Claimant accepted an early retirement separation package because he was concerned about his job security. However, because he failed to show a reasonable belief that he would be subject to imminent layoff if he did not take the package, and did not show that the employer hindered his ability to objectively assess the likelihood of being terminated, he is ineligible for benefits under G.L. c. 151A, § 25(e)(1).

Board of Review
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Issue ID: 0021 4208 63

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The employer appeals a decision by P. Sliker, 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 resigned from his position with the employer on March 24, 2017. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on June 29, 2017. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, attended only by the claimant, the review examiner overturned the agency's initial determination and awarded benefits in a decision rendered on August 22, 2017. 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). After considering the recorded testimony and evidence from the hearing, the review examiner's decision, and the claimant's appeal, we afforded the parties an opportunity to submit written reasons for agreeing or disagreeing with the decision. Only the claimant responded. 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 is eligible for benefits under G.L. c. 151A, § 25(e)(1), because he reasonably believed his job was in jeopardy if he did not take the employer's early retirement offer, is supported by substantial and credible evidence and is free from error of law.

Findings of Fact

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

1. The claimant worked as a product test engineer for the employer, a semiconductor manufacturer. The claimant began work for the employer in 1975.

2. In the early 2000s, the employer began discharging employees for business reasons. They went through approximately one round of layoffs every year.

3. The claimant was not a union worker. It is not known if the employer reduces its workforce in order of least seniority. It is not known what system the employer used in laying off employees.

4. The employer also began offering retirement incentives.

5. The claimant worked in a group with nine employees. In 2015, the employer discharged 7 of his group's employees due to a lack of work. After approximately 6 months, the employer found a new group for the claimant to work in.

6. The claimant was concerned with the amount of time the employer took in finding a new group for him. He asked his new manager if his job was in jeopardy. The manager told the claimant he did not know.

7. The employer announced the purchase of a competitor semiconductor manufacturing company. Many of the positions at the competitor were the same as positions at the employer. The claimant was concerned this might make his job redundant.

8. In January 2017, the employer offered an Early Retirement Offer (ERO). The offer was for all U.S. based employees age 57 and older as of December 31, 2017 and [who] were hired on or before August 1, 2016. The offer was for two weeks of salary continuation for each year of service and health insurance coverage until the age of 65.

9. At the time of the offer, the claimant was 63 years old.

10. The offer specifically states: "While the Company does not anticipate further restructuring in the foreseeable future, the Company reserves the right to do so. Benefits offered for any later structuring likely will be less generous than the benefits offered under the ERO."

11. At the time of the offer, there were approximately 6,000 employees. The claimant heard from coworkers the offer was made to approximately 100 employees.

12. Because of the prior reductions in force and because of his prior re-assignment, the claimant believed his job was in jeopardy.

13. The claimant accepted the offer and informed the employer he would like to remain at work until July 28, 2017. The employer informed the claimant his last day would be March 24, 2017. He signed the agreement on February 9, 2017.

14. The claimant remained employed until March 24, 2017.

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 ultimate conclusion is free from error of law. Upon such review, the Board adopts the review examiner's findings of fact and deems them to be supported by substantial and credible evidence. However, as discussed more fully below, we disagree with the review examiner's legal conclusion that the claimant had good cause attributable to the employer to leave his job.

Because the claimant voluntarily left his employment, we analyze this case 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] . . . (e) 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 . . . .

The express language of this provision assigns the burden of proof to the claimant.

In this case, the claimant separated from his position pursuant to the terms of an Early Retirement Offer (ERO). The Board has noted two distinct circumstances in which a claimant can be eligible for benefits in cases where the claimant accepts a compensation package in exchange for ending his employment. The first is characterized as an involuntary departure. It is 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. *See* White v. Dir. of Division of Employment Security, 382 Mass. 596, 597–598 (1981). In the second circumstance, the separation is deemed to be voluntary, but with good cause attributable to the employer. The claimant must show a reasonable belief that he would be terminated and that 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. *See* State Street Bank and Trust Co. v. Deputy Dir. of Department of Employment and Training, 66 Mass. App. Ct. 1, 11 (2006).

The company's January, 2017, ERO did not include any information about how much of its workforce it wanted to reduce. Nor did the employer announce that personnel would be laid off if an insufficient number of workers elected the ERO. Nonetheless, the review examiner concluded that the claimant reasonably believed his job was in jeopardy because, in 2015, the employer laid off seven of the nine employees in the claimant's workgroup, it took six months

for the claimant to be reassigned, and because the employer had just purchased a manufacturing competitor that employed many of the same positions as the employer. While the claimant may reasonably have been concerned about his job security, nothing in the record indicates that a layoff was imminent. The prior layoff was two years before. The claimant testified that the employer was not struggling financially.[1] We also have no information about how buying a competitor manufacturer of unknown size would affect positions in the employer's approximately 6,000-person workforce. There is simply insufficient evidence to establish that the claimant's separation was involuntary under White.

Alternatively, we consider whether the claimant has shown that he had good cause attributable to the employer to resign under the State Street rule. The Massachusetts Appeals Court recognized that an individual would not be able to assess whether he was in danger of imminent layoff if the employer hindered his ability to obtain the information needed to make that assessment. In State Street, for example, after announcing that an 1,800-person layoff would follow if not enough people opted for its voluntary separation package offer, the employer provided no information about how the offer was working and instructed managers not to talk with workers about the criteria that would be used to make the layoff, if it was unsuccessful. State Street, 66 Mass. App. Ct. at 3–4. "State Street created an environment in which all employees were required to guess, speculate, and cobble together as best they could information on which to base a decision as to whether they would be involuntarily separated." Id. at 11.

Here, there is no indication that the employer discouraged anyone from asking about potential layoffs or the likelihood that the individual would be targeted. The findings show that, in 2015, after being reassigned to a new workgroup, the claimant had asked his manager if his job was in jeopardy and was told that the manager did not know. However, it does not appear that he posed the same question to anyone in management in 2017. This lack of effort certainly hinders the claimant's ability to establish that the employer intentionally withheld information that would have enabled him to objectively assess the likelihood that his own job was in jeopardy. For this reason, the claimant has also failed to meet the State Street test.

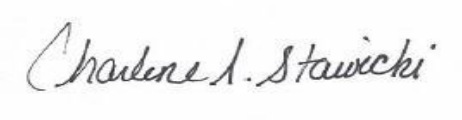
We, therefore, conclude as a matter of law that the claimant has failed to sustain his burden to prove that he was involuntarily separated or that he voluntarily resigned for good cause attributable to the employer. Therefore, he is ineligible for benefits under G.L. c. 151A, § 25(e)(1).

[1] 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).

The review examiner's decision is reversed. The claimant is denied benefits for the period beginning March 24, 2017, 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.

BOSTON, MASSACHUSETTS
DATE OF DECISION - November 29, 2017

Paul T. Fitzgerald, Esq.
Chairman



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

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.

AB/rh