SUMMARY
February 23, 2023

2023COA19

No. 22CA0984, *Bara v. ICAO* — Labor and Industry — Colorado Employment Security Act — Benefit Awards — Disqualification — Violation of a Company Rule — COVID-19

In this unemployment benefits case, a division of the court of appeals concludes that the Industrial Claim Appeals Office correctly determined that the claimant was disqualified from unemployment benefits under section 8-73-108(5)(e)(VII), C.R.S. 2022, because her separation from employment was based on her volitional violation of a company rule that required employees to either get a COVID-19 vaccination or request an exemption by a specified deadline.

COLORADO COURT OF APPEALS **2023COA19**

Court of Appeals No. 22CA0984
Industrial Claim Appeals Office of the State of Colorado
DD No. 5499-2022

Kristen Bara,

Petitioner,

v.

Industrial Claim Appeals Office of the State of Colorado and Mental Health CTR of Boulder County, Inc.,

Respondents.

ORDER AFFIRMED

Division V
Opinion by JUDGE DUNN
Brown and Gomez, JJ., concur

Announced February 23, 2023

Kristen Bara, Pro Se

No Appearance for Industrial Claim Appeals Office

Lewis Brisbois Bisgaard & Smith LLP, Benjamin Hase, Denver, Colorado, for Respondent Mental Health CTR of Boulder County, Inc.

¶ 1 The COVID-19 pandemic brought unprecedented changes to the workplace. For some employers, this included imposing mandatory vaccination policies.

¶ 2 The claimant, Kristen Bara, seeks review of a final order of the Industrial Claim Appeals Office (Panel) disqualifying her from unemployment benefits after she failed to follow the policy of her employer, Mental Health CTR of Boulder County, Inc. (MHC), mandating that all employees either receive a COVID-19 vaccination or submit a request for a medical or religious exemption by an identified deadline.

¶ 3 Because the undisputed evidence supports the Panel's order, we affirm.

I. Background

¶ 4 Starting in 2013, Bara worked as MHC's office manager. In September 2021, MHC announced a communicable disease immunization and testing policy. As relevant here, the policy mandated that all employees provide proof of COVID-19 vaccination by October 31st. The policy allowed employees to seek a vaccination exemption for medical or religious reasons by

submitting a request for such an exemption before the stated deadline.

¶ 5 Because Bara declined to receive the COVID-19 vaccine and neither sought nor was granted an exemption, MHC terminated her employment.

¶ 6 Bara then applied for unemployment benefits. Concluding that Bara's violation of a company rule could result in serious damage to her employer's interests, a deputy for the Division of Unemployment Insurance disqualified Bara from unemployment benefits under section 8-73-108(5)(e)(VII), C.R.S. 2022.

¶ 7 Bara appealed the disqualification. At the evidentiary hearing, Bara testified to her concerns about the safety of the COVID-19 vaccine and to her religious objections to the vaccine. Bara admitted, however, that she had not sought a medical or religious exemption.

¶ 8 The hearing officer reversed the deputy's decision, finding that Bara's refusal to get vaccinated for COVID-19 was based upon "reasonable concerns" about "her health and safety" and that MHC offered "no reasonable alternatives" to vaccination. The hearing

officer therefore found that Bara was not at fault for her separation and was entitled to unemployment benefits.

¶ 9 The Panel reversed the hearing officer's decision. It concluded that Bara's failure to follow the vaccination policy could have resulted in serious damage to MHC's interests, disqualifying her from unemployment benefits under section 8-73-108(5)(e)(VII). It also concluded that Bara was disqualified under section 8-73-108(5)(e)(VI) for deliberate disobedience of an employer's reasonable instruction. And it found that Bara's "failure to comply" with the vaccine policy was "fully under her control" and "not an objectively reasonable decision."

II. Analysis

¶ 10 Bara asks us to set aside the Panel's decision because she contends that the Panel improperly substituted "its conclusions of law and its interpretation of facts for the hearing officer's." We see no basis to set aside the Panel's decision.

A. Legal Principles and Standard of Review

¶ 11 An individual is entitled to receive unemployment benefits if she is unemployed through no fault of her own. *See* § 8-73-108(1)(a). For purposes of the unemployment statutes, "fault"

includes "a volitional act or the exercise of some control or choice in the circumstances leading to the discharge from employment such that the claimant can be said to be responsible for the termination." *Richards v. Winter Park Recreational Ass'n*, 919 P.2d 933, 934 (Colo. App. 1996). Put differently, "certain acts of individuals are the direct and proximate cause of their unemployment" and "may result in such individuals receiving a disqualification." § 8-73-108(1)(a).

¶ 12 An individual is disqualified from receiving unemployment benefits if her separation from employment was due to her violation of "a company rule which resulted or could have resulted in serious damage to the employer's property or interests or could have endangered the life of the worker or other persons." § 8-73-108(5)(e)(VII). A violation of a company policy alone is not per se disqualifying under subsection (5)(e)(VII); rather, serious damage — or the possibility of such damage — to either the company's interests or the health and safety of its employees must result from the violation. *See Morris v. City & Cnty. of Denver*, 843 P.2d 76, 78 (Colo. App. 1992).

¶ 13 "[W]e review de novo the Panel's ultimate legal conclusion." *Harbert v. Indus. Claim Appeals Off.*, 2012 COA 23, ¶ 9. Whether a

claimant is at fault for the separation from employment is an "ultimate legal conclusion," *Mesa Cnty. Pub. Libr. Dist. v. Indus. Claim Appeals Off.*, 2017 CO 78, ¶ 17, and requires a case-specific consideration of the totality of the circumstances using an objective standard, *Morris*, 843 P.2d at 79.

¶ 14 We will uphold the Panel's decision unless the findings of fact do not support the decision or the decision is erroneous as a matter of law. § 8-74-107(6)(c)-(d), C.R.S. 2022; *see Mesa Cnty. Pub. Libr. Dist.*, ¶ 17.

B. The Evidence Supports the Panel's Decision

¶ 15 The undisputed evidence presented at the unemployment benefits hearing supports the Panel's conclusion that Bara's separation from employment was based on her volitional violation of a company rule that could result in serious damage to MHC's interests.

¶ 16 At the unemployment benefits hearing, Bara admitted that she knew about the vaccination policy, declined a COVID-19 vaccine, and didn't seek an exemption. And Emily Hardy-Green, MHC's Vice President of Human Resources, testified to financial harm that could result if MHC's employees did not comply with the

vaccination policy. Hardy-Green explained that MHC received Medicaid funding, and that the Center for Medicare and Medicaid Services (CMS) had implemented a rule requiring all employees of providers receiving Medicaid funds to be vaccinated or exempted from vaccination. If MHC failed to enforce CMS's rule, it risked losing federal funding. *See Biden v. Missouri*, 595 U.S. ___, ___, 142 S. Ct. 647, 651 (2022) (affirming Health and Human Services rule that, in order to receive Medicare and Medicaid funding, participating facilities must ensure that their staff — unless exempt for medical or religious reasons — are vaccinated against COVID–19).

¶ 17 Bara doesn't dispute any of this. She acknowledged at the hearing that MHC's failure to ensure compliance with the vaccination policy could endanger MHC's federal funding. On appeal, Bara doesn't suggest that MHC's interests in preserving Medicaid funding and protecting its employees from a deadly virus aren't reasonable or legitimate. Instead, she contends that the hearing officer correctly found that the vaccination policy left her with no "reasonable alternatives" and, thus, her decision to refuse to comply with the policy was objectively reasonable.

¶ 18 But the hearing officer's finding that Bara had no reasonable alternatives was mistaken. The vaccination policy plainly allowed employees to seek medical and religious exemptions. In fact, Hardy-Green testified that twelve employees sought — and were granted — such exemptions. And though Bara testified at the unemployment benefits hearing — and asserts on appeal — that she had legitimate medical and religious objections to the COVID-19 vaccine, she declined to seek an exemption on either basis.[1] The hearing officer offered no explanation as to why the policy's exemption provisions were not reasonable alternatives or why Bara's refusal to even seek an exemption was objectively reasonable.

¶ 19 Because Bara knew she could seek a medical or religious exemption but chose not to, the decision leading to her job separation was within her control, and thus volitional. *See Richards*, 919 P.2d at 934; *cf. Nielsen v. AMI Indus., Inc.*, 759 P.2d 834, 835 (Colo. App. 1988) (claimant couldn't act volitionally if he hadn't been made aware of unwritten policy). For that reason, we

[1] Bara testified to various health and safety concerns based on her review of online sources.

reject Bara's claim that the vaccination policy left her "with no choice whatsoever."[2]

¶ 20 Bara next challenges the reasonableness of the vaccination policy itself, arguing that it wasn't reasonable for MHC to apply it to remote employees. But Bara wasn't hired for a remote position. Hardy-Green testified that Bara's office manager position was "an in-office" position. Beyond allowing employees the temporary accommodation to work remotely during the COVID-19 pandemic, Hardy-Green explained that MHC had "since asked folks to come back" and the vaccination policy was "in preparation for" a return to the office.[3]

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[2] To the extent the hearing officer rested his decision on Bara's generalized assertion that she was "uncomfortable" requesting either exemption, that doesn't change the fact that the vaccination policy provided reasonable alternatives to address medical and religious concerns. *See* Webster's Third New International Dictionary 1892 (2002) (defining "reasonable," in part, as "not absurd: not ridiculous . . . not extreme: not excessive . . . ; possessing good sound judgment: well balanced: sensible"). And with respect to the religious exemption specifically, we agree with MHC that an employee who seeks a religious accommodation has an obligation to engage in an interactive process to determine whether an accommodation is possible. *See Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 69 (1986).

[3] We recognize that the vaccination mandate at issue in *Biden v. Missouri*, 595 U.S. ___, 142 S. Ct. 647 (2022), didn't apply to "staff who telework full-time." *Id.* at ___, 142 S. Ct. at 651. The telework

¶ 21 Even assuming MHC allowed Bara some further extension to remain remote, we still conclude that MHC's vaccination policy was appropriate to accomplish MHC's legitimate business interests. MHC implemented the policy to protect the health and safety of its employees, clients, and partners; to maintain its federal funding; and to better serve its clients. With respect to the health of its employees and client services in particular, Hardy-Green explained the toll COVID-19 had taken on MHC's staff, which affected MHC's ability to "treat clients in a timely fashion" and left clients without needed access to care. Bara doesn't explain how any of these business interests are not objectively reasonable.

¶ 22 Nor are we persuaded by Bara's contention that the vaccination policy was objectively unreasonable simply because it didn't track the Colorado Department of Public Health and Environment's vaccination rule. True, the Department's rule required vaccination only for "staff who are client-facing and those who may be exposed to infectious materials." But MHC's broader

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exception wasn't at issue in *Biden* and the Court didn't discuss it. At any rate, the undisputed testimony at the unemployment benefits hearing showed that Bara was hired for an in-person position, not a "full-time" remote position.

rule was developed not just to keep its clients safe, but also to protect its staff and partners, limit community transmission of COVID-19, and maintain federal funding. Protecting employees and the community from a lethal virus is not objectively unreasonable. *See Biden*, 595 U.S. at ___, 142 S. Ct. at 653 ("Vaccination requirements are a common feature of the provision of healthcare in America . . . ."); *see also* Webster's Third New International Dictionary 2507 (2002) (defining "unreasonable" to include, among other things, something that is "absurd, inappropriate, incongruous . . . exceeding the bounds of reason or moderation . . . inordinate, [or] unconscionable").

¶ 23 Finally, we don't agree with Bara that the Panel substituted its views on what is objectively reasonable for those of the hearing officer. The hearing officer based his ruling on Bara's individual, subjective "concerns over her health and safety" that purportedly forced her into a "moral dilemma" requiring her to "choose between her job and livelihood over her health and safety." But having found that Bara's "refusal to get vaccinated resulted in her eventual discharge and [that] she was otherwise culpable," the hearing officer ignored the alternatives provided and didn't explain why Bara's

related failure to seek an exemption based on her medical and religious concerns was objectively reasonable. And in focusing only on Bara's stated concerns, the hearing officer neither addressed nor acknowledged the serious harm Bara's unilateral decision could cause MHC. The Panel therefore didn't err by considering the totality of the evidence presented. *See Colo. Custom Maid, LLC v. Indus. Claim Appeals Off.*, 2019 CO 43, ¶ 12 (Panel may set aside evidentiary facts found by hearing officer if they are contrary to the weight of the evidence).

¶ 24 For all these reasons, we conclude that the Panel correctly determined that Bara was disqualified from unemployment benefits under section 8-73-108(5)(e)(VII). And because we conclude the undisputed facts support the Panel's decision that Bara is disqualified from receiving unemployment benefits under section 8-73-108(5)(e)(VII), we need not address its conclusion that she was also disqualified under section 8-73-108(5)(e)(VI).

III. Disposition

¶ 25 The Panel's order is affirmed.

JUDGE BROWN and JUDGE GOMEZ concur.