

**Claimant who took a voluntary separation package was ineligible under §25(e)(1), where she admitted the employer announced a restructuring rather than a reduction in force, and despite receiving inconclusive responses from her supervisor and human resources when she asked if her job was safe from layoff.**

**Board of Review  
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**Issue ID: 0019 0065 78**

## **BOARD OF REVIEW DECISION**

### **Introduction and Procedural History of this Appeal**

The claimant appeals a decision by J. Cofer, 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 June 1, 2016. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on July 9, 2016. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, attended only by the claimant, the review examiner affirmed the agency's initial determination and denied benefits in a decision rendered on August 12, 2016. 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, or urgent, compelling, and necessitous reasons, 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 additional evidence regarding the voluntary separation package that the claimant accepted, and the circumstances under which the employer offered it to her. Only the claimant attended the remand hearing. Thereafter, the review examiner issued his 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's decision to accept a voluntary separation package was not 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 she had a reasonable belief that her job was in jeopardy.

### **Findings of Fact**

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

1. The employer is an insurance company. The claimant worked as a full-time executive assistant for the employer. The claimant worked for the employer from 4/01/1990 until 6/01/16.
2. In December, 2015, the employer announced that it wanted to restructure its workforce. The employer did not announce that it wanted to reduce its workforce.
3. The employer offered a voluntary separation package to its workers. The employer announced the package in December, 2015. The employer gave the voluntary separation package application to the claimant on 12/02/15.
4. The employer never gave any indication of how many jobs it sought to eliminate. The employer never specified the types of jobs it sought to eliminate. The employer never gave any indication of whether it sought to eliminate administrative jobs.
5. The employer never gave any indication whether it would implement involuntary layoffs if not enough employees opted to take the voluntary separation package.
6. The package indicated that a worker was qualified for it if he or she was over fifty-five years old and had at least ten years of service. The package indicated that workers who accepted it would receive a certain amount of money for each year of service.
7. The claimant asked her supervisor whether the employer would lay her off or discharge her if she did not accept the package. The claimant does not know the exact date when she asked this. She asked sometime between 12/02/15 and 12/15/15. The supervisor told her that he did not know whether the employer would lay her off or discharge her if she did not accept the package. He did not give any indication that the employer would lay her off or discharge her. He did not give any indication that the employer would not lay her off or discharge her.
8. The employer provided a telephone number to call with any questions about the voluntary separation package. The claimant called and spoke to a certain worker. She asked the worker whether the employer would lay her off or discharge her if she did not accept the package. The claimant does not know this worker's name or job title. The claimant does not know the exact date when she asked this. She asked sometime between 12/02/15 and 12/15/15. The worker did not give any indication of whether the employer would lay her off or discharge her if she did not accept the package.
9. The employer did not give any indication to the claimant that it planned to lay her off or discharge her if she did not accept the package. The employer did

not give any indication to the claimant that it did not plan to lay her off or discharge her if she did not accept the package.

10. The claimant accepted the package. She submitted a document titled Voluntary Separation Incentive Plan Application. She submitted it on 12/[16/15]. The employer accepted the claimant's application and allowed her to take the package.
11. The employer and the claimant executed the voluntary separation agreement. The claimant signed the separation agreement. The agreement was titled, "Acknowledgement, Waiver and General Release of All Claims by [claimant's name] in connection with the [employer's name] Voluntary Separation Incentive Program." The claimant signed the document on 6/01/16. The agreement reads, "Executed this 1 Day of June 2016."
12. The voluntary separation agreement indicated that the employer would pay money to the claimant. The agreement indicated that the claimant waived certain causes of action that might have arisen before she signed the agreement.
13. The claimant accepted the voluntary separation package because the monetary benefit was very attractive to her and she did not have confirmation that the employer would allow her to continue her employment if she did not accept the package.
14. The employer assigned a last day to the claimant. The assigned last day was 6/01/16. The claimant worked until that date.

### 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.

The review examiner denied benefits under 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 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. The first situation involves what the courts have characterized as an “involuntary departure.” It is an “involuntary departure” if the claimant can show that the VSP was accepted under a reasonable belief that she would soon be terminated if the employer’s offer were not accepted. White v. Dir. of Division of Employment Security, 382 Mass. 596, 597-598 (1981). In White, the employer had offered an early retirement incentive. The claimant heard a rumor there would be layoffs if the employer’s work force was not reduced by early retirements. Because of his low seniority, the claimant believed he would be laid-off and so he accepted the early retirement incentive. Id. at 597. The Massachusetts Supreme Judicial Court (SJC) remanded the case back to the DUA for further findings. In so doing, the SJC stated that, if the claimant reasonably believed his layoff was imminent, “a finding was required that the claimant did not leave his employment voluntarily.” Id. at 598–599.

The second situation is characterized as a “voluntary departure.” A claimant who accepts a VSP has left her employment voluntarily for good cause attributable to the employer, if the claimant reasonably feared she might be terminated, and the employer “substantially hindered the ability of [the] employee to make a realistic assessment of the likelihood that she would be involuntarily separated” if she did not accept the offer. State Street Bank and Trust Co. v. Deputy Dir. of Department of Employment and Training, 66 Mass. App. Ct. 1, 11 (2006). In State Street, the employer announced a plan to reduce its workforce by 1,800 employees. This reduction was to be achieved in two phases: first a VSP and then an involuntary layoff. The employer did not provide information to its employees about when and who would be laid-off during phase two. The Massachusetts Appeals Court held that, by withholding information, the employer gave the claimants “good cause to adopt the mitigating strategy of accepting the VSP and leaving.” Id. at 12.

The principles set forth under White and State Street have been applied in numerous subsequent court<sup>1</sup> and Board of Review decisions<sup>2</sup>. Our consideration of these VSP cases leads us to identify two situations in which a claimant will be eligible for benefits: where the employer offering the VSP has announced that the incentive could be followed by involuntary layoffs if there are insufficient volunteers, or the circumstances surrounding the VSP offer indicate such layoffs are likely, and (1) the claimant has demonstrated a reasonable basis for believing he or

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<sup>1</sup> See, e.g., Connelly v. Dir. of Division of Unemployment Assistance, 460 Mass. 24 (2011) (Board of Review correctly applied the good cause analysis under State Street in denying benefits to a claimant who accepted a VSP in part for personal reasons and did not believe her job was in jeopardy); and Curtis v. Comm’r of Division of Unemployment Assistance, 68 Mass. App. Ct. 516 (2007) (where employer announced reduction in force and instructed managers not to give individual employees information, held claimants entitled to benefits under the good cause standard set forth under State Street).

<sup>2</sup> See, e.g., Board of Review Decision 0015 4276 73 (May 10, 2016) (applying White, denied benefits where claimant failed to establish that she accepted the VSP based upon a reasonable belief that she would soon be terminated or transferred to an unsuitable position); Board of Review Decision 0012 1399 45 (Sept. 14, 2014) (applying White and State Street, claimant denied benefits where the employer had not definitely announced there would be layoffs and the claimant did not believe she would be subject to a layoff if she did not accept the VSP); and Board of Review Decision 0002 4043 89 (Oct. 8, 2013) (applying State Street, awarded benefits to claimant who reasonably believed she would be separated and the employer hindered her ability to make a realistic assessment). Board of Review Decisions 0012 1399 45 and 0002 4043 89 are unpublished decisions, available upon request. For privacy reasons, identifying information is redacted.

she was in danger of imminent termination if he or she did not accept the VSP, or (2) the circumstances gave the claimant a rational basis for suspecting his or her job might be in jeopardy, and the employer hindered the claimant's ability to realistically assess the likelihood of this happening if he or she did not accept the VSP. Applying these factors to the appeal before us, we conclude that the claimant is not entitled to benefits.

It is significant to our analysis that 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 work force. The review examiner found that the employer announced in December 2015 that it would *restructure* its work force when it offered the VSP; it did not announce it would reduce its workforce. The employer's offer of a VSP was not accompanied by any indication that it sought to eliminate administrative jobs like the claimant's, or that it sought to eliminate any particular number or type of job. Indeed, neither the employer's announcement nor any surrounding circumstances suggested that the employer would implement involuntary layoffs at all if not enough employees opted to take the VSP. We also observe that the claimant herself characterized the employer's announcement as a "restructuring." Thus, there is no evidence in the record that, in offering the VSP, the employer was also contemplating layoffs as part of a reduction in force.

It is also significant that the record before us does not establish that claimant possessed a reasonable belief that her job was in jeopardy if she failed to accept the VSP. Initially, the review examiner found that the claimant chose to take the VSP because the monetary benefits were favorable and the employer did not confirm that her employment would continue if she did not take the package. After remand, the review examiner's finding as to why the claimant took the VSP was essentially unchanged: she chose the package because the financial incentive was favorable and she had no confirmation that her job would continue if she didn't take the package. The claimant received the VSP package on December 2, 2015, and applied for the VSP on December 16, 2015. *See* Remand Exhibit # 5. While the claimant elected to take the VSP in December 2015, she remained employed until June 2, 2016, suggesting any prospective layoff she may have faced was not imminent. Based on these objective facts, we conclude that the claimant's job was not in imminent jeopardy, and she has not carried her burden in this regard under White.

We next consider whether the employer prevented the claimant from attempting to ascertain her likelihood of being involuntarily terminated if she did not accept the VSP. The review examiner found the claimant asked her supervisor and an unknown human resources contact whether or not her job was secure, and these employees gave no indication either way about whether she faced layoff or discharge if she did not apply for the VSP. The record, therefore, indicates the claimant made inquiries into her job security, which the employer did not satisfy. However, in itself, this is insufficient to establish that the claimant is eligible for benefits. Since the circumstances did not create an environment which suggested involuntary layoffs would likely follow the VSP, nor did the claimant have a reasonable belief she would be subject to involuntary termination, she had no objective basis for speculating that she might be involuntarily separated. Hence, there is no need to embark upon "the mitigating strategy of accepting the VSP and leaving." State Street, 66 Mass. App. Ct. at 12. A claimant is not entitled to benefits simply because her employer does not affirmatively assure her of continuing employment. She must have a reasonable basis for thinking her job is in jeopardy.

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

The review examiner's decision is affirmed. The claimant is denied benefits for the week ending June 4, 2016, 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 - January 31, 2017**



Paul T. Fitzgerald, Esq.  
Chairman



Judith M. Neumann, Esq.  
Member



Charlene A. Stawicki, Esq.  
Member

**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](http://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.

JPC/AB/rh