0015 4276 73 (May 10, 2016) – The claimant failed to establish that she had a reasonable belief that she would soon be involuntarily terminated or transferred to an unsuitable position, if she did not accept the employer's voluntary separation package, where nothing in the record suggested that the employer hindered her ability to assess her job security, and the claimant made no effort to ask her employer or union about it.

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Issue ID: 0015 4276 73
Claimant ID: 1861117

BOARD OF REVIEW DECISION

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 affirm.

The claimant was separated from her position with the employer on December 21, 2014. She filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on March 18, 2015. The employer appealed the determination to the DUA hearings department. Following a hearing on the merits, attended by both parties, the review examiner overturned the agency's initial determination and denied benefits in a decision rendered on May 11, 2015. We accepted the claimant's application for review.

Benefits were denied after the review examiner determined that the claimant voluntarily left employment without good cause attributable to the employer and thus was disqualified, under G.L. c. 151A, § 25(e)(1). After considering the recorded testimony and evidence from the hearing, the review examiner's decision, and the claimant's appeal, we remanded the case to the review examiner to take further testimony regarding the claimant's state of mind and to allow the parties to submit evidence about the layoff provisions of the collective bargaining agreement. Only the claimant and her union representative attended the remand hearing. Thereafter, the review examiner issued her consolidated findings of fact. Our decision is based upon our review of the entire record.

The issue before the Board is whether the review examiner's conclusion that the claimant, who resigned from her employment to accept a voluntary separation package (VSP) offered by the employer, had no reasonable belief that she would be laid off if she did not accept the VSP, is supported by substantial and credible evidence and is free from error of law.

Findings of Fact

The review examiner's consolidated findings of fact are set forth below in their entirety:

1. The claimant worked full-time as a special assistant for the employer from 6/15/74 until 12/21/14. The claimant worked a regular schedule of 37.5 hours per week and was paid $1185 per week. The claimant's position was represented by the [Union].

2. Approximately five years prior to her separation, the claimant's job title had been designated as a surplus title and the work she had been performing was reassigned to employees working in Pennsylvania. After her position was designated as surplus, the claimant was reassigned new duties but continued to hold the title and pay of special assistant. The claimant worked at the employer's location in [City A] for approximately 1 ½ years before she and all of the employees working in that location were transferred to a location in [City B]. The claimant worked at the [City B] location for approximately 6 months prior to separating.

3. The employer had four employees with the special assistant title working at the [City B] location. After one of the employees accepted a voluntary separation package and resigned, the position was not filled with a new employee. The claimant was the senior of the three remaining employees working under the special assistant title. The employer did not lay off anyone who held the special assistant title; however, the employer did not replace any employee who left their special assistant position.

4. Sometime in September or October of 2014, the employer extended the claimant and its other employees a voluntary separation package which included a financial incentive known as an income protection plan [(IPP)]. The employer allowed the claimant several weeks to decide if she would accept the offer. The employer did not deny any employee who requested to accept the employer's voluntary separation package.

5. The claimant was not told by the employer that she would be laid off if she did not accept the voluntary separation package.

6. The claimant notified the employer that she would accept the voluntary separation package. The claimant chose to accept the voluntary package because her position had been designated as surplus several years earlier and she was uncertain what the future held for her with the employer. The claimant was concerned about being reassigned to another department. The claimant was aware that as the employer downsized, employees were assigned to other departments and she was afraid of where she might end up.

7. During the approximately five years that the claimant's Special Assistant position had been designated as "surplus", the claimant had been offered an

IPP approximately every calendar quarter. The claimant chose to accept the IPP offered in the fall of 2014 because she considered it a "special" offer because it provided a larger monetary payout than the previous quarterly offers. The claimant was aware that the last time the employer offered a comparable monetary payout, sometime in 2009 or 2010, there were involuntary layoffs. At that time, the employer laid off 100 outside plant technicians who had been working in Rhode Island.

8. The claimant would not have received the IPP had her position not been designated "surplus". The claimant believed she was at risk of being involuntarily laid off because she [believed] her position had been designated "surplus" and she received the IPP.

9. Prior to accepting the IPP, the claimant did not discuss with the union or the employer the possibility of her being involuntarily laid off.

10. The employer posts vacant positions which the claimant could bid on. The claimant did not apply for any other positions with the employer. The claimant took a service representative test sometime after her position had been designated as surplus; however, the employer did not offer the training needed for the claimant to be eligible for a service representative position. The claimant would have been allowed to transfer to vacant positions prior to involuntary layoff, pursuant to G25.02(b) [of the Collective Bargaining Agreement]. Positions with the claimant's title were available at the employer's [City A] and [City C] locations.

11. The collective bargaining agreement between the employer and the [Union] contains articles related to a force adjustment plan. Within this section are detailed steps to be followed if the employer notifies the Union in writing of the need to layoff or involuntarily separate employees as the result of a surplus resulting from technological changes. The first step in this plan is the implementation of the income protection plan. The agreement contains a section which reads: "If the implementation of the above steps does not eliminate a surplus resulting from an External Event and if at least thirty (30) days has elapsed from the notification of a surplus condition pursuant to this Article, the Company shall lay off employees as provided for in the layoff provisions of this Labor Agreement." It is unknown if the employer declared the IPP to be the result of an Internal Event or an External Event. The details of the layoff provisions contained in the agreement referenced in G25.05 of the Collective Bargaining Agreement are unknown. This section of the agreement contains a note which reads: "If a surplus is declared in a job title at a work location where an administrative work group in the surplus job title consists of employees reporting to other work locations and such employees are normally assigned to a common work area, all such work locations shall be considered as a single work location for purposes of the Force Adjustment Plan."

12. It is not known if the claimant was protected from involuntary layoff due to her seniority. This would have been determined based upon the seniority of the employees remaining, after the completion of the IPP.

13. If the claimant had not accepted the IPP, she was uncertain whether she would have been involuntary relocated or reassigned again. The claimant had no way of knowing prior to accepting the IPP how things would have worked out. Since she had been moved three times in the past, the claimant believed she would likely be moved again. The claimant could have been reassigned to work in [City C] or [City A] because positions within her title were available at both locations. The claimant was concerned about the possibility of being reassigned to the employer's [City C] location because the commute would be one hour from her home in [City D].

14. The employer did not layoff any employees after offering the voluntary separation package in October or November of 2014.

15. The claimant would not have been laid off from her work, had she not accepted the voluntary separation package offered in October or November of 2014.

16. If the IPP had not been offered, the claimant would not have quit her job anyway.

17. The claimant filed a claim for unemployment insurance benefits, effective 12/28/14. The claimant notified the DUA that she was separated due to a lack of work.

18. On 1/23/15, the employer returned the Lack of Work Notification form, indicating that the claimant quit her work.

19. On 2/3/15, the claimant completed a DUA questionnaire. In her responses, the claimant wrote several times: "My job position was surplus. They had too many people. I did not quit. I was laid off." The claimant wrote in her responses that she had been laid off despite her awareness that she had never been told by the employer that she was laid off. The claimant was aware that she could have returned to work on 12/22/14 because continuing work was available for her.

20. On 3/18/15, the DUA issued the employer a Notice of Approval, finding the claimant eligible for benefits under Section 25(e)(1) of the law. The employer appealed the Notice.

Ruling of the Board

In accordance with our statutory obligation, we review the decision made by the review examiner to determine: (1) whether the consolidated findings are supported by substantial and

credible evidence; and (2) whether the review examiner's ultimate conclusion is free from error of law. Upon such review, the Board adopts the review examiner's consolidated findings of fact and deems them to be supported by substantial and credible evidence. As discussed more fully below, we believe these findings sustain the review examiner's initial decision to deny benefits to the claimant.

Since the claimant voluntarily chose to participate in the VSP, qualification for benefits is governed by G.L. c. 151A, § 25(e)(1), 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 for . . . the period of unemployment next ensuing . . . after the individual has left work (1) voluntarily unless the employee establishes by substantial and credible evidence that he had good cause for leaving attributable to the employing unit or its agent . . . .

Under this section of the law, the claimant has the burden to show that she is entitled to benefits. The review examiner concluded that the claimant had not carried her burden. Based on the consolidated findings of facts set forth above, we agree.

The claimant testified that she believed she was at risk of involuntary layoff. An employee may be entitled to benefits if she can show that she accepted a VSP under a reasonable belief that she would soon be laid off if she did not accept the employer's offer. White v. Dir. of Division of Employment Security, 382 Mass. 596, 597-598 (1981).

In this case, the claimant's job had been designated surplus for approximately five years, and — despite being offered a VSP on a regular basis — none of the employees in the claimant's position had been involuntarily laid off. *See* Consolidated Findings # 3 and # 7. The claimant had not been told that any involuntary layoffs would occur, and the claimant made no efforts to inquire about this prior to accepting the VSP. *See* Consolidated Findings # 5 and # 9. Without further inquiry, the claimant's conclusion that her job was at risk was based upon little more than conjecture. While the claimant may have subjectively believed her job was in danger, the reasonableness of the claimant's belief is a question of law. *See* Ducharme v. Comm'r of Department of Employment and Training, 49 Mass. App. Ct. 206, 208–209 (2000). Objectively, the claimant's job was not in danger. *See* Consolidated Finding # 15. If the claimant had inquired about her job security with the employer or with her union, she may have learned this. Pursuant to a letter of agreement between the employer and the claimant's union, there could be no involuntary layoffs if the reduction-in-force is the result of internal "process changes."[1] In addition, the collective bargaining agreement states, "if the surplus condition is caused by an External Event as these terms are defined in the letter of agreement […], the Company shall so notify the Union in writing." *See* Exhibit # 8. The claimant's union representative testified that no such notification occurred.

[1] Both the employer and the union representative testified to this fact, while the claimant expressed ignorance about the union provisions. We have supplemented the findings of fact, as necessary, with the unchallenged evidence before the review examiner. *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).

There is nothing in the record to suggest that the employer hindered the claimant's ability to assess whether she could be involuntarily laid off. Thus, the claimant has failed to demonstrate that the employer "substantially hindered the ability of [the] employee to make a realistic assessment of the likelihood that [s]he would be involuntarily separated." State Street Bank & Trust Co. v. Deputy Dir. of Division of Employment and Training, 66 Mass. App. Ct. 1, 11 (2006).

The claimant also testified that she believed that she could be reassigned to a job location that would have been more inconvenient for her. *See* Consolidated Finding # 13. Such an action could render the job unsuitable, giving her good cause to resign. Graves v. Dir. of Division of Employment Security, 384 Mass. 766, 768 (1981). However, as with the claimant's belief that she could be involuntarily laid off, the possibility of involuntary transfer was also speculative for the same reasons. The claimant testified that, if she was transferred to the employer's location in [City C], she would have had a one-hour commute. The claimant did not offer explanation as to why a one-hour commute would render her job unsuitable. The claimant bears the burden of proving that the potential employment would be unsuitable. McDonald v. Dir. of Division of Employment Security, 396 Mass. 468, 470 (1986) (citations omitted). The claimant testified that she could also have been transferred to the employer's location in [City A], where positions with the claimant's title were also available. The claimant did not testify as to any problems with transferring to [City A], where she had previously worked and which is geographically closer to the claimant's home in [City D] than to the claimant's then-current work location in [City B].

More generally, the review examiner's findings indicate that the claimant did not primarily accept the VSP due to concerns about her job security but due to the large financial incentive for doing so. Over the approximately five years since the claimant's job title had been declared "surplus," she had declined a VSP offer roughly twenty times before accepting this one in December 2014. *See* Consolidated Finding # 7. The claimant chose to accept this particular VSP because of it represented a larger monetary payout than the previous offers. *See* Consolidated Findings # 7. The claimant would not have resigned if the employer had not offered this financial incentive. *See* Consolidated Finding # 16.

We, therefore, conclude as a matter of law that the claimant left her job without good cause attributable to the employer, within the meaning of G.L. c. 151A, § 25(e)(1).

The review examiner's decision is affirmed. The claimant is denied benefits for the week ending January 3, 2015, and for subsequent weeks, until such time as she has had at least eight weeks of work and has earned an amount equivalent to or in excess of eight times her weekly benefit amount.

BOSTON, MASSACHUSETTS
DATE OF DECISION - May 10, 2016

Paul T. Fitzgerald, Esq.
Chairman

Judith M. Neumann, Esq.
Member

Member Charlene A. Stawicki, Esq. did not participate in this decision.

ANY FURTHER APPEAL WOULD BE TO A MASSACHUSETTS STATE DISTRICT COURT OR TO THE [CITY A] MUNICIPAL 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.

JRK/rh