to sufficient facts to support criminal charge of indecent assault and battery on a child).

The examiner's conclusion that Ms. Jefferson did not engage in deliberate misconduct is especially apt in view of the Legislature's purpose "to provide compensation for those who are thrown out of work through no fault of their own." Still I, 39 Mass. App. Ct. at 507. Ms. Jefferson did not lose her job through her own fault, but rather as a result of an unforeseeable pandemic that brought her sincerely held religious beliefs into conflict with her employer's reasonable expectations. Although those circumstances may have justified Ms. Jefferson's termination, it does not mean that she was disqualified for unemployment benefits. Smith v. Dir. of Div. of Emp. Security, 376 Mass. 563, 566-67 (1978) ("[W]hile the violation of a work rule may well justify the discharge of an employee, such a violation does not necessarily amount to misconduct for unemployment compensation purposes.").

Fallon argues (pp. 18, 31-34) that the examiner in effect "found that [Ms.] Jefferson's religious beliefs were a mitigating circumstance that excused her misconduct." But this mischaracterizes the examiner's reasoning; indeed, Fallon acknowledges in the same breath (p. 31) that the examiner "did not expressly find any mitigating circumstances." Rather than view Ms. Jefferson's religious beliefs as evidence of mitigation of her willful disregard of

Fallon's interest, the examiner instead viewed them as evidence of a lack of wrongfulness in Ms. Jefferson's refusal of the vaccine. For this reason, both Fallon's argument (p. 32) that mitigating circumstances alone cannot excuse an employee's behavior, and its argument (pp. 33-34) that an interoffice memorandum of the Department fails to characterize religious beliefs as potential mitigation, are misplaced.⁹

II. Fallon's Vaccination Policy Was Not Reasonable.

A person is disqualified from receiving unemployment benefits if she has been discharged due to a "knowing violation of a reasonable and uniformly enforced rule or policy of the employer." G.L. c. 151A, § 25(e)(2). The review examiner concluded that Ms. Jefferson had complied with the Vaccination Policy by requesting a religious exemption, but this Court can and should affirm despite this harmless error. See pp. 20-21 below. Specifically, as the district court concluded, the Vaccination Policy is not reasonable. See pp. 21-27 below.

⁹ Similarly wide of the mark is Fallon's argument (p. 32) that mitigation is limited to "facts that may offer support for a conclusion that the employee's act was essentially spontaneous and unplanned." Even if mitigation were an issue in this appeal (it is not), mitigation may take a wide variety of forms.

A. This Court Can and Should Affirm Despite the Examiner's Harmless Error.

The examiner concluded that Ms. Jefferson had complied with the Vaccination Policy "by submitting a timely request for the religious exemption." RA102. But the Vaccination Policy makes plain that mere submission of a request for exemption was not enough to achieve compliance. RA112-13 (Add. 43-44).

This circumstance, however, does not require this Court to remand the case. This is because Chapter 30A permits an agency decision to be set aside or modified only if "the substantial rights of any party may have been prejudiced" by the agency's decision. G.L. c. 30A, § 14(7). This "harmless error" principle is frequently used to sustain an agency decision where the grounds given by the agency are not viable, but the record nonetheless makes clear that the agency reached the right conclusion. See, e.g., Doe No. 22188 v. Sex Offender Registry Bd., 101 Mass. App. Ct. 797, 801-04 (2022) (court will affirm if facts of the case "clearly dictate" result reached by agency); Police Dep't of Boston v. Kavaleski, 463 Mass. 680, 691-92 (2012) (court will affirm agency decision, despite agency's reliance on improper evidence, if "there was other substantial and reliable evidence in the record . . . to support the [agency's] decision"); Catlin v. Bd. of Reg. of Architects, 414 Mass. 1, 6-7 (1992) (court will affirm agency decision, despite

agency's failure to consider evidence, if that evidence "does not contain any information which might have produced a different result"); United Food Corp. v. Alcoholic Beverages Control Comm'n, 375 Mass. 238, 245 (1978) (affirming agency decision, despite agency's reliance in part on statute that was later held unconstitutional, where "there is no real doubt that the [agency] upon a remand would again order revocation, and accordingly that remand would be merely a waste of time") (Kaplan, J.).

B. The District Court Correctly Concluded that Fallon's Vaccination Policy Is Not Reasonable.

The district court found that the Vaccination Policy was not reasonable because it was implemented in a way that "obliterated" the religious exemption such that "the sincerely held religious belief of the claimant could not have resulted in an exemption."¹⁰ RA169. This conclusion was amply supported by the evidence and the law. Specifically, the evidence demonstrated--and the review examiner found--that

¹⁰ The district court did not focus on the Vaccination Policy's omission of religious exemptions at several key steps, omissions that might be seen to raise a question whether Fallon ever harbored any openness to granting religious exemptions. E.g., RA113 (Add. 44) ¶ 7(a) (discussing how reasonable accommodation will be determined if medical exemption is granted; omitting any comparable discussion of how reasonable accommodation will be determined if religious exemption is granted).

Fallon denied every request for a religious exemption under the Vaccination Policy. RA101; see RA51-52, 64-65, 75. Such an application of the Vaccination Policy rendered the religious exemption wholly illusory. The district court did not misapply the law in deeming the Vaccination Policy not reasonable on this ground.

Fallon argues (pp. 34-35) that, in doing so, the district court engaged in "rogue" factfinding that contradicted a finding by the review examiner. But this argument is doubly misguided. First, the district court's conclusion that the Vaccination Policy is not reasonable does not represent a finding of fact, but rather an application of law to fact--a function that is well within the province of a reviewing court.¹¹ Second, the examiner's allegedly

¹¹ Fallon may reply by invoking the principle, occasionally stated by this Court and the SJC, that a reviewing court "will not supply a reasoned basis for the agency's decision that the agency itself has not given." E.g., Costello v. Dep't of Public Util., 391 Mass. 527, 535-36 (1984). But that principle coexists with the robust "harmless error" principle of Chapter 30A review discussed at pages 20-21 above. It is also best-suited to, and most likely to be applied in, cases of great technical complexity. See, e.g., ENGIE Gas & LNG LLC v. Dep't of Pub. Util., 475 Mass. 191, 198 n.15 (2016); NSTAR Elec. Co. v. Dep't of Pub. Util., 462 Mass. 381, 387 (2012); Costello, 391 Mass. at 535-36. Where, as here, a review examiner committed harmless error in the course of reaching a correct conclusion on an clear-cut issue of eligibility for unemployment benefits, remand to the Department is unnecessary, and contrary to values of efficiency and judicial economy.

contradictory finding, to which Fallon alludes, is that “[Fallon] had an expectation that its employees get vaccinated against the COVID-19 virus and this expectation was reasonable.” RA102. But the fact that Fallon’s expectation was reasonable does not necessarily mean that the Vaccination Policy Fallon adopted to promote that expectation--let alone the way Fallon applied that policy--was likewise reasonable.

Fallon also argues (pp. 36-40) that the district court “essentially posits that Fallon violated the antidiscrimination provisions of Title VII of the Civil Rights Act of 1964 and Chapter 151B of the Massachusetts General Laws by not granting any patient-facing employee’s request for a religious exemption from [the Vaccination Policy].” But “[t]he issue [in a case concerning disqualification under § 25(e)(2)] is not . . . whether [the employee] was discriminated against. It is whether the Legislature intended that certain unemployment benefits should be denied in the circumstances of [the] case[.]” Goodridge v. Dir. of Div. of Emp. Security, 375 Mass. 434, 436 (1978). Here, in assessing the Vaccination Policy’s reasonableness within the meaning of § 25(e)(2), the district court did not implicitly or

explicitly analyze Fallon's compliance with any other provision of law, nor was it required to do so.¹²

Fallon next argues (pp. 40-44) that the district court erred by rejecting the notion that "the nature of [Ms.] Jefferson's job, which required her to provide care and assistance to medically vulnerable individuals in person, made [the Vaccination Policy] reasonable." But this argument again elides the real issue. There is no dispute that the nature of a job can, in the abstract, inform the reasonableness of an employer's policy; nothing in the district court's analysis suggests otherwise. And it may well be that a hypothetical alternative vaccine mandate policy, making no provision for any religious exemption, would have been reasonable in view of the nature of Ms. Jefferson's job. But the district court properly focused on the actual Vaccination Policy as it was actually applied by Fallon. That Vaccination Policy did make provision for a religious exemption, a provision that Fallon rendered illusory in practice.

Finally, Fallon argues (pp. 35-36) that the district court erred by improperly "rewriting"

¹² The two federal cases cited by Fallon (pp. 39-40) not only did not consider G.L. c. 151A, § 25(e)(2) in any way; they also involved vaccine mandates that made no provision for any religious exemption. As such, those cases are inapposite to Fallon's Vaccination Policy.

Departmental standards. Fallon invokes an internal Department memorandum that includes the passage:

When a claimant has been discharged for failure to obtain the required vaccination(s), the fact finding must follow the standard questioning and fact pattern of 25(e)(2).

- Was there a rule?
 . . .
- Was the rule reasonable?
 . . .
- Was the rule reasonably applied?

If all the above have been answered 'yes', the claimant will be ineligible for benefits.

Otherwise, additional fact finding is needed.

The claimant will be ineligible for benefits unless the facts establish that the claimant's refusal of vaccination was due to . . . a sincerely held religious belief, and no opportunity to request or apply for reasonable accommodation was offered by the employer.

If an employer's vaccine policy permitted such requests and a claimant's request for an exemption or accommodation was denied, Adjudicators should not 'second guess' the employer's decision. Specifically . . . where an employer--through a review of documentation or an interview, or some other reasonable process--has found that an employee's professed religious belief either is not sincerely held or does not prevent the employee from being vaccinated, an Adjudicator should not attempt to overturn that decision through paper fact finding.

Fallon cherry-picks (p. 36) the memorandum's admonition that an examiner is not to second guess an employer's denial of an exemption or accommodation.

At the threshold, Fallon misunderstands the office of this memorandum. It is directed to Department "adjudicators"--those who make an initial determination regarding a claimant's eligibility, pursuant to G.L. c. 151A, § 39(a), based on basic questionnaire responses submitted by the claimant and the former employer. A review examiner, in contrast, is required by statute to be "impartial" of the Department, and thus empowered to take a different view of the facts and the law than the Department. See G.L. c. 151A, § 39(b). The Board of Review is similarly "not bound by any previous finding of the director or [the review examiner]." Pizura v. Dir. of Div. of Emp. Sec., 331 Mass. 286, 292, 118 N.E.2d 771, 774 (1954). As such, this memorandum has no bearing on their authority.

Moreover, even if the memorandum did have some bearing in this case, nothing in the memorandum relieves an employer of the need to show that its policy is both reasonable and reasonably applied. Indeed, read as a whole, the memorandum clearly assumes the availability of a genuine religious exemption process, in which the employer makes an individualized choice whether to grant such exemption. A situation like Fallon's, in which the only available religious exemption process is illusory, better comports with the memorandum's description of an

employer that offers "no opportunity to request or apply for reasonable accommodation."

CONCLUSION

For all of the foregoing reasons, this Court should affirm the judgment of the district court.

Respectfully submitted,

KATIE DISHNICA, ACTING DIRECTOR,
DIVISION OF UNEMPLOYMENT
ASSISTANCE,

By her attorneys:

ANDREA JOY CAMPBELL
Attorney General

May 26, 2023

/s/ Eric A .Haskell
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Assistant Attorney General
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CERTIFICATES

Pursuant to Mass. R. App. P. 16(k), I certify that this brief complies with the rules of court that pertain to the filing of briefs. Specifically, I certify that this brief complies with the length limit of Mass. R. App. P. 20(a)(2)(A) by using 12-point "Courier New" font (i.e., 10 cpi) and comprising 22 pages excepting those portions excluded by Mass. R. App. P. 20(a)(2)(D).

I further certify, in accordance with Mass. R. App. P. 13(e), that this brief will be served on counsel of record for the plaintiff by this Court's e-filing system and at fdeluca@ebglaw.com and amaziarz@ebglaw.com; and will also be served on co-appellee Shanika Jefferson by U.S. Mail at 43 Chilson Street, Springfield, Mass. 01118-2125.

May 26, 2023

/s/ Eric A. Haskell

Eric A. Haskell
Assistant Attorney General

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G.L. c. 151A, § 25 (excerpt)

No waiting period shall be allowed and no benefits shall be paid to an individual under this chapter for:

(e) For the period of unemployment next ensuing and until the individual has had at least eight weeks of work and has earned an amount equivalent to or in excess of 8 times the individual's weekly benefit amount 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

COMMONWEALTH OF MASSACHUSETTS

WORCESTER, SS.

DISTRICT COURT DEPARTMENT
WORCESTER DIVISION
CIVIL DOCKET NO. 2262CV0731

FALLON COMMUNITY HEALTH
PLAN, INC.,

Petitioner

v.

SHANIKA JEFFERSON and
CONNIE C. CARTER,
INTEREM DIRECTOR,
DEPARTMENT OF UNEMPLOYMENT ASSISTANCE

Respondent

MEMORANDUM OF DECISION

This matter came before the court on September 21, 2022, on the petition of Fallon Community Health Plan, Inc. (“Fallon”) for judicial review of the decision of the Board of Review affirming the decision of the Department of Unemployment Assistance review examiner’s allowance of Shanika Jefferson’s (“claimant”) claim for unemployment insurance benefits. After review of the record and the arguments of counsel, the court affirms the decision of the Board of Review and makes the following findings and rulings. The salient facts are not in dispute, and the court adopts the findings of fact made by the review examiner dated March 26, 2022, following a telephonic hearing held on March 16, 2022. The review examiner found that Fallon had not met its burden of proof in accordance with G.L. c.151A § 25 (e)(2), that is, that “the employer must establish by substantial and credible evidence that it discharged the claimant due to deliberate misconduct and willful disregard of its interest or due to a knowing violation of a reasonable and uniformly enforced policy or rule, provided that such violation is not the result of the employees incompetence.” The review examiner found that Fallon’s expectation that its employees get vaccinated against the Covid-19 virus was reasonable. Fallon acknowledged that its client population is frail and elderly, and notwithstanding the claimant’s willingness to get tested and wear a mask and goggles, it determined that no accommodation could be provided to the claimant. As a result, the review examiner

found that the claimant is entitled to receive benefits in accordance with section 25 (e)(2) of the law. After the review of the recorded testimony and evidence from the hearing, the review examiner's decision and the employer's appeal, the Board of Review concluded that the review examiner's decision was based on substantial evidence and free from any error of law affecting substantive rights.

The court's review of the Board's decision incorporates the standard of review applicable to agency decisions pursuant to G.L. c. 30A, § 14(7). The court may affirm the Board's decision, remand the matter to the Board, or set aside or modify the decision if it determines that the "substantial rights of any party have been prejudiced" by the Board decision which is: in violation of constitutional provisions; in excess of statutory authority or jurisdiction of the Board; based upon an error of law; made upon unlawful procedure; unsupported by substantial evidence; unwarranted by facts found by the court on the record (where the court has allowed additional evidence under, G.L. c. 30A, § 14(6)); or arbitrary or capricious, an abuse of discretion, or otherwise not in accordance with the law. G.L. c. 151A, § 42. The court's review is confined to the administrative record, and the burden is on the plaintiff "to demonstrate its invalidity." The court is required to "give due weight to the experience, technical competence, and specialized knowledge of the agency, as well as the discretionary authority conferred upon it." Lincoln Pharmacy of Milford, Inc. v. Commissioner of the Division of Unemployment Assistance, 74 Mass. App. Ct. 428, 431 (2009). "The agency's decision may only be set aside if the court determines that the decision is unsupported by substantial evidence or is arbitrary or capricious, an abuse of discretion, or not in accordance with law." G.L. c. 30A, § 14(7). "To satisfy the substantial evidence requirement, the agency's conclusion need not be based upon the clear weight of the evidence or even a preponderance of the evidence, but only upon reasonable evidence, that is, such evidence as a reasonable mind might accept as adequate to support a conclusion." Gupta v. Deputy Director of the Division of Employment & Training, 62 Mass. App. Ct. 579, 582 (2004). The review by this court is not a de novo determination of the facts and the court must "defer to the agency's interpretation and application of the statute within which it operates." Tri-County Youth Programs, Inc. v. Acting Deputy Director of the Division of Employment and Training, 54 Mass. App. Ct. 405, 408 (2002).

The review examiner found that the evidence presented at the hearing was insufficient to show that the claimant was discharged for a knowing violation of a reasonable and uniformly enforced policy or rule, in that the claimant complied with the policy by submitting a timely request for the religious exemption. Additionally, the review examiner found that Fallon failed to establish by substantial and credible evidence that the claimant was discharged due to deliberate misconduct and willful disregard of its interests. Fallon argued that the board impermissibly second-guessed its business judgment and that this is contrary to its role. It cites a DUA interoffice memorandum addressing employees' eligibility for unemployment benefits where they refused to receive a Covid 19 vaccine as stated:

The claimant will be ineligible for benefits unless the facts established by the claimant's refusal of vaccination was due to a substantiated medical condition that prevented vaccination or a sincerely held religious belief, and no opportunity to request or apply for reasonable accommodation was offered by the employer. If an employer's vaccine policy permitted such requests and a claimant's request for an exemption or a combination was denied, adjudicators should not second guess the employer's decision. DUA, Interoffice Memorandum, UIPP2021.10.

Here, there was no second guessing by the review examiner. The sincerity of the claimant's religiously held beliefs and the documentation in support was never in question. For the prohibition of benefits to apply under 25 (e)(2), the policy has to be both knowing and reasonable, facially and as implemented. As argued by the Department, the policy "obliterated" the religious exemption. No Fallon employee was granted a similar exemption request. In this case the sincerely held religious belief of the claimant could not have resulted in an exemption. The claimant was not getting vaccinated for sincerely held religious beliefs, an act that was not deliberate misconduct or willful disregard of the employer's interest. The policy was not reasonable on his face and in the manner in which it was implemented. The court affirms the decision of the Board of Review.

October 5, 2022



Paul F. LoConto, Justice

JUDGMENT FOR DEFENDANT(S)	DOCKET NUMBER 2262CV000731	Trial Court of Massachusetts District Court Department Civil Session 
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Fallon Community Health Plan, Inc. v. Shanika Jefferson

PLAINTIFF(S) WHO ARE PARTIES TO THIS JUDGMENT Fallon Community Health Plan, Inc.	COURT NAME & ADDRESS Worcester District Court 225 Main Street Worcester, MA 01608
---	--

DEFENDANT(S) WHO ARE PARTIES TO THIS JUDGMENT Shanika Jefferson Connie Carter In his/her official capacity as Interim Director, Division of Unemployment Assistance	
---	--

ATTORNEY (OR PRO SE PARTY) TO WHOM THIS COPY OF JUDGMENT IS ISSUED Francesco A DeLuca, Esq. Epstein Becker and Green, P.C. 125 High St Suite 2114 Boston, MA 02110	NEXT COURT EVENT (IF ANY) No Future Event Scheduled
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JUDGMENT FOR DEFENDANT(S)

On the above action, after trial by a judge, IT IS ORDERED AND ADJUDGED by the Court (Hon. Paul F LoConto) that the decision of the defendant agency or official is **AFFIRMED**.

Memorandum of Decision

NOTICE OF ENTRY OF JUDGMENT

Pursuant to Mass. R. Civ. P. 54, 58, 77(d) and 79(a), this Judgment has been entered on the docket on the "Date Judgment Entered" shown below, and this notice is being sent to all parties.

DATE JUDGMENT ENTERED 10/07/2022	CLERK-MAGISTRATE/ASST. CLERK X 
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Board of Review
19 Staniford St., 4th Floor
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

Claimant ID: 568906
Issue ID: 0073 9348 82

BOARD OF REVIEW DECISION

The employer appeals a decision by the Review Examiner of the Department of Unemployment Assistance (DUA) to the Board of Review, in accordance with G.L. c. 151A, § 40.

After considering the recorded testimony and evidence from the hearing, the review examiner's decision, and the employer's appeal, we conclude that the review examiner's decision is based on substantial evidence and is free from any error of law affecting substantive rights.

The review examiner's decision is affirmed. **Any further appeal would be to a Massachusetts State District Court*** (see Section 42 of Chapter 151A of the General Laws, attached).

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.



Paul T. Fitzgerald, Esq.
Chairman



Charlene A. Stawicki, Esq.
Member



Michael J. Albano
Member

Hearings Department
West/Central Regional Office
88 Industry Avenue, Suite A
Springfield, MA 01104
Phone: 413-452-4700
Fax: 413-784-1309
TDD: 711

DECISION

ISSUE ID: 0073 9348 82-02

I. STATUTORY PROVISION(S) AND ISSUE(S) OF LAW:

MGL Chapter 151A, §§25(e)(1) & (e)(2) - Whether there is substantial and credible evidence to show that the claimant left work voluntarily with good cause attributable to the employer or its agent, or involuntarily for urgent, compelling and necessitous reasons, or by discharge for deliberate misconduct in willful disregard of the employing unit's interest, or for a knowing violation of a reasonable and uniformly enforced policy or rule, unless the violation was the result of the employee's incompetence.

II. FINDINGS OF FACT:

1. The claimant worked full time as a home health aide for the employer, an elder care agency, from 9/18/2017 to 11/8/2021.
2. The claimant worked on-site in-person at an adult day program, in an assisted living facility or in individual residences providing care and assistance to elderly individuals who required long-term care.
3. Sometime in October 2021, the employer received the Massachusetts Health Managed Care Entity Bulletin 69 from the Massachusetts Office of Health and Human Services that required them to have their workers be vaccinated against the COVID-19 virus.
4. The employer updated their COVID-19 policy and forwarded it out to their workers by email on 10/7/2021.
5. The employer's Pandemic COVID-19 Workforce Response policy states, "(the employer) will require its employees at the employer's elder care sites who provide direct care or have any physical contact or are in proximity with our participants to provide evidence of vaccination against COVID-19 by November 8, 2021." The policy goes on to state, "Consistent with other Massachusetts COVID-19 vaccination requirements, an individual will not be required to provide proof of vaccination: 1) If the vaccine is medically contraindicated and the individual's job is such that the employer can offer a reasonable accommodation to avoid risk of contracting or transmitting COVID-19 on the job; or 2) If the individual objects to vaccination based on a sincere religious belief and the individual's job is

such that the employer can offer a reasonable accommodation to avoid risk of contracting or transmitting COVID-19 on the job.” The policy further states that, “The vaccine requirement is considered a condition of employment for staff members that provide direct care or have any physical contact or are in close physical proximity with (the employer’s) participants; therefore, the vaccination is mandatory. Failure to comply with the requirement will be considered a resignation from employment with (the employer).”

6. The purpose of the employer’s policy is to keep the patients and staff safe and to protect against the spread of the COVID-19 virus among their frail, elderly population.
7. The claimant applied for a religious exemption to the employer’s Pandemic COVID-19 Workforce Response policy on or about 10/19/2021.
8. The claimant met with the human resources business partner (“P”) and a vice president on or about 10/26/2021 to discuss the religious exemption and the claimant’s request for an exemption.
9. On or about 10/29/2021 the employer reviewed all of the requests for exemption from the Pandemic COVID-19 Workforce Response policy. The employer reviewed whether they could offer possible accommodations to its employees while maintaining a safe environment for the patients.
10. The claimant was willing to wear full personal protective equipment (PPE) and get frequently tested to accommodate the employer.
11. Due to the nature of the claimant’s job, there was no accommodation the employer could provide in lieu of the COVID-19 vaccine.
12. The employer would not accept testing and mask wearing as an accommodation to its employees due to the very frail patient population. Due to the patients’ co-morbidities and their advanced age, they are at an extreme risk.
13. No employees who worked for the employer were granted a religious exemption to the Pandemic COVID-19 Workforce Response policy.
14. On or about 11/8/2021, the claimant was discharged from her employment with the employer for failing to get vaccinated in violation of the Pandemic COVID-19 Workforce Response policy.

III. CONCLUSIONS & REASONING:

The claimant attended the telephone hearing held on 3/16/2022. The senior site director and the senior human resources business partner attended the hearing on behalf of the employer. A representative was present at the hearing on behalf of the employer.

The claimant was discharged from her employment and therefore Section 25(c)(2) of the law applies to this case.

In accordance with Section 25(e)(2) of the law, the employer must establish by substantial and credible evidence that it discharged the claimant due to deliberate misconduct in willful disregard of its interest or due to a knowing violation of a reasonable and uniformly enforced policy or rule, provided that such violation is not the result of the employee's incompetence.

In this case, the employer has not met its burden of proof.

The testimony and evidence presented was insufficient to show that the claimant was discharged from employment for a knowing violation of a reasonable and uniformly enforced policy or rule. The employer's vaccination policy provided a religious exemption to getting the COVID-19 vaccination. The claimant complied with the policy by submitting a timely request for the religious exemption. The claimant did not commit a knowing violation of the policy.

Likewise, the employer failed to establish by substantial and credible evidence that the claimant was discharged due to deliberate misconduct in willful disregard of its interest. The employer had an expectation that its employees get vaccinated against the COVID-19 virus and this expectation was reasonable. The employer provides care for a population that is vulnerable and at-risk. The claimant was not getting vaccinated for sincerely held religious beliefs and this was not deliberate misconduct or willful disregard of the employer's interest. The claimant was willing to get tested, wear masks, wear goggles or any other gear required by the employer. The employer's witnesses credibly testified that the employer's client population is frail and elderly and that there were no accommodations that the employer could provide to the claimant.

Accordingly, the claimant is not subject to disqualification and is entitled to benefits under Section 25(e)(2) of the law.

IV. DECISION:

The determination is reversed.

The claimant is entitled to receive benefits in accordance with Section 25(e)(2) of the law for the week beginning 11/7/2021 and subsequent, if otherwise eligible.

HEARINGS DEPARTMENT

BY: M. Shufro

REVIEW EXAMINER

NOTE: DUA changed its debit card provider in 2022. If your payment method is set to Debit Card, please go to your UI Online account to review or update your payment method. Visit www.mass.gov/dua for more information.



**HUMAN RESOURCES
TIME AWAY FROM WORK**

**PANDEMIC COVID-19 WORKFORCE
RESPONSE**

Policy #: 203.12	Original date: 4/15/20 Revision date(s): 4/15/20, 1/1/21, 7/1/21; 9/10/21; 10/19/21 Review date(s): 6/1/20, 7/15/21
Approvals	
DocuSigned by: Signature Policy Owner: <u>Jill Green Lebow</u> Date: <u>10/19/2021</u> Policy Owner Printed Name: <u>Jill Lebow, SVP & CHRO</u>	
DocuSigned by: Signature Senior Leader: <u>R Burke</u> Date: <u>10/19/2021</u> Senior Leader Printed Name: <u>Richard Burke, President & CEO</u>	

I. PURPOSE

Fallon Health ("FH") is committed to providing a safe and healthy environment for its employees. This policy has been created in response to the Coronavirus (COVID-19) outbreak and addresses how FH will ensure the health, safety, and welfare of our patients and staff, as well as the continuity of operations. The guidance in this policy may change as additional information about the severity and duration of the Coronavirus (COVID-19) situation becomes known.

II. SCOPE

This policy applies to all employees of Fallon Community Health Plan, Inc. (d/b/a "Fallon Health") and any other persons whose conduct, in the performance of work for Fallon Health, is under the direct control of Fallon Health.

Throughout this Policy, unless otherwise indicated, Fallon Health includes all Fallon Community Health Plan, Inc. subsidiary and affiliated organizations and any operating divisions, product or service lines of Fallon Health, such as Summit ElderCare. Examples of Fallon Health subsidiary or affiliated organizations include Fallon Health and Life Assurance Company, Inc. ("FHLAC"), Fallon Total Care, Inc. ("FTC"), Ultra Benefits, Inc., FCHP New York, LLC and Fallon Health Weinberg, Inc. ("FHW").

III. RESPONSIBILITY

The Chief Human Resources Officer (CHRO) is the owner of this policy. As such, it is the CHRO's, or their designee's, responsibility to provide guidance and oversight on the implementation of this

EX 2

policy. Additionally, it is the CHRO's, or their designee's, responsibility to monitor compliance with this policy.

IV. DEFINITIONS

N/A

V. DESCRIPTION

SECTION A: PANDEMIC - General

Pandemic Planning Team

Fallon Health's Pandemic COVID-19 Planning Team consists of representatives from several departments throughout the organization. Using Centers for Disease Controls (CDC) and Prevention guidelines, the team is responsible for monitoring conditions for the purposes of: (a) reducing transmission among staff; (b) maintaining business operations; (c) communicating to employees; (d) maintaining the safety and security of Fallon Health's premises during pandemic conditions; and (e) minimizing adverse effects on our members, providers and community partners.

Employee Communication

The Pandemic Planning team is closely monitoring the situation so that we can respond appropriately and provide up to date communications to employees. Any information that is time sensitive will be communicated via an advisory email. Any information of a critical nature will be communicated via Fallon Health's Emergency Alert System, EverBridge.

Mandatory Reporting

If you have symptoms of an acute respiratory illness you must not report to work at an FH facility. If you report to work and it appears that you have symptoms of an acute respiratory illness, including coughing, fever, sore throat, headache, muscle aches, feeling tired or weak, you will be sent home and you will be asked to contact your Primary Care Provider.

All FH employees are required to notify their manager and/or Human Resources if they have tested positive for COVID-19. Employees working on site at any FH facility must also notify Human Resources and/or their manager if someone in their household has tested positive for COVID-19 – or if they were exposed to or identified as a close contact to anyone else who tested positive for COVID-19. Managers who learn of an employee testing positive for COVID-19 must inform Human Resources.

Employees should notify Human Resources via the reporting form available in Dayforce under Forms titled "COVID-19 Check-In." Managers should direct employees to use this form. If an employee is not able to access Dayforce, they may send an email to HRService@fallonhealth.org or call HR Service at 508-368-9893. Managers should contact HR Service if their employee is not feeling well enough to do so.

Human Resources will make every effort not to disclose the identity of the employee testing positive. The mandatory reporting requirement is in place to mitigate any potential spread of the virus amongst our workforce, members and participants. Depending on the timing of the exposure, others may need to be notified in accordance with DPH recommendations. It is also important that HR be aware of an individual testing positive so that the appropriate resources may be provided. The confidentiality of the employee testing positive and potentially exposed co-workers will be maintained to the extent possible.

For PACE employees: Pursuant to OSHA Emergency Temporary Standard (ETS) for COVID-19 for Healthcare Providers (effective June 21, 2021) a notice to co-workers who were exposed to someone found to have contracted COVID-19 will be provided. For additional information see www.osha.gov/coronavirus/ets.

Responding to a Positive Case of COVID-19 within the Workforce

When Human Resources learns an employee has tested positive for COVID-19, a Human Resources department representative immediately notifies the appropriate DPH representative if required and follows DPH guidance regarding the following: resources for the infected employee, notifying co-workers, members or participants if they have potentially been exposed, cleaning the facility (in certain areas - including participant/member care areas - and for medical devices and equipment, standard practices for cleaning and disinfection must be followed in accordance with the CDC's COVID-19 Infection Prevention and Control Recommendations and other requirements set forth in the ETS) or temporarily closing the facility. Throughout the process, Human Resources will continue to maintain the confidentiality of the employee testing positive. For the employee to return to work – they need to follow 203.12.01PR Employee Return to Work COVID-19 Pandemic Process.

SECTION B: PANDEMIC - New York locations: COVID-19 Mandatory Vaccination guidelines

Emergency Regulations of New York State Department of Health (hereinafter referred to as Department) made vaccination against COVID-19 a condition of employment.

Public Health and Health Planning Council and the Commissioner of Health by Public Health Law Sections 225, 2800, 2803, 3612, and 4010, as well as Social Services Law Sections 461 and 461-e, Title 10 (Health) of the Official Compilation of Codes, Rules and Regulations of the State of New York requires all covered entities' personnel to be fully vaccinated against COVID-19 with the first dose for current personnel received by September 27, 2021 for general hospitals and nursing homes, and by October 7, 2021 for all other Covered Entities absent the documentation of a medical exemption, and to document evidence of vaccination or granted medical exemptions in personnel records as stated in the emergency regulations above, as amended. All employees hired after these dates must be fully vaccinated or have received a medical exemption at the time of hire.

DEFINITIONS:

Covered Entities for purposes of the emergency regulation include:

- 1) General hospitals
- 2) Nursing homes
- 3) Diagnostic and treatment centers (D&TCs)
- 4) Certified Home Health Agencies (CHHAs)
- 5) Licensed Home Care Services Agencies (LHCSAs)
- 6) Long term home health care programs (LTHHCPs)
- 7) AIDS home care agencies
- 8) Limited LHCSAs serving Assisted Living Programs (ALPs)
- 9) Hospices
- 10) Adult care facilities (ACFs).

Covered Personnel for the purposes of this policy, shall mean all persons employed or affiliated with a covered entity, whether paid or unpaid, including but not limited to employees, members of the medical and nursing staff, contract staff, students, and volunteers, who engage in activities such that if they were infected with COVID-19, they could potentially expose other covered personnel, patients

or residents to the disease. This includes any personnel who does not work directly with members/participants – but has direct contact with other personnel who works directly with members/participants.

Exemptions: The emergency regulation contains a limited medical exemption to the COVID-19 vaccination requirement. Covered personnel are exempt from the COVID-19 vaccination requirement if a physician or nurse practitioner certifies that immunization is detrimental to the health of the individual based upon a pre-existing condition. The medical exemption is only applicable until such immunization is found no longer to be detrimental to such personnel member's health. The nature and duration of the medical exemption must be stated in the personnel employment record, and any reasonable accommodation may be granted and must likewise be documented in such record. The emergency regulation requires medical exemptions to be granted in accordance with generally accepted medical standards. Requests for medical exemptions that do not meet applicable standards will not be granted. The Emergency Regulations do not permit the granting of religious exemptions. As a result, any religious exemption previously granted is revoked as of the effective date specified above.

A federal court case has temporarily prohibited the State from enforcing the vaccine mandate without accommodating for religious objections. *During the pendency of the court order, Fallon Health will consider a request for reasonable accommodation for religious reasons for staff members if they hold a genuine and sincere religious belief contrary to the practice of immunization.*

Fully Vaccinated for the purposes of this policy, shall be determined in accordance with applicable federal guidelines and recommendations and based upon modifications to CDC guidance, including if CDC recommends an additional dose of vaccine. Unless otherwise specified by the New York State Department of Health, documentation of vaccination must include the manufacturer, lot number(s), date(s) of vaccination; and vaccinator or vaccine clinic site in one of the following formats:

- 1) record prepared and signed by the licensed health practitioner who administered the vaccine, which may include a CDC COVID-19 vaccine card;
- 2) an official record from one of the following, which may be accepted as documentation of immunization without a health practitioner's signature: a foreign nation, NYS Countermeasure Data Management System (CDMS), the NYS Immunization Information System (NYSIIS), City Immunization Registry (CIR), a Department-recognized immunization registry of another state, or an electronic health record system; or
- 3) any other documentation determined acceptable by the Department.

REQUIREMENTS:

- 1) All covered personnel must comply with this condition of employment, with verification by Human Resources – including confirmation of a medical exemption.
- 2) All covered personnel must submit proof of vaccination in Dayforce.
- 3) If first dose of a two dose vaccine, proof of second dose must be submitted within five (5) weeks of the first dose in one of the above referenced formats.
- 4) If proof of vaccination already submitted in Dayforce, no need to resubmit.
- 5) Exemption: Request for Medical Exemption and Reasonable Accommodation Form (New York only) to be used by covered personnel seeking medical exemption (refer to *Medical Exemption Form/Reasonable Accommodation Application* section below for additional information).
 - o Medical exemption does not apply to vendors, students, volunteers, temporary, or

contracted workers who must be vaccinated, under same conditions as covered personnel. Absent vaccination, assignment will terminate.

Medical Exemption Form/Reasonable Accommodation Application

- 1) Request for Medical Exemption and Reasonable Accommodation Form (New York only) must be used.
- 2) Form must be completed and signed by covered personnel and licensed physician or certified Nurse Practitioner.
 - a) Exemption form must contain the necessary detail and documentation to establish a medical exemption.
 - b) Exemption must be in accordance with generally accepted medical standards (for example: the recommendations of the Advisory Committee on Immunization Practices of the U.S. Department of Health and Human Services).
- 3) Form must be submitted by covered personnel to the Human Resources Business Partner within 10 business days from being notified by Human Resources of the requirement to be fully immunized against COVID-19 to ensure timely decision.
- 4) Human Resources Business Partner may consult with medical or scientific experts/specialists and may seek additional information/documentation from the health care provider who completed the covered personnel's exemption request.
- 5) The decision will be made by Chief Human Resources Officer. This decision will be final with no additional review or appeal option.
- 6) Human Resources Business Partner will inform the covered personnel of the approval/denial of the medical exemption request.
 - a) If covered personnel are eligible for a medical exemption, Human Resources Business Partner shall engage in an interactive process to determine what, if any, reasonable accommodation is appropriate under the circumstances, considering various factors, including but not limited to the nature of the covered personnel's duties.
 - b) Staff not granted medical exemption will be required to comply with the mandate or be deemed to have resigned their employment for failure to comply with this condition of employment.
- 7) Human Resources Benefits Department will maintain a record of the request, which will remain confidential.
- 8) Any knowing submission of false information in connection with a request under this policy shall be subject to termination of employment.

SECTION C: PANDEMIC - Massachusetts Summit ElderCare locations: COVID-19 Mandatory Vaccination guidelines

The Massachusetts Executive Office of Health and Human Services (EOHHS) has issued an expanded vaccine requirement that applies to many of our partner organizations (including but not limited to nursing homes and assisted living facilities).

To further increase the safety of our participants and employees and to be in compliance with the requirements at our partnering organizations, Fallon Health will require its employees at Summit ElderCare sites who provide direct care or have any physical contact or are in proximity with our participants to provide evidence of vaccination against COVID-19 by November 8, 2021.

Exemptions:

Consistent with other Massachusetts COVID-19 vaccination requirements, an individual will not be required to provide proof of vaccination:

- 1) If the vaccine is medically contraindicated and the individual's job is such that the employer can offer a reasonable accommodation to avoid risk of contracting or transmitting COVID-19 on the job; or
- 2) If the individual objects to vaccination based on a sincere religious belief and the individual's job is such that the employer can offer a reasonable accommodation to avoid risk of contracting or transmitting COVID-19 on the job.

The vaccine requirement is considered a condition of employment for staff members that provide direct care or have any physical contact or are in close physical proximity with Summit ElderCare participants; therefore, the vaccination is mandatory. Failure to comply with the requirement will be considered a resignation from employment with Fallon Health.

Exemption Forms/Reasonable Accommodation Application

- 1) Request for Medical Exemption and Reasonable Accommodation Form (Massachusetts only) or Request for Religious Exemption and Reasonable Accommodation Form (Massachusetts only) must be used.
- 2) Medical Exemption Form must be completed and signed by staff member and licensed physician or certified Nurse Practitioner.
 - a) Medical exemption must be in accordance with generally accepted medical standards (for example: the recommendations of the Advisory Committee on Immunization Practices of the U.S. Department of Health and Human Services).
- 3) Exemption forms must contain the necessary detail and documentation to establish an exemption.
- 4) Form must be submitted by staff member to HRService no later than 10/29/2021 or within 7 business days prior to start of a new position at Summit Eldercare.
- 5) Human Resources Business Partner may consult with medical or scientific experts/specialists and may seek additional information/documentation from the health care provider who completed the staff member's exemption request.
- 6) The decision will be made by Chief Human Resources Officer. This decision will be final with no additional review or appeal option.
- 7) Human Resources Business Partner will inform the staff member of the approval/denial of the medical exemption request.
 - a) If staff member is eligible for a medical exemption, Human Resources Business Partner shall engage in an interactive process to determine what, if any, reasonable accommodation is appropriate under the circumstances, considering various factors, including but not limited to the nature of the staff member's duties.
 - b) Staff not granted medical exemption will be informed of such by Human Resources Business Partner and will be required to comply with the mandate or be deemed to have resigned their employment for failure to comply with this condition of employment.
- 8) Human Resources Benefits Department will maintain a record of the request, which will remain confidential.
- 9) Any knowing submission of false information in connection with a request under this policy shall be subject to termination of employment.

VI. REFERENCES

203.12.01PR Employee Return to Work COVID-19 Pandemic Process

VII. DOCUMENTATION REFERENCED

203.12.01F Request for Medical Exemption and Reasonable Accommodation Form (New York only)

203.12.02F Request for Religious Exemption and Reasonable Accommodation Form (New York only)

203.12.03F Request for Medical Exemption and Reasonable Accommodation Form (Massachusetts only)

203.12.04F Request for Religious Exemption and Reasonable Accommodation Form (Massachusetts only)