

Claimant reasonably believed that her job could be in jeopardy if she did not take a separation package, in light of the transfer of some of the claimant's primary job functions to another department, the employer's interest in creating a new position supporting the entity the claimant was already supporting, the superfluous nature of the claimant's group's work, and the lack of information provided to the claimant after inquiring about her job security. She is not disqualified under G.L. c. 151A, § 25(e)(1).

**Board of Review
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Issue ID: 0023 2343 41

BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The claimant appeals a decision by 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 reverse.

The claimant separated from her position with the employer on October 6, 2017. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on November 1, 2017. The claimant 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 denied benefits in a decision rendered on January 30, 2018. 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 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 obtain additional testimony and other evidence pertaining to the communications between the claimant and the employer regarding the voluntary early retirement offer made to employees. Both parties attended the remand hearings. Thereafter, the review examiner issued her 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 decision, which concluded that the claimant, who resigned from her employment to accept a voluntary early retirement offer, did not have a reasonable basis for her belief she would be laid off if she did not take the offer, is supported by substantial and credible evidence and is free from error of law.

Findings of Fact

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

1. In September, 2003, the claimant started working for the employer.
2. The claimant initially worked part-time for the employer.
3. In 2014, the claimant started working full-time for the employer. The claimant was working 40 hours per week commencing 2014.
4. The claimant was most recently scheduled to work Monday through Friday from 8:30 a.m. until 5:30 p.m. or 6 p.m.
5. The claimant was paid an annual salary of \$103,000.
6. In July 2017, the employer presented the claimant and other qualified workers a Voluntary Early Retirement Offer (hereinafter VERO). In order to qualify for the offer, the workers had to be 55 years of age or older and worked for the employer for 7 years or longer.
7. The VERO offered the qualified workers with [sic] a pension enhancement, which included 3 years of services being added and 3 years of age being added. The workers could take this benefit as a lump sum or as a monthly benefit. This offer also included continued medical benefits for 18 months.
8. The workers that applied for and were accepted for the VERO would have to leave the employer's establishment by [sic] September 8, 2017, through November 1, 2017.
9. The claimant accepted the VERO on September 7, 2017.
10. The claimant decided to accept the employer's VERO as the claimant believed she was going to be laid off from work.
11. The claimant was concerned about future layoffs.
12. In 2015, the employer offered a VERO and subsequently layoffs occurred. The claimant did not take the VERO in 2015.
13. The last time layoffs happened in the claimant's group was 2015.
14. The claimant heard rumors of layoffs from co-workers.
15. The claimant worked in the Global Sales Operations Group. There were a lot of changes in the claimant's department and restructuring. There were no

layoffs in the claimant's immediate group at [the] time of the claimant's separation.

16. The specific changes that occurred in the claimant's work group in the years leading up to her acceptance of [the] VERO started during the Summer of 2015.
17. In the Spring 2015, the employer offered a VERO. Two workers in the Order Management Department, within the Global Sales Operation Group under the claimant's Director, were offered the VERO. These two workers were not in the claimant's immediate work group. These two worker[s] declined to take the VERO and were subsequently laid off by the employer.
18. In 2015, [in] the claimant's immediate work group, Business Planning and Analysis, one worker was laid off. This worker held the same title as the claimant which was a Business Analyst. The claimant's manager at the time did not know this lay off was coming.
19. On the day of the layoffs in 2015, the claimant's work group also lost two individuals. These two workers were transferred to the Supply and Demand Planning work group. These workers were transferred due to the employer restructuring.
20. Following the 2015 layoffs, the employer had a restructuring. The claimant was alarmed by the restructuring. The restructuring was done without the input of the claimant's manager or co-manager.
21. Prior to 2015, the claimant's work group's primary functions were forecast and analysis for specific channels. Each Business Analyst would perform forecast and analysis work for a specific channel. The claimant's assigned channel was [Company A].
22. In the summer of 2015, after the layoffs, there were 8 Business Analyst[s] in the claimant's work group. Once the one worker was laid off, the claimant's work group went down from 8 Business Analysts to 7 Business Analysts. 5 of the Business Analysts were instructed by the Director to report to one manager.
23. The other 2 Business Analysts, including the claimant, were instructed by the Director to report to another manager. The claimant's group was informed by the Director they would be performing Product Launch and Transition Support for all American channels. The claimant did know the tasks in Product Launch and Transition Support. The claimant had performed some tasks in connection with Product Launch and Transition Support in the past for her connected channel.

24. The claimant then realized that the workers in the Product Launch and Transition Support groups were not doing what they used to do so these tasks were falling upon the claimant's work group. Over the next several months, Product Allocations and Excess Inventory Management came into the claimant's work group as an extended role.
25. In January, 2016, the Director announced that the Business Planning and Analysis work group would go global for products all over the world. The Director announced that the Business Planning and Analysis work group would be divided into Forecast Workers and Channel Support Workers. The Forecast Workers will be Global. The Channel Support People will be local to their work location. For example, Channel Support Workers in the United States will support United States Channels.
26. In the Spring 2016, there was another reorganization. The employer demoted the claimant's manager to a Business Analyst and placed her in the Channel Support Group.
27. The role of the Channel Support Manager, previously held by the claimant's former manager, then was left open by the employer. The position then became a global position.
28. In the Spring 2016, the claimant's work group was renamed Global Planning and Analysis.
29. The employer then informed the claimant's work group to report to a manager located in Dubai in the meantime. The claimant felt this manager in Dubai was a good guy.
30. The claimant sent emails to the Director and the Manager in Dubai complaining that the claimant's work group needed a manager locally. In these emails, the claimant recommended the claimant's former manager. In response to these emails, the Director explained there was no need to fill the position and the position will be left open.
31. In the Channel support role, the claimant and the other workers were required to teach the Sales and Channel forecasting function to the Sales Managers. In the past, the claimant did not have to train Sales Managers on how to forecast.
32. In October 2016, the employer filled the Channel Support Manager Position with a worker located in Europe. This worker was previously in a marketing role. This created challenges for the claimant's work group due to time differences between Europe and the United States.
33. In April 2017, the worker who had filled the Channel Support Manager Position resigned providing a 2-month notice period to the employer.

34. During a meeting in the spring 2017, the Director informed the claimant and other workers that the claimant's group would return to a local group again.
35. The changes in the claimant's work group made the claimant believe that she would be laid off if she did not accept the VERO, as when the employer offered the previous VERO in 2015, two workers that did not take the VERO were subsequently laid off by the employer. The changes in her work group also made the claimant believe that she would be laid off if she did not accept the VERO, as the claimant had to teach forecasting to the Sales Managers, she felt her value was diminished, the claimant felt her group was excess work, as the claimant's work did [sic] was being done by other work groups, and the employer announced the building in [Town A], Massachusetts was closing.
36. The claimant made inquiries to management regarding the changes to her work group and how they would affect her going forward. The claimant spoke with both the Supervisor and the Director in the Spring and Summer of 2017 on a one-to-one basis about what would happen to the claimant's work group and their role. In response to this inquiry, the Supervisor and the Director informed the claimant that her work group could focus on analysis.
37. The claimant believed that the employer was not going to renew the lease to the building that she worked [in]. The claimant believed the employer was not going to renew the lease to the building that she worked in because the claimant and other workers received emails from the employer announcing this informing [sic] in the spring or summer 2017. The emails listed that workers had to be out of the building by August, 2018. In the emails, the employer informed workers that they would be informed of where they would be relocated. There were also discussions about the marketing department going to a new building.
38. The claimant made inquiries to management about the employer's plans for relocation and how they would affect her. The claimant spoke with a Supervisor and the Director. In response to this inquiry, they said they did not know and they would let the claimant and the other workers know when the decision was made.
39. Some of the claimant's primary job functions moved to another department. The channel specific forecasting tasks were moved to the Sales Directors for this to be their responsibility.
40. The claimant was also told by the Business Unit Manager in passing that a request was made to do a position in the field supporting [Company A]. There was not a title for this position that was requested.
41. The claimant's senior manager, located in Dubai, did not have a response when the claimant informed the senior manager that she may take the VERO, because she was worried about the work group and that she would like to take

- another position. This conversation took place in July 2017 or August 2017 during an in person meeting. In this conversation, the claimant informed the senior manager that when she took the VERO that [sic] she would like to stay on for a while, as she knew the Fall season was busy. In response to this information, the senior manager stated no and that the claimant could leave from September 8, 2017 to October 31, 2017 according to the VERO. This response made the claimant feel like she did not have a future with the company and that she was of no value to stay longer.
42. In August 2017, the claimant spoke with another new manager about taking the VERO. This manager did not have a response. This manager did explain it was the claimant's decision, and he could not discuss the VERO with the claimant. This manager said he would be sorry to see the claimant leave.
 43. The employer was not planning on relocating the claimant's work functions. The claimant was also told by the Business Unit Manager in passing that a request was made to do a position in the field supporting [Company A].
 44. Managers were instructed not to discuss the VERO with workers by the Director.
 45. The claimant's work group's primary function was forecasting.
 46. The employer did not announce that any layoffs were going to take place.
 47. The employer did not inform the claimant that the claimant was going to be laid off from work.
 48. A member of management did not advise the claimant to take the VERO.
 49. The employer did not tell the claimant that she was going to be discharged from work.
 50. The claimant believed that she would be laid off sometime after January 2018.
 51. The claimant was not a union member.
 52. The claimant's last date of work was on October 6, 2017.
 53. The claimant was not discharged from work.
 54. The claimant was not laid off from work.
 55. The claimant left work in accordance with the terms of a VERO providing the claimant with financial incentives.
 56. The claimant has rolled her pension enhancement of a lump sum into an IRA.

57. On October 11, 2017, the claimant filed an initial claim for unemployment insurance benefits (Exhibit 1). The claim is effective the week beginning October 8, 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 consolidated findings are supported by substantial and credible evidence; and (2) whether the review examiner's original 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. However, as discussed more fully below, we reject the review examiner's legal conclusion that the claimant is not eligible to receive unemployment benefits.

The claimant separated from her position after she accepted the employer's Voluntary Early Retirement Offer (VERO), which was offered to her and other employees in July of 2017. The VERO was optional. Because the claimant's action in taking the VERO 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 here. 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 of 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 not carried her burden. After our review of the record and the new consolidated findings of fact, 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 either the White situation or the State Street situation is applicable. In other words, she must show that she had a reasonable belief that she, specifically, was in danger of separation if she did not take the separation package, or that the employer had hindered her ability to ascertain if she, specifically, would be laid off if she 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.

In this case, the review examiner found that the employer did not announce that layoffs could happen if a sufficient number of employees did not accept the VERO. However, we think that the circumstances attendant to the VERO offer were sufficient for the claimant to reasonably conclude that layoffs could happen in the near future, and specifically in her department. The record indicates that, in 2015, the employer offered a VERO and subsequent layoffs occurred. Following these layoffs, the employer engaged in a restructuring. The record also indicates that several changes to the claimant's work duties began in the summer of 2015, which was roughly two years prior the VERO that was offered to the claimant in July of 2017. The most significant of those changes being that some of the claimant's primary job functions were transferred to another department, and a lot of the work the claimant was doing was also being done by a different department. Specifically, the claimant's channel-specific forecasting tasks were given to sales directors over the course of 2016, and the work subsequently performed by the claimant's group was already being done by another group, which made the claimant think her group's work was superfluous. Finally, the employer's director confirmed that the employer was looking into creating a new position to support an entity the claimant was already supporting.² When the claimant questioned both her supervisor and the director in the spring and summer of 2017 about what would happen to the claimant's work group, they said it could focus on analysis work. Although the employer told the claimant that there was analysis work to be done by her group around the time the employer offered the VERO, it is understandable that the claimant still had concerns about the status of her employment going forward, as the trend for the past two years had been for more and more of the claimant's primary functions to be stripped from her and given to others.

The fact that several of the claimant's primary job duties were transferred to other people, the employer was seriously looking into creating a new position that would offer support to the same entity the claimant already supported in her role, and another group also performed the work

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).

performed by the claimant's group, made it reasonable for the claimant to believe her role was becoming obsolete, and she would be laid off if she did not accept the VERO offered by the employer. Moreover, when the claimant spoke to two of her supervisors about taking the VERO and her worries about her job status, they offered her no assurance that her job would be available to her if she did not take the VERO. One supervisor even told the claimant that if she took the VERO her services would not be needed beyond the deadline to leave given by the employer, despite the claimant's offer to stay longer to help out during the busy season if she decided to take the VERO. The lack of information regarding the security of her job could reasonably have signaled that the employer was looking to separate employees involuntarily, if necessary. Viewed together, these circumstances are sufficient for the claimant to have reasonably believed that the employer could resort to adverse employment actions after the VERO process was over.

The type of responses given to the claimant was much like the response in State Street, where management employees were instructed not to talk with employees about whether to take the separation package. *See State Street*, 66 Mass. App. Ct. at 3–4. The employees in State Street and the claimant in this case were left with the same level of assurance about the status of their jobs: practically none. Based on the transfer of some of the claimant's primary job functions to another department, the superfluous nature of the claimant's group's work, the employer's interest in creating a new position supporting the entity the claimant was already supporting, and the lack of information provided to the claimant about her job security, we think that the claimant has shown both that she reasonably believed her job was in jeopardy at the time she took the VERO, and that the employer hindered her ability to assess whether her job might be in jeopardy. The claimant did the best she could with limited information, and she chose to take the VERO. Under these circumstances, she did not bring her separation upon herself, and, thus, she is not subject to disqualification under G.L. c. 151A, § 25(e)(1).

We, therefore, conclude as a matter of law that the review examiner's initial decision to deny benefits under G.L. c. 151A, § 25(e)(1), is not based on substantial and credible evidence in the record or free from error of law, because (1) the employer hindered the claimant's ability to assess whether her job was in jeopardy at the time she took the VERO and (2) with the information she did have, the claimant reasonably believed that her job was in jeopardy.

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week ending October 14, 2017, and for subsequent weeks if otherwise eligible.



Paul T. Fitzgerald, Esq.
Chairman

BOSTON, MASSACHUSETTS
DATE OF DECISION - July 30, 2018



Charlene A. Stawicki, Esq.
Member

Member Michael J. Albano 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/rh