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Issue ID: 0020 2081 23

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The claimant appeals a decision by Krista Tibby, a review examiner of the Department of Unemployment Assistance (DUA), to deny the claimant benefits following his separation from employment on October 31, 2016. We review, pursuant to our authority under G.L. c. 151A, § 41, and affirm.

On February 28, 2017, the agency initially determined that the claimant was not entitled to unemployment benefits. The claimant appealed, and both parties attended the hearing. In a decision rendered on June 8, 2017, the review examiner affirmed the agency determination, concluding 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). The Board accepts the claimant's application for review.

Ruling of the Board

After considering the recorded testimony and evidence from the hearing, the review examiner's decision, and the claimant's appeal, we conclude that the review examiner's findings of fact are supported by substantial and credible evidence in the record.

As stated in the findings, the claimant separated from his position pursuant to the terms of the Voluntary Retirement Incentive Program (VRIP). The Board has noted two distinct circumstances in which a claimant can be eligible for benefits in cases where the claimant accepts a separation/retirement package. The first is characterized as an involuntary departure. The separation will be deemed to be involuntary if the claimant can show that he had a reasonable belief that he would soon be terminated if he did not accept the employer's separation package, or, here, the VRIP. *See* White v. Dir. of Division of Employment Security, 382 Mass. 596, 597–598 (1981). The second type of separation is deemed to be voluntary, but with good cause attributable to the employer. A claimant will be eligible in this circumstance if he shows that he reasonably feared an imminent termination and the employer "substantially hindered the ability of [the] employee to make a realistic assessment of the likelihood that he would be involuntarily separated" if he did not accept the employer's offer of the separation package. *See* State Street Bank and Trust Co. v. Deputy Dir. of Department of Employment and Training, 66 Mass. App. Ct. 1, 11 (2006).

Reading the holdings of these cases together, the Board has held that to determine whether a claimant is eligible for benefits, the claimant first must show that he has a reasonable basis for

believing that layoffs are a possibility if he does not take the separation/retirement package. This can be shown by presenting evidence that the employer has announced that involuntary layoffs could follow the offer of the package, or by showing that the circumstances surrounding the offer of the package indicate that layoffs would be likely if enough employees did not accept it. Then, the claimant has to show that either the White situation or the State Street situation is applicable. In other words, he must show that he had a reasonable belief that he, specifically, was in danger of separation if he did not take the separation package, or that the employer had hindered his ability to ascertain if he would be laid off if he did not take the package. *See* Board of Review Decision 0018 6461 03 (January 31, 2017).[1] Generally, the initial inquiry focuses on the overall potential for layoffs, and the subsequent analysis focuses on a claimant's specific circumstances.

Here, the first prong was established. Both parties testified[2] that in the spring of 2016, the employer announced that there could be layoffs if enough employees did not accept the VRIP. However, the claimant did not present substantial evidence to satisfy either the White or State Street tests. As noted by the review examiner in Part III of her decision, the claimant did not present specific, credible evidence that his job was in jeopardy. Thus, she reasonably concluded that he did not have a reasonable belief that his job could end if he did not take the VRIP. The claimant also did not present sufficient evidence to show that the employer hindered his ability to show that his job was in jeopardy. The review examiner found that the claimant's job was not declared surplus, his job was a critical position, and he was replaced after he separated from his job. The claimant admitted that he did not ask anyone, prior to accepting the VRIP, if someone in his position could lose his job if enough employees did not take the VRIP. In this case, we think that the lack of effort by the claimant to obtain more information from the employer regarding the security of his job means that he has not shown that the employer was intentionally keeping information from him as to whether he could be involuntarily separated.

Since the claimant has not carried his burden under either the White or State Street tests, we conclude that the review examiner's decision to deny benefits is free from error of law.

The review examiner's decision is affirmed. The claimant is denied benefits for the week beginning October 30, 2016, and for subsequent weeks, until such time as he has had at least

[1] Board of Review Decision 0018 6461 03 is an unpublished decision, available upon request. For privacy reasons, identifying information is redacted.

[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).

eight weeks of work and has earned an amount equivalent to or in excess of eight times his weekly benefit amount.

BOSTON, MASSACHUSETTS
DATE OF DECISION - June 19, 2017

Paul T. Fitzgerald, Esq.
Chairman

Charlene A. Stawicki, Esq.
Member

Member Judith M. Neumann, 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.

SF/rh