The claimant was offered a voluntary separation package (VSP) from which she reasonably believed that she was on a list of people who had been selected for layoff based upon the plain language in the VSP document. The employer did not give employees information as to how or if layoffs could happen and instructed managers not to provide advice, thus hindering the claimant's ability to ascertain her job stability. When she accepted the VSP, the claimant did so for good cause attributable to the employer.

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Issue ID: 0026 7632 87

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 December 1, 2017. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on September 13, 2018. 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 December 27, 2018.

Benefits were denied after the review examiner determined that the claimant voluntarily left employment without good cause attributable to the employer or urgent, compelling, and necessitous reasons 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 accepted the claimant's application for review and remanded the case to the review examiner to take additional evidence about the employer's voluntary separation package (VSP), the employer's layoff policies, and the reasons why the claimant accepted the VSP. Both parties attended the remand hearing. 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 to deny benefits pursuant to G.L. c. 151A, § 25(e)(1), is supported by substantial and credible evidence and is free from error of law, where the claimant accepted a VSP and separated from her job, the VSP contained a provision stating that certain employees had been "selected for layoff," and the employer did not offer any clarification or guidance as to what this meant for the claimant's job security.

Findings of Fact

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

1. The claimant worked full time for the employer, a hospital, from April 20, 1971 until December 1, 2017 when the claimant quit.

2. During the last 15 years of the claimant's employment, she worked as a Health Unit Coordinator.

3. The employer's Manager of Patient Care was the claimant's immediate supervisor.

4. In September, 2017, the employer offered a voluntary separation package (package) to 385 employees who were at least 62 years old and had at least 20 years of service with the employer.

5. The severance package agreement paragraph #9 that is entitled: "Release of claims; Covenant Not to Sue" states in part "Also in accordance with the requirements of the Federal Age Discrimination in Employment Act, (employer) is providing you on Exhibit A to this Agreement, a list of the job titles and ages of all employees in the "decisional unit" who have been selected for layoff at this time, together with a list of the job titles and ages of those employees in the decisional unit who have been selected."

6. The "Exhibit A" provided to the claimant by the employer indicated the claimant's position and age was listed as an employee to whom the package was offered.

7. The employer was required by law to provide employees "Exhibit "A" to comply with the Federal Age Discrimination in Employment Act in order to prevent discrimination.

8. The claimant believed that the use of the term "lay off" in paragraph 9 meant that the employees in the listed positions would be laid off.

9. Exhibit 14 is a letter from the employer's President/CEO to employees notifying them that the employer was offering the package as a first step in reducing costs. The letter states to whom the plan is offered and the deadline for accepting the plan. The letter states that actual separation dates would be at the discretion of leadership. The letter details the benefits offered in the plan: severance payments for one week per completed year of service up to a maximum of 39 weeks and up to one year of continued health and dental insurance, at the active employee rate, based on current coverage level, and provided that the [sic] are an eligible participant under the plans. The letter

directs employees to address any question to the Human Resources Department.

10. The deadline to accept the package was October 16, 2017.

11. The claimant signed the acceptance and acknowledgement paragraph of the package on October 13, 2017.

12. The acceptance and acknowledgment paragraph of the package states:

    I hereby acknowledge that I have read the foregoing election and General Release Agreement, that my decision to participate in the Plan is completely voluntary, that I have been given a reasonable time of up to 45 days to consider its terms, that I have been advised to consult an attorney of my choosing concerning this Agreement and have done so or decided to do so, and that I have knowingly and voluntarily agreed to sign this Agreement in order to receive the enhanced severance pay and health and dental benefits being offered to me under the terms of the Plan, I also hereby acknowledge that I have the right to rescind my election to participate in the Plan by complying with the procedures in the Agreement and that, if I do not revoke my election within seven days, or if (employer's name) does not grant any later application to rescind under the terms of the Plan, then my election will be final and irrevocable.

13. In total, 194 employees accepted the package.

14. The claimant did not go to the Human Resources to ask questions about the voluntary separation package or her job security.

15. The employer held meetings open to all employees to discuss the voluntary separation package September 7, 2017, September 12, 2017, September 16, 2017, September 19, 2017 and September 20, 2017.

16. The claimant attended two or three of the meetings. The claimant does not recall the dates of the meetings she attended.

17. The claimant did not ask any question at the meetings.

18. At the meetings that she attended, the claimant learned that the employer needed to cut costs, would make biweekly payments to employees who accepted the package, that the employer would go to a second step if not enough people accepted the package and that she would be able to collect unemployment once the severance payments ended.

19. While at work prior to accepting the package, the claimant informed the Vice President of Operations that she was considering accepting the package. The Vice President of Operations advised the claimant to speak to HR or to

consult her own personal attorney. The Vice President further replied that it would be a personal decision and could not advise the claimant one way or the other.

20. The Vice president did not inform the claimant that her position would be filled with per diem and part time employees.

21. The Vice President of Operations did not inform the claimant that anyone would be losing their jobs due to the employer's financial difficulties.

22. The claimant requested to remain longer at work.

23. The employer was only allowing positions that were difficult to recruit for or required [sic] special skillset in order to have time to train a new employee.

24. The claimant's position was not difficult to recruit for nor did it require [sic] special skillset.

25. The claimant was not notified by any Supervisor or the Vice President of Operations that she would be separated if she failed to accept the package.

26. The claimant was not a member of a labor union.

27. The employer has a written policy pertaining to how it conducts involuntary layoffs. The employer conducts layoffs based on employee seniority. The employer allows employees chosen for lay off to displace the less senior workers. The laid off employee may choose to work with the employer's Human Resources Department to find another position with the employer for which they may qualify.

28. The claimant was not aware that the employer laid off employees according to seniority.

29. The claimant was not aware of any other health unit coordinator who had worked for the employer longer than her forty-six-year employment.

30. The employer has not laid off any health unit coordinators since the claimant's separation.

31. The employer posted the claimant's position when the claimant accepted the package.

32. The employer hired a new employee for the claimant's position after the claimant's separation.

33. Prior to the package being offered, the claimant intended to work at least 1.5 years prior to retiring.

34. Prior to accepting the package, the claimant considered the employer's statements that they would not offer a package program in the near future. Due to her health concerns, the claimant feared losing her health benefits if she was laid off by the employer.

35. The claimant accepted the voluntary separation package offered by the employer because she believed the employer was trying to reduce costs and would be laying off employees if enough employees did not accept the package. The claimant believed she could at least have the benefits from the package and health coverage without any gap in case of a layoff.

36. The claimant quit when she accepted a voluntary separation package offered by the employer.

37. The employer had work available for the claimant.

Credibility Assessment:

The claimant provided uncontested testimony that she accepted the voluntary separation package offered by the employer because she believed the employer was trying to reduce costs and would be laying off employees if enough employees did not accept the package. She further offered that although she intended to work for at least another year and a half, she believed she could at least have the benefits and health coverage from the package without any gap in case of a layoff.

The claimant also provided contested testimony that the employer's Vice President of Operations informed her that her position would be eliminated, and she could fill it with per diem and part time employees.

The employer's Vice President of Operations denies stating to the claimant that the employer was replacing her position with per diem and part time employees. She offered candid testimony that the claimant did approach her about accepting the package. The Vice President admits that the claimant did ask whether she could extend the separation date. The Vice President further offered that she told the claimant to consult with her own attorney or see the HR department. The Vice President's testimony was consistent with the employer's letter to employees.

The employer's witnesses offered corroborating testimony that work was available for the claimant if she did not accept the package. Also, the employer has not laid off any health unit coordinators since the claimant's separation.

Given the above, it is concluded that the Vice President's testimony is more plausible.

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 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. We further believe that the review examiner's credibility assessment is reasonable in relation to the evidence presented. However, as discussed more fully below, we conclude that the claimant is eligible to receive unemployment benefits.

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 in cases 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). 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 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).

In this case, we believe that the claimant has met her burden under the State Street standard.[1] The claimant has shown that she reasonably believed that layoffs could happen if she did not

[1] The review examiner, applying the standard laid out in White, decided that "it cannot be concluded that the claimant was facing an imminent discharge or that the employer acted unreasonably towards the claimant." 382 Mass. at 597–598. The review examiner did not undertake a complete analysis under the test created by the Appeals Court in State Street Bank, 66 Mass. App. Ct. at 11.

take the VSP. The claimant showed this primarily by pointing out that, in Paragraph 9 of the VSP document, the employer stated that it was attaching "a list of the job titles and ages of all employees . . . who have been selected for layoff at this time." *See* Consolidated Finding of Fact # 5; Remand Exhibit 7, p. 6. The review examiner noted in the decision that the VSP provision containing the layoff language was included to comply with federal law. Consolidated Finding of Fact # 7. It may be the case that the employer included the language for this reason. However, the employer did not clarify at any point in the process of offering the VSP that, despite the text of the agreement, layoffs of the listed employees were not being contemplated. Given the plain language referring to a list of all employees selected for layoff and the fact that the claimant's position and exact age were on the list, the claimant reasonably believed that she had been selected for layoff. *See* Consolidated Finding of Fact ## 6 and 8.

The claimant further showed that the employer hindered the claimant's ability to know if she was actually going to be laid off if she did not take the VSP. First, when she attended a meeting to discuss the VSP, the claimant learned that the employer needed to cut costs and that "the employer would go to a second step if not enough people accepted the package." Consolidated Finding of Fact # 18. Apparently, no further information was offered, such as the number of people the employer was looking to separate or what the "second step" would be and how it would be conducted. Second, when the claimant tried to talk with the Vice President of Operations about taking the package, the Vice President sent her elsewhere and told the claimant that the Vice President "could not advise the claimant one way or the other." Consolidated Finding of Fact # 19. Third, the Frequently Asked Questions document given to the claimant and other employees who had been offered the VSP states that "[n]o [Employer Name] employees, including your supervisor, your manager, nor any Human Resources employee, is permitted to offer you advice on whether this program is right for you." Remand Exhibit # 3, p. 4.[2]

In short, no substantive guidance was offered to the claimant from the employer. Such a situation is very similar to the prohibition placed on managers in State Street, who were "instructed . . . not to provide subordinates with opinions about whether to take a VSP . . . [and who were] also instructed not to offer any suggestions or opinions regarding criteria that State Street would use for involuntary terminations if the VSP failed to produce the needed workforce reduction." State Street, 66 Mass. App. Ct. at 3–4. In this case, the employer's lack of information and guidance served to "creat[e] an environment in which all employees had to speculate on the likelihood that they would be able to avoid involuntary separation." Id. at 11.[3] Thus, the claimant had "good cause to adopt the mitigating strategy of accepting the VSP and leaving." Id. at 11–12.

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 not supported by substantial and credible evidence or free from error of law, because the claimant has carried her burden to show that the employer

[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).

[3] The fact that the employer lays off employees according to seniority is of little import here. S*ee* Consolidated Finding of Fact # 27. The claimant was not aware of this. Consolidated Finding of Fact # 28. Her belief as to a layoff could not have been affected by information she did not know.

was contemplating layoffs at the time it offered a VSP and the employer hindered the claimant's ability to ascertain if she could be laid off if she did not accept the VSP.

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week beginning November 26, 2017, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - August 20, 2019

Paul T. Fitzgerald, Esq.
Chairman

Michael J. Albano
Member

Member Charlene A. Stawicki, 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