A claimant with about thirty years of service, who voluntarily took a VSP, is not eligible to receive benefits, where she did not show that her job specifically could have been affected if she did not take the VSP, she did not show that the employer substantially hindered her ability to assess if she would be laid off if she did not take the VSP, and she did nothing to try to obtain information about the potential for layoffs.

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Issue ID: 0022 6470 65

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The employer appeals a decision by 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 separated from her position with the employer on July 28, 2017. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on August 26, 2017. The claimant 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 awarded benefits in a decision rendered on January 18, 2018.[1]

Benefits were awarded after the review examiner determined that the claimant, who accepted a voluntary separation package which ended her employment, had a reasonable belief that her discharge was imminent if she did not take the separation package and was substantially hindered in her ability to assess if she would have been involuntarily separated if she did not accept the separation package. Consequently, although she brought about her separation by taking the package, she 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 employer's appeal, we accepted the employer's application for review and afforded the parties an opportunity to submit written reasons for agreeing or disagreeing with the decision. Neither party 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 to receive unemployment benefits is supported by substantial and credible evidence and

[1] In Part IV of his decision, the review examiner concluded that the agency's determination "is affirmed." This was clearly an error, as the text of Part III and the final portion of Part IV of the decision indicate that the review examiner was concluding that the claimant should be eligible to receive benefits.

is free from error of law, where the claimant did very little, if anything, to obtain information as to whether her job specifically would be at risk if she did not take the separation package.

Findings of Fact

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

1. The employer is a manufacturer. The claimant worked as a full-time fab specialist for the employer. The claimant worked for the employer from 10/05/87 until 7/28/17.

2. The claimant did not belong to a labor union.

3. In December 2016, the employer offered a voluntary early retirement package (the ERO) to all of its U.S. based workers who were over age fifty-seven and who had started employment before August 2016. Workers who were not over age fifty-seven and/or who had started employment after August 2016 were not eligible to apply for the ERO.

4. The deadline to apply for the ERO was 1/13/17.

5. The claimant was fifty-seven when the employer offered the ERO. The claimant was eligible to apply for the ERO.

6. The employer never announced that it would certainly impose layoffs if it did not gain enough volunteers for the ERO.

7. The ERO program was voluntary. The employer did not require the claimant to apply for the ERO. The claimant knew that the ERO was voluntary.

8. The employer never told the claimant that it planned to target certain job titles for layoffs if it did not gain enough volunteers for the ERO. The claimant never asked the employer about what job titles it planned to target for layoffs, if any.

9. The employer never told the claimant that it planned to lay her off if she did not accept the ERO. The claimant never asked the employer whether it planned to lay her off if she did not accept the ERO. The employer never gave any indication about how likely it was that she faced a layoff if she did not accept the ERO. The claimant never asked the employer about the likelihood of a layoff if she did not accept the ERO.

10. The claimant never asked the employer about what criteria it planned to use if it decided to impose layoffs.

11. The employer's human resources senior vice president sent an e-mail to the claimant. The email was dated 12/19/17. The e-mail read, "As a follow up to

the email I sent to you last Friday, I would like to emphasize that the ERO is a voluntary program and as such there is no requirement for you to participate. I appreciate there may be some concern that if you decide not to participate in the ERO, your role may be impacted should the company be required to take additional steps to reduce expenses. It is difficult to predict what, if any, additional steps may be required. However, as you evaluate whether to participate in the ERO, you should consider your personal situation and whether the program is right for you. Understand that a decision not to participate in the ERO does not automatically mean that you will be asked to leave at a later date should additional expense reduction actions be required. While I cannot guarantee that you will not be impacted, I call tell you that your decision not to apply for the ERO will not be a factor in any subsequent employment decisions."

12. The claimant applied for the ERO on 12/20/16.

13. The claimant applied for the ERO because the employer did not guarantee the claimant's employment and she thought there was a chance that the employer would lay her off.

14. The employer was free to accept or reject applications for the ERO. The employer accepted the claimant's application.

15. The employer offered the option to rescind ERO applications. The deadline to rescind was in February 2017. The claimant did not rescind her application.

16. In her ERO application, the claimant requested to work until 7/28/17. The employer accepted this and the claimant worked until 7/28/17.

17. The ERO featured a severance pay agreement. As part of the ERO, the employer agreed to pay the claimant's normal weekly salary for sixty-six weeks after her separation date.

18. The employer never told the claimant that it planned to reduce her pay if she did not accept the ERO. The employer never told the claimant that it planned to move her work location if she did not accept the ERO. The employer never told the claimant that it planned to change her job if she did not accept the ERO.

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 reject the review examiner's legal conclusion that the claimant established that she had a

reasonable belief that her separation was imminent if she did not take the early retirement package (ERO), and that the employer had substantially hindered her ability to assess if she could be involuntarily separated if she did not take the offer.

The claimant separated from her position after she accepted the ERO, which was offered to her and other employees in December of 2016. The ERO was optional. Finding of Fact # 7. Because the claimant's action in taking the ERO caused the separation, rather than any employer-initiated action, G.L. c. 151A, § 25(e)(2), which generally applies in discharge cases, is not applicable. Rather, G.L. c. 151A, § 25(e)(1), is applicable and 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 . . . [or] if such individual established to the satisfaction of the commissioner that his reasons for leaving were for such an urgent, compelling and necessitous nature as to make his separation involuntary.

Under these statutory provisions, the claimant has the burden to show that she is eligible to receive unemployment benefits. Following the initial hearing, the review examiner concluded that the claimant had carried her burden. After our review of the record, we reach the opposite conclusion.

We have 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 her employment. The first is characterized as an involuntary departure. It is deemed to be involuntary if the claimant can show that she had a reasonable belief that she would soon be terminated if she 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 she would be terminated and 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" if she 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). 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 she has a reasonable basis for believing that layoffs are a possibility if she 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 she either had a reasonable belief that she, specifically, was in danger of separation if she did not take the separation package, as in White, or that the employer had hindered her ability to ascertain if she, specifically, would be laid off if she did not take the package, as in State Street. *See* Board of

Review Decision 0018 6461 03 (January 31, 2017).[2] Generally, the initial inquiry focuses on the overall potential for layoffs, and the subsequent analysis focuses on a claimant's specific circumstances.

As an initial matter, we note that the evidence in the record that layoffs would have been likely had enough employees not taken the ERO is scant, at best. The mere offer of the ERO is insufficient to conclude that layoffs could have been possible. The employer never gave any indication that layoffs could occur if the claimant, or others, did not accept the ERO. Findings of Fact ## 8 and 9. The claimant offered no testimony to suggest that prior situations in which the ERO was offered always, or very often, led to layoffs. There is no evidence that layoffs had been ongoing, and that the ERO was a method to accelerate the separation process of a large number of employees.

The review examiner based his conclusion that the claimant had a reasonable belief of imminent layoff on the December 19, 2017, e-mail. The review examiner concluded that the e-mail "indicated that layoffs could occur and that the employer could not guarantee that she would keep her employment." The e-mail actually stated, in part, the following:

> I appreciate there may be some concern that if you decide not to participate in the ERO, your role may be impacted should the company be required to take additional steps to reduce expenses. It is difficult to predict what, if any, additional steps may be required. However, as you evaluate whether to participate in the ERO, you should consider your personal situation and whether the program is right for you. Understand that a decision not to participate in the ERO does not automatically mean that you will be asked to leave at a later date should additional expense reduction actions be required. While I cannot guarantee that you will not be impacted, I can tell you that your decision not to apply for the ERO will not be a factor in any subsequent employment decisions.

Layoffs are not specifically mentioned, but are hinted at. The general gist of the e-mail appears to be that even the employer is unsure if additional actions may be required after the ERO process is completed. The e-mail, in our view, does not create a reasonable basis for the claimant to believe that layoffs would be likely and imminent if enough employees did not take the ERO. During the hearing, the claimant testified that she needed to take the ERO, because her job was not guaranteed to her. We decline to hold that an employer's action in not guaranteeing an employee a job automatically translates into a reasonable belief that the person could be imminently laid off if she does not take a separation package. No reported case or Board decision requires such a result. On this record, there is simply insufficient evidence to conclude that the claimant had a reasonable belief that layoffs were likely if she did not take the ERO.

We recognize, however, that the e-mail may have created some uncertainty in the claimant's mind. The review examiner found that the claimant took the ERO, in part, because "she thought that there was a chance that the employer would lay her off." Finding of Fact # 13. Although the e-mail did not state what steps might be taken if "additional expense reduction actions"

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

needed to happen, involuntarily layoffs are presumably one option. Even if the record contained sufficient evidence to suggest that layoffs might happen following the ERO process, the claimant has certainly not shown that she reasonably could have believed that she, personally, would have been a likely target for layoff. The review examiner concluded that the employer substantially hindered the claimant's ability to assess if she could be subject to a layoff, but the claimant took no actions to try to make such an assessment. Such efforts would have been a reasonable way for her to make a determination about her future employment. The review examiner found that the claimant "never asked the employer about what job titles it planned to target for layoffs," *see* Finding of Fact # 8, that the claimant "never asked the employer whether it planned to lay her off if she did not accept the ERO," *see* Finding of Fact # 9, that the claimant "never asked the employer about the likelihood of layoff if she did not accept the ERO," *see* Finding of Fact # 9, and that the claimant "never asked the employer about what criteria it planned to use if it decided to impose layoffs." *See* Finding of Fact # 10. In short, the claimant did nothing to ascertain the likelihood of her layoff.

The review examiner concluded that the claimant was "left to speculate" about the likelihood of a layoff "because [the employer] did not provide any information for the claimant to base a decision on." Reasonably viewed, the evidence shows that the employer offered the ERO without contemplating the need for layoffs. If the claimant was concerned about the possibility of a layoff, she could have asked the employer about this concern. The "substantially hindered" language comes directly from State Street, in which the employer announced that layoffs *would* happen if enough employees did not take the separation package and in which the employer prohibited managers from providing opinions as to whether employees should take the separation package or what criteria could be used to determine who would be laid off. The claimant was not hindered in this case from asking questions or trying to get information from the employer about her future job security. The situation is not akin to what happened in State Street. Indeed, it appears that the employer was open to talking with its employees. A portion of the December 19, 2017, e-mail, *see* Exhibit # 10, p. 5, which was not cited by the review examiner in his decision, stated the following:

> As a reminder, I would encourage you to take advantage of the on-site sessions at the major locations as was communicated in the microsite. These sessions will begin tomorrow. . . . Spouses are invited to join the Saturday, January 7th sessions in Wilmington or the webinars. . . .

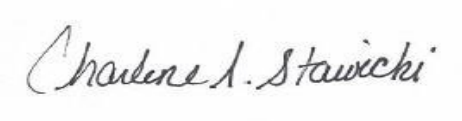
Per her own testimony, the claimant did not attend any sessions. She testified that she had no questions to ask the employer. It's not clear what was exactly discussed at the sessions, but it is clear that the claimant did not attend them and did not try to obtain information about her job security. Thus, she has not shown that her job specifically was in jeopardy or that the employer substantially hindered her ability to assess whether she could be laid off if she did not take the ERO.

We, therefore, conclude as a matter of law that the review examiner's decision to award benefits under G.L. c. 151A, § 25(e)(1), is not supported by substantial and credible evidence or free from error of law, because the claimant did not carry her burden to show that her job was in jeopardy if she did not take the separation package, or that the employer hindered her ability to assess whether she could be laid off if she did not take the employer's offer.

The review examiner's decision is reversed. The claimant is denied benefits for the week beginning July 30, 2017, 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 - April 27, 2018

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.

SF/rh