The claimant was offered a voluntary separation package from which she reasonably believed that she was on a list of people who had been selected for layoff. The employer then did not give employees information as to how layoffs could happen, 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, pursuant to State Street.

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Issue ID: 0028 3997 09

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 March 3, 2018. She filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on January 9, 2019. The employer 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 denied benefits in a decision rendered on March 30, 2019.

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 accepted the claimant's application for review and afforded the parties an opportunity to submit written reasons for agreeing or disagreeing with the decision. Only the claimant responded. Our decision is based upon our review of the entire record.

The issue before the Board is whether the review examiner's 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 voluntary separation package (hereinafter, "VSP" or "agreement") which resulted in her separation from employment, the VSP contained a provision indicating that the claimant had been "selected for layoff," and the employer did not clarify or offer guidance as to what this meant for the claimant's job security.

Findings of Fact

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

1. The claimant worked full time for the employer, a hospital, from October 3, 1982 until March 3, 2018 when the claimant quit.

2. The claimant's last position with the employer was as a part time oncology nurse.

3. The employer's Nurse Manager was the claimant's immediate supervisor.

4. The employer offered a voluntary separation package to employees who were at least 62 years old, were [regular] service employees and had at least 20 years of service with the employer. The package included severance pay and other health insurance benefits.

5. The employer sent an email notifying employees that the voluntary separation package was offered to reduce costs.

6. The employer notified employees that they could apply for unemployment benefits when the severance pay was completed. The employer did not inform employee that they would be approved for unemployment benefits.

7. 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.

8. 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.

9. The employer held meetings open to all employees to discuss the voluntary separation package on various dates.

10. During one of the meetings, the claimant's co-worker asked the employer's Senior Vice President of Human Resources whether the employer can guarantee if they accepted the package they would not be laid off. The Senior Vice President of Human Resources replied that he could not guarantee that if everyone accepted the package they would not be a laid off [sic].

11. The claimant was not notified by any supervisor or manager that she would be separated if she failed to accept the package.

12. The claimant attempted to speak to her Supervisor about the severance plan. The Supervisor replied that she could not discuss the separation plan with the claimant.

13. The claimant was not a union member.

14. The employer lays off employees according to seniority based by department and position with bumping rights.

15. The employer hired a new employee to replace the claimant when the claimant separated from the employer.

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

17. The employer had work available for the claimant.

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 conclusion is free from error of law. After such review, the Board adopts the review examiner's findings of fact except for certain portions of Finding of Fact # 10. Finding of Fact # 10 seems to credit the testimony offered by the claimant and her witness as to what happened during a meeting with the Vice President of Human Resources. The review examiner's finding states that there was talk about the employer being able to "guarantee" that there would not be lay offs. The claimant's witness testified that she asked, "if we don't take the package, would we be laid off?" She testified that the Vice President responded that he could not say that the employees would not be laid off. When talking about that same meeting, the claimant testified that a question was asked about layoffs. The response from the Vice President was that "they couldn't tell us at that time." The claimant then also testified that the employer "could not guarantee we would not be laid off if there were further layoffs." Thus, it appears that the testimony about a "guarantee" is the claimant's interpretation of what the Vice President said, not an exact quote from him. We thus reject the finding's language about a guarantee. We accept that the claimant's co-worker asked whether there would be layoffs if the VSP was not accepted and that the Vice President responded that he could not say that there would not be layoffs. It is also evident that this finding is meant to reflect an inquiry as to whether they would be laid off if they did *not* accept the package. We accept the remainder of the findings and deem them to be supported by the record. However, as discussed more fully below, we reject the review examiner's legal conclusion that the claimant is not entitled to 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 take the package. 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* Exhibit 7, p. 6 and Finding of Fact # 7. Although the claimant's name was not listed in the agreement or in the attachment to the agreement (called "Exhibit A"), she reasonably believed that she had been selected for layoff, because her position and exact age were noted in the list.[2] Finding of Fact # 8. The review examiner noted in the decision that the VSP provision containing the layoff language was included merely to comply with federal law. It may be the case that the employer included the language for this reason. However, it did not clarify at any place in the agreement that the

[1] The review examiner, applying the standard laid out in White decided that "it cannot be concluded that the claimant reasonably believed that her lay off was imminent if she did not accept the employer's voluntary separation package." 382 Mass. at 597–598. The review examiner failed to analyze the matter under the test created by the Appeals Court in State Street Bank, 66 Mass. App. Ct. at 11.

[2] When asked during the hearing why she believed that she could be laid off, the claimant responded, in part, "because of the contract itself, talking about a layoff." By "contract," the claimant was clearly referring to the VSP agreement. Her testimony shows that she read Paragraph 9 prior to signing it. The employer did not offer evidence to suggest that the claimant did not read the VSP prior to accepting it. 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).

attached list was only a list of people who were going to be offered the VSP, rather than a list of people who had been identified for layoff, as stated in the text of the agreement.

The claimant further showed that the employer hindered her 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, and a co-worker asked if layoffs could happen if employees did not accept the VSP, and the Vice President of Human Resources gave a vague answer indicating that he could not say that layoffs would not happen. Second, when the claimant tried to talk with her supervisor about the agreement, the claimant was rebuffed and given no concrete information to go on to decide if her job was actually in jeopardy. Finding of Fact # 12. 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." Exhibit 15, p. 4.[3] The claimant attempted to ascertain more information by going to the Human Resources meeting, asking her supervisor about the VSP and reading all of the documents provided to her by the employer, but was unsuccessful. *See* Exhibits ## 7, 15, 16, and 17.

In short, the employer did not offer any substantive guidance. Such a situation is very similar to the prohibition in State Street on managers, 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 lack of information and guidance by the employer 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.[4] By informing the claimant that she was on a list of employees who had been selected for layoff and then not giving more information as to how those layoffs could have been carried out, the employer "gave employees who reasonably feared involuntary separation 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 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 package.

[3] Given this directive to managers, we attribute little weight to the finding that no supervisor or manager told the claimant that she was be separated from her job if she did not take the VSP. *See* Finding of Fact # 11,

[4] The fact that the employer lays off employees according to seniority was of little substantive assistance to the claimant, because the claimant was told that she had been "selected for layoff" and there were only two people in the claimant's job title who were noted in Exhibit A to the VSP. It was unclear what the overall staffing plan was for the claimant's department, how much the claimant knew of this seniority policy, or whether the employer was bound to enforce it with non-union employees like the claimant. *See* Findings of Fact # 13 and 14.

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week beginning February 25, 2018, 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