Claimant, who resigned through a voluntary separation program, did not have a reasonable belief of imminent layoff. Changes to his work duties, newspaper articles about layoffs and his employer's wish to reduce costs could give rise to a concern, but claimant did not make a substantial inquiry about the status of his job. He only discussed his concerns with coworkers and his manager, who could not say what, if anything, would happen to the claimant's job. Additionally, there is no indication in the record that the employer hindered his ability to assess the likelihood that he would be laid off; employees were told they could consult with HR if they had any questions about the VSP. Finally, the claimant did not establish that the employer planned a reduction in force.

Board of Review
19 Staniford St., 4th Floor
Boston, MA 02114
Phone: 617-626-6400
Fax: 617-727-5874

Paul T. Fitzgerald, Esq.
Chairman
Judith M. Neumann, Esq.
Member
Charlene A. Stawicki, Esq.
Member

Issue ID: 0018 6812 048

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The employer appeals a decision by Eric M. P. Walsh, a review examiner of the Department of Unemployment Assistance (DUA), to award unemployment benefits. We review, pursuant to our authority under G.L. c. 151A, § 41, and reverse.

The claimant was separated from his position with the employer on December 31, 2015. He filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on June 2, 2016. The employer appealed the determination to the DUA hearings department. Following a hearing on the merits, attended by both parties, the review examiner affirmed the agency's initial determination and awarded benefits in a decision rendered on October 25, 2016. We accepted the employer's application for review.

Benefits were awarded after the review examiner determined that the claimant voluntarily left employment for good cause attributable to the employer and, thus, was not disqualified under G.L. c. 151A, § 25(e)(1). Our decision is based upon our review of the entire record, including the recorded testimony and evidence from the hearing, the review examiner's decision, and the employer's appeal.

The issue before the Board is whether the review examiner's conclusion that the claimant's decision to accept a voluntary separation package was based upon good cause attributable to the employer is supported by substantial and credible evidence and is free from error of law, where the claimant did not establish that the employer planned to implement layoffs, that he had a reasonable belief his job was in jeopardy, or that the employer hindered his ability to discern whether his job was in jeopardy.

Findings of Fact

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

1. The claimant worked full-time for the employer, an information technology company, from July 7, 2003 to December 31, 2016 as a Software Engineer.

2. The claimant had a prior period of employment from 1998 to 2002, which ended due to layoff as a part of a reduction-in-force.

3. From 2003 to 2015, the employer offered VSP's on more than one occasion, to which the claimant did not apply.

4. In 2015, the claimant was assigned to a group doing work that was a deviation from his usual skillset, namely that it involved some electrical engineering.

5. On October 26, 2015, the employer sent an email to all employees in a certain category (employees fifty-five years of age or older with at least five years of service or employees with at least twenty years of service), offering a Voluntary Separation Program (VSP) as the employer was looking to save $750 million (across the board).

6. The employer forbade members of management to advise employees in their decision-making process.

7. The VSP had a deadline of November 13, 2015, and notification, if approved by the employer, was made by November 30, 2015, with a last day employed being December 31, 2015.

8. Since 1998, the claimant received performance ratings of at least "consistently exceeds." The claimant received ratings of "far exceeds" for 2001 and 2004.

9. The claimant believed that his job was in jeopardy already prior to the reduction-in-force announcement. The claimant believed that the work in his group was to be reassigned to a group in China or possibly in Minnesota. The claimant based his belief upon his own conclusions.

10. The claimant submitted his VSP application by the deadline. The VSP application was the separation agreement and release, which did not mention that the employer retained a right of refusal.

11. By November 30, 2015, the claimant received the employer's approval of his VSP application.

12. The claimant worked through December 31, 2016.

Ruling of the Board

In accordance with our statutory obligation, we review the decision made by the review examiner to determine: (1) whether the findings are supported by substantial and credible evidence; and (2) whether the review examiner's original conclusion is free from error of law. After such review, the Board adopts the review examiner's findings of fact and credibility assessment except as follows. We set aside the portions of Findings of Fact # 1 and # 12, which indicate that the claimant worked until December 31, 2016, as the record before us shows that the claimant's last day was December 31, 2015. We also set aside the part of Finding of Fact # 9 stating that there was a "reduction-in-force" announcement, as there is no evidence in the record that such an announcement was made by the employer. In adopting the remaining findings, we deem them to be supported by substantial and credible evidence. However, as discussed more fully below, we conclude that the findings and the totality of the record before us support a denial of benefits to the claimant.

Because the claimant resigned from his job, his 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 he is entitled to benefits.

The Massachusetts appellate courts have recognized two situations in which claimants who leave their employment to accept a voluntary separation package (VSP) will be entitled to benefits, but in either situation, the claimant must initially establish, through direct employer announcements or through circumstantial evidence, that the VSP is being offered as part of a reduction in force and not merely, for example, to restructure. *See* Board of Review Decision 0019 0065 78 (2017).[1] If so, the claimant will be allowed benefits as an "involuntary quit" if he can demonstrate a reasonable basis for believing he was likely to be imminently laid off or terminated if he did not accept the VSP. *See* White v. Dir. of Division of Employment Security, 382 Mass. 596, 597-598 (1981). Alternatively, the claimant may be allowed benefits as a "voluntary quit" with good cause attributable to the employer, if the circumstances gave the claimant a rational basis for suspecting his job was in jeopardy and the employer hindered the claimant's ability to realistically assess that likelihood. *See* State Street Bank and Trust Co. v. Deputy Dir. of Department of Employment and Training, 66 Mass. App. Ct. 1, 11 (2006).

As to the preliminary issue, the record before us does not indicate that the VSP offered by the employer was part of a planned or likely reduction in the employer's workforce. As noted above, while the review examiner found that the employer announced it would reduce its

[1] Board of Review Decision 0019 0065 78 is an unpublished decision, available upon request. For privacy reasons, identifying information is redacted.

workforce, the record does not support that finding. In fact, the VSP announcement issued by the employer via email on October 26, 2015 states that the program was being offered in response to requests from long-term employees, and not because the employer was planning on reducing its force. Neither the employer's announcement nor any surrounding circumstances suggested that the employer would implement involuntary layoffs if too few employees opted to take the VSP. Certainly, no one in management told the claimant that the employer was seeking to eliminate software engineering jobs such as the claimant's. The reasons given by the claimant for his belief that layoffs were likely – his reassignment to new, less familiar work, groups in other locations performing the same work as his group, and newspaper articles discussing layoffs – are not sufficient to establish a reasonable belief that involuntary layoffs were likely.[2]

Even if the VSP was reasonably linked to likely layoffs, the claimant did not possess a reasonable belief that *his job* was in jeopardy if he failed to accept the VSP. The review examiner found that the claimant reached a personal conclusion that the work in his group would be reassigned to another group. In addition, he had been assigned some unfamiliar work earlier in 2015, and certain newspaper articles had speculated about layoffs. These factors might give rise to a generalized, speculative concern, but they do not supply a reasonable basis for the claimant to believe that his own job was actually in jeopardy. In light of this, we conclude that the claimant has not carried his burden to demonstrate that he quit involuntarily under White.

The claimant also failed to demonstrate that he is entitled to benefits under the alternative, State Street, analysis. Again, assuming that the VSP was linked to a potential reduction in force, and further assuming that the newspaper articles and other events occurring in the claimant's work assignments created an objective basis for speculating that he might be laid off, the claimant has not shown that the employer denied him information he needed to assess his likelihood of being laid off. The claimant testified that he discussed the layoff with his coworkers and current manager, none of whom could confirm whether he would be laid off or not. In order to better assess the status of his continued employment, the claimant should have made a more substantial inquiry. In particular, he might have inquired about his job status with the human resources department, which was designated as a resource for questions about the VSP in the employer's October 26th announcement. The claimant's failure to make reasonable further inquiry rendered any belief that his job was at risk little more than conjecture. *See* Board of Review Decision 0014 7732 73 (Dec. 17, 2015).[3] Without an objective basis for believing that he might be involuntarily separated, there was no need for the claimant to embark upon "the mitigating strategy of accepting the VSP and leaving." State Street, 66 Mass. App. Ct. at 12.

We, therefore, conclude as a matter of law that the claimant did not carry his burden to show that he is eligible for benefits under G.L. c. 151A, § 25(e)(1).

The review examiner's decision is reversed. The claimant is denied benefits for the week ending January 2, 2016, and for subsequent weeks until such time as he has had at least eight weeks of work and has earned an amount equivalent to or in excess of eight times his weekly benefit amount.

[2] 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).

[3] Board of Review Decision 0014 7732 73 is also an unpublished decision, available upon request.

BOSTON, MASSACHUSETTS
DATE OF DECISION - February 28, 2017

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 BOSTON 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.

SVL/jv