Claimant failed to demonstrate that the employer misled her to believe she would receive unemployment benefits if she accepted the voluntary separation package.

Board of Review
19 Staniford St., 4th Floor
Boston, MA 02114
Phone: 617-626-6400
Fax: 617-727-5874

Issue ID: 0025 8324 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. Benefits were denied on the ground that the claimant quit her job to accept a voluntary separation package (VSP) offered by the employer, and did so voluntarily, without good cause attributable to the employer pursuant to G.L. c. 151A, § 25(e)(1).

The claimant filed a claim for unemployment benefits, which was denied in a determination issued by the agency on June 28, 2018. The claimant appealed to the DUA Hearings Department. Following a hearing on the merits, the review examiner affirmed the agency's initial determination in a decision rendered on October 12, 2018. The claimant sought review by the Board, which denied the appeal, and the claimant appealed to the District Court pursuant to G.L. c. 151A, § 42.

On June 12, 2019, the District Court ordered the Board to make subsidiary findings from the record. Consistent with this order, we remanded the case to the review examiner to make subsidiary findings of fact from the record as to whether the employer misled the claimant regarding her eligibility to receive unemployment benefits if she elected to take the VSP. Thereafter, the review examiner issued her consolidated findings of fact and credibility assessment.

The issue before the Board is whether the review examiner's decision, which concluded that the claimant did not have a reasonable belief that she faced imminent layoff if she did not accept the employer's offer of a VSP and, thus, failed to establish good cause attributable to the employer, is supported by substantial and credible evidence and is free from error of law.

After reviewing the entire record, including the recorded testimony and evidence from the hearing, the review examiner's decision, the claimant's appeal, the District Court's Order, and the consolidated findings of fact and credibility assessment, we affirm the review examiner's decision.

Findings of Fact

The review examiner's consolidated findings of fact and credibility assessment, which were issued following the District Court remand, are set forth below in their entirety:

1. The claimant worked full time for the employer, a hospital, between late May 1989 and 11/03/2017, when she separated.

2. The claimant worked as a secretary in the philanthropy department. The claimant was one (1) of two (2) secretaries who worked in the department, the other of whom was secretary A.

3. The claimant's immediate supervisor was the donor relations manager (manager). The claimant's upper level manager was a senior vice president (V.P.).

4. The employer maintains policies governing how the employer lays off employees when layoffs occur. Such policies are available through the employer's human resources department. The claimant did not contact the human resources department to inquire about such policies.

5. Per the employer's policies, employees with disciplinary issues are the first to be laid off. Thereafter, employees with the lowest seniority (based upon hire date) are the next to be laid off. Laid off employees receive one (1) week of severance pay for every year of service up to twenty six (26) years.

6. The claimant had no disciplinary issues. Secretary A had lower seniority based upon hire date than the claimant did.

7. The claimant observed that layoffs were occurring annually since 2013. None of these layoffs affected the claimant and she remained employed.

8. On 09/27/2013, [Employer Name] Today posted an article about the employer "to lay off up to 60 people," a reduction "of less than 1 percent for [the employer]," and that the reductions will affect "both union and non-union positions – leadership and staff positions – and will occur across several departments." On 10/17/2014, [Employer Name] Today posted an article that the employer laid off seventy (70) employees. On 01/17/2015, [Employer Name] Today posted an article that the employer laid off thirty-five (35) employees "system-wide" to "restructure." On 03/04/2015, [Employer Name] Today posted an article that the employer "posted a $30 million loss in fiscal 2014." On 03/30/2016, [Employer Name] Today posted an article that the employer laid off ninety-five (95) employees citing "unanticipated financial challenges" and that the "cuts affected all levels of the company – physicians, nurses, and administrators." On 06/08/2017, the [Journal A] posted an article about the employer's financial losses. The claimant was aware of these articles.

9. The claimant observed donations within the philanthropy department drop over the years, and the claimant observed consultants walking through the facility.

10. The claimant was performing increased job duties during her employment. The employer was in the process of promoting the claimant's position by two (2) pay grades. The claimant was unaware of this impending promotion.

11. Prior to 09/01/2017, the claimant attended staff meetings held by the manager. The manager communicated in such staff meetings that the employer was sustaining financial losses and "would have to do whatever necessary" to cut costs.

12. Prior to 09/01/2017, the claimant attended staff meetings held by the V.P. During such meetings, the V.P. communicated that the employer was sustaining financial losses and there "would have to be reductions somewhere."

13. In approximately mid to late August 2017, the president and CEO issued a two (2) page letter [Exhibit # 8] stating, "As a first step in reducing costs, we are offering some of our longest-tenured employees a voluntary severance plan that provides compensation and benefits beyond those offered in a traditional reduction-in-force. These types of plans are very common, and ours is *completely* voluntary. We expect some employees will view this plan as an opportunity to retire early or pursue new interests or vocations." The letter identified the Voluntary Separation Incentive Plan (VSIP) benefits as "[s]everance payments of one week per completed year of service up to a maximum of 39 weeks" and "[u]p to one year of continued health and dental insurance, at the active employee rate, based upon current coverage level, and provided that they are an eligible participant under those plans." This letter did not reference unemployment benefits and stated, "other initiatives to reduce labor costs may be necessary in the future."

14. On 09/01/2017, the employer offered the VSIP to three hundred fifty two (352) eligible employees including the claimant.

15. In order to be eligible for the VSIP, employees (as of 08/28/2017) had to be regular status employees (not per diem or temporary), had to have at least twenty (20) years of continuous service as of 12/31/2017 based on date of hire, and had to be at least sixty two (62) years old as of 12/31/2017.

16. Secretary A was not eligible to participate in the VSIP and the employer did not offer the VSIP to secretary A.

17. A five (5) page letter dated 09/01/2017 from the senior vice president of human resources [Exhibit # 9] stated that the VSIP was a "one-time" offer that was "strictly voluntary." The letter also stated that the employer "has no

present intention of offering the incentives provided in the [VSIP] in the future." This letter did not reference unemployment benefits.

18. The employer prepared a Summary Plan Description for the VSIP dated 08/28/2017 [Exhibit # 10]. This summary did not reference unemployment benefits.

19. The employer issued a four (4) page list of "Frequently Asked Questions" to employees [Exhibit # 11], including the claimant, regarding the VSIP. Question eleven (11) was "If I accept the [VSIP], can I apply for unemployment benefits?" The answer was, "Yes, but only after the severance pay ends. If you apply for unemployment benefits while you are receiving severance pay, [the employer] will object on the grounds that your decision was voluntary in accordance with the terms of the program and that you currently are receiving severance pay, which [the employer] believes will disqualify you from receiving unemployment benefits." The "Frequently Asked Questions" did not explicitly state that employees accepting the VSIP would receive unemployment benefits.

20. The senior vice president of human resources issued a nine (9) page letter to the claimant dated 09/01/2017 regarding the VSIP election and general release agreement [Exhibit # 12]. Item 4(a) of this letter referenced severance pay and stated, in part, "This severance pay will be paid to you regardless of whether you find other employment apart from [the employer] or its Affiliates, and regardless of whether you receive unemployment compensation following your separation date." Item 6 of this letter referenced the acknowledgement of full payment, status of benefits and stated, in part, "it is specifically agreed that the Enhanced Separation Benefits to be provided…are in lieu of any other pay or other benefits to which you might otherwise be entitled as a result of your [s]eparation and the termination of your [employer] employment, other than unemployment benefits for which you are eligible under applicable law; (it being understood that you are free to apply for and receive unemployment benefits in accordance with applicable law following the [s]eparation [d]ate, although, [the employer] has the right to contest or correct any statements you make in connection with your application). You hereby waive any right you may have to any pay or benefits (other than unemployment benefits)…."

21. The employer held approximately thirty (30) information sessions regarding the VSIP through September 2017. The human resources business partner (partner) and the claimant attended as many of these sessions as they could.

22. During the information sessions, a commonly asked question was whether employees would receive unemployment benefits. During the information sessions, the employer informed employees that they "can apply" and "may apply" for unemployment benefits. During the information sessions, the employer did not inform employees that they would "receive" or be

"approved" for unemployment benefits because the employer knew they do not make the decision regarding eligibility for unemployment benefits.

23. At the time the VSIP was offered, the employer did not have any information regarding future layoffs to communicate to employees. The employer did not know whether or not there would be future layoffs and had not determined which departments or positions would face layoffs.

24. At no point was the claimant informed by the manager, the V.P. or the human resources department that she would be laid off, or that the philanthropy department would be targeted for layoffs. The claimant was not told of any future layoffs slated for the philanthropy department. The claimant was not told of any future layoffs for employees with the most seniority.

25. The claimant was concerned about the future of her position within the philanthropy department. The claimant carried health insurance for herself, her husband, and her child. The claimant had a mortgage and a credit card. The claimant was concerned about her financial state if she did not accept the VSIP (which included enhanced benefits) and were to be laid off in the future. No one instructed the claimant to accept the VSIP.

26. The claimant quit her employment to receive the financial benefits offered by the VSIP and because she believed she might be laid off.

27. The claimant was one (1) of one hundred eighty nine (189) employees who accepted the VSIP. The claimant accepted the VSIP on 09/08/2017.

28. The claimant believed that accepting the VSIP included being able to collect unemployment benefits.

29. At the time the claimant accepted the VSIP, the employer had over one hundred (100) vacancies ranging from entry level to leadership positions.

30. On 11/17/2017, [Employer Name] posted an article that the employer was laying off "about 50 employees" citing a "$38 million operating loss for the past fiscal year."

31. Many of these laid off employees were reassigned into vacant positions and returned to work within a few months, retaining their seniority and other benefits. The claimant was aware that laid off employees can be reassigned into vacant positions.

32. No one from the philanthropy department was laid off.

33. Not all employees who were laid off were offered the VSIP.

Credibility Assessment:

> During the original hearing, there was a dispute between the claimant and the human resources business partner about what was communicated to employees during information sessions. The claimant maintained that employees were instructed they could "receive" unemployment benefits so long as employees applied for unemployment benefits after receipt of their severance. The human resources business partner maintained that employees were instructed they "can apply" and "may apply" for unemployment benefits. Given 1) the employer's knowledge that the DUA (and not the employer) determines eligibility for unemployment benefits, 2) the employer's time spent in preparing written materials regarding the VSIP, and 3) the employer's preparation for the information sessions, it is more likely than not that the employer was careful with its wording when communicating with employees about unemployment benefits; did so in a manner consistent with the employer's written statements that employees could apply for benefits and that the employer could object to an application for unemployment benefits; and did not verbalize to employees during information sessions that they would receive or be approved for unemployment benefits. It is more likely than not that the claimant inferred and assumed she would receive unemployment benefits after receiving written materials and verbal instructions that she could apply.

Ruling of the Board

In accordance with our statutory obligation, we review the record and 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 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. We further believe that the review examiner's credibility assessment is reasonable in relation to the evidence presented.

When a claimant separates from her job after accepting a VSP, the correct section of law to apply is G.L. c. 151A, § 25(e)(1). That provision provides, in relevant 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 . . . .

Under this section of law, the claimant has the burden to show that she is eligible to receive unemployment benefits.

Generally, there are two types of cases in which a claimant can be eligible for benefits where she 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).

In consideration of both of these cases, 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 VSP. Then, the claimant has to show that she either had a reasonable belief that she, specifically, was in danger of imminent 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).

The review examiner initially concluded that the claimant did not meet her burden under the White standard. Acknowledging that the claimant feared for her position and was aware of annual layoffs since 2013, the review examiner nevertheless concluded that the claimant herself had not established that she faced *imminent* layoff (emphasis in original). Where the review examiner found that the employer maintained explicit policies governing the order of layoffs when they do occur, the claimant had seniority over the other similarly situated secretary in her department, and the employer had a practice of reassigning laid off employees into vacant positions, she concluded it was not reasonable for the claimant to believe that continuing work was not available for her had she not accepted the VSP.

The District Court remanded the case to the review examiner to make subsidiary findings on the sole issue of whether the employer misled the claimant regarding her eligibility or ineligibility for unemployment benefits. Where the District Court has not challenged the remainder of the review examiner's initial analysis, we adopt and reaffirm her conclusion that the claimant did not have a reasonable belief that her own layoff was imminent if she did not elect to take the VSP.

After remand by the District Court, the review examiner reviewed the parties' testimony from the initial hearing, as well as the documents that had been entered into evidence regarding the VSP. The review examiner found that the initial written correspondence about the VSP, a two-page letter sent to employees by the employer's president in late August 2017, made no reference to unemployment benefits. *See* Consolidated Finding # 13 and Exhibit # 8.

Similarly, the review examiner found that the five-page letter from the senior vice president of human resources (SVP of HR) to the claimant on September 1, 2017, offering her the opportunity to take the VSP, did not reference unemployment benefits. *See* Consolidated Finding # 17 and Exhibit # 9. Further, a nine-page summary plan description for the VSP, dated August 28, 2017, made no reference to unemployment benefits. *See* Consolidated Finding # 18 and Exhibit # 10.

The review examiner found that while a four-page list of "Frequently Asked Questions" mentioned that employees who elected to take the VSP could apply for unemployment benefits,

the document noted the employer would object if the employee filed for unemployment while collecting their severance pay, and did not explicitly indicate that employees who chose the VSP would receive unemployment benefits. *See* Consolidated Finding # 19 and Exhibit # 11, p. 3.[1] This explicitly warns employees that the receipt of unemployment benefits is not guaranteed to those who take the VSP.

Further, from a nine-page letter from the employer's Senior Vice President of Human Resources to the claimant on September 1, 2017, which was the actual "Election and General Release Agreement" for the VSP itself, the review examiner highlighted that severance pay would be paid "regardless of whether [she received] unemployment compensation" after her separation date; the severance pay provided through the VSP was in lieu of any other pay or benefits she may have been entitled, "other than unemployment benefits for which you are eligible under applicable law; followed by another explicit caveat: "you are free to apply for and receive unemployment benefits in accordance with applicable law . . . , although [*the employer] has the right to contest or correct any statements you make in connection with your application*" for unemployment benefits. *See* Consolidated Finding # 20 and Exhibit # 12 (emphasis added). Again, the employer explicitly warned employees that the receipt of unemployment benefits is not guaranteed.

In addition to reviewing the documents in evidence, the review examiner reviewed the parties' testimony from the two days of hearing she had convened. She found that, during information sessions attended by the claimant and the human resources official who testified at the hearing on the employer's behalf, the employer told employees they "can apply" or "may apply" for unemployment benefits but not that the employees would "receive" or "be approved" for those benefits, since the employer knew it did not make the decision to award or deny unemployment benefits. *See* Consolidated Finding # 22.

After reviewing the testimony and evidence as instructed by the District Court, the review examiner issued a credibility assessment weighing the parties' conflicting testimony as to what was conveyed about unemployment benefits during information sessions about the VSP. The review examiner found the employer's testimony more credible in conveying that employees who took the VSP could apply for unemployment benefits but did so consistently with its written communications that, while they could apply for benefits, the employer could still contest their application. Such assessments are within the scope of the fact finder's role, and, unless they are unreasonable in relation to the evidence presented, they will not be disturbed on appeal. *See* School Committee of Brockton v. Massachusetts Commission Against Discrimination, 423 Mass. 7, 15 (1996).

[1] We note that in Exhibit # 11, paragraph 11, the employer's "belief" itself — that employees who file a claim for unemployment benefits while receiving severance pay are ineligible for benefits — seems predicated on a misinterpretation of the law. As a general rule, G.L. c. 151A, § 1(r)(3), disqualifies a claimant from benefits while receiving severance pay. Payments made to a severed employee in return for a general release of claims, however, are not disqualifying remuneration within the meaning of G.L. c. 151A, § 1(r)(3). White v. Comm'r of Department of Employment and Training, 40 Mass. App. Ct. 249, 252–253, *further app. rev. den'd.* (1996). Thus, employees who sign a general release of claims such as those who took the employer's VSP, are able to apply for unemployment benefits while receiving severance pay.

While the review examiner's credibility assessment acknowledged that the claimant may have inferred and assumed she would receive unemployment benefits from being told she could *apply* for them, this is vastly different from being told she would *receive* these benefits. We note that the review examiner found the claimant accepted the VSP on September 8, 2017 — only a week after it was issued. *See* Finding # 27. Yet the employer gave employees 45 days to consider the offer, and directed employees with questions to its human resources department. *See* Exhibits ## 8–9. We further note that the claimant did not consult the employer's human resources department with any questions. *See* Consolidated Finding # 4.

Of the four documents related to the VSP in evidence, only two referred to unemployment benefits. Both of the documents that referenced unemployment benefits also mentioned scenarios where the employer might challenge the employee's right to unemployment benefits, which highlighted the distinction between being able to apply for unemployment benefits (which all separated employees may do), and being eligible to collect unemployment benefits (which is determined by the DUA). Where the claimant may have believed she would be entitled to unemployment benefits if she took the VSP, the employer was not at fault for her incorrect inference.

We, therefore, conclude as a matter of law that the review examiner's decision to deny benefits pursuant to G.L. c. 151A, § 25(e)(1), is supported by substantial and credible evidence or free from error of law. The claimant quit without establishing that she had a reasonable belief that her discharge was imminent, or that the employer misled her into taking the VSP.

The review examiner's decision is affirmed. The claimant is denied benefits for the week ending November 4, 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 - September 27, 2019

Paul T. Fitzgerald, Esq.
Chairman

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.

JC/rh