

Where the employer's voluntary separation agreement attached a list of job titles and ages of employees selected for layoff and the claimant lab technician's managers stated that the employer's labs were to be consolidated and machinery was to be used to perform work, she reasonably anticipated a possibility of layoff. Where the employer also prohibited managers and human resources from advising employees whether they would be laid off, the Board held the claimant separated for good cause attributable to the employer when she took the voluntary separation package and resigned.

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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 resigned from her position with the employer on March 3, 2018. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on February 15, 2019. 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 April 6, 2019. 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, she was disqualified under G.L. c. 151A, § 25(e)(1). Our decision is based upon our review of the entire record, including the recorded testimony and evidence from the hearing, the review examiner's decision, and the claimant's appeal.

The issue before the Board is whether the review examiner's decision, which concluded that the claimant was ineligible for benefits under G.L. c. 151A, § 25(e)(1), because she failed to establish that she held a reasonable belief of being laid off if she did not accept the employer's voluntary separation package, is supported by substantial and credible evidence and is free from error of law.

Findings of Fact

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

1. The claimant worked part time as a medical lab technician for the employer, a hospital group, from July, 1970 until March 3, 2018, when she left work.
2. The claimant worked 32 hours a week. Her shift was 6:00 a.m. to 2:30 p.m.
3. The claimant was paid \$34.89 per hour.
4. The claimant's immediate supervisor was the Lab Manager.
5. The claimant was not a union member.
6. On September 1, 2017, the employer offered eligible employees a voluntary separation package (the VSP) to reduce costs. The deadline to accept the package was October 16, 2017.
7. The VSP was not offered due to a reduction in force.
8. The VSP was offered to regular status employees with at least 20 years of continuous service as of December 31, 2017 and were at least 62 years of age as of December 31, 2017.
9. The employer provided employees offered the VSP with a list of all employees that were offered the package and all the employees that weren't offered the package. The lists did not provide names of employees. The lists provided the position and the ages of the employees.
10. Employees who accepted the VSP received severance payments of one week per complete year of service not to exceed 39 weeks and up to one year of continued health and dental insurance.
11. The claimant was offered the package because she met the three criteria to be eligible.
12. There was a total of 10 employees with the same position as the claimant at her site.
13. Two of the employees had more seniority than the claimant.
14. One of the employees completed retirement paperwork prior to the offer of the VSP.
15. The employer's layoff policy is to layoff employees with the least seniority before employees with more seniority. The policy is accessible online to all employees.

16. The employer's Human Resource Department held approximately 80 meetings with employees to answer questions about the VSP.
17. Management and the Human Resource Department wouldn't advise employees whether they would be laid off, if they didn't accept the VSP.
18. There was rumor amongst employees that the employer was going to implement a layoff.
19. The Lab Manager and the Lab Supervisor told employees that the employer intended to consolidate labs and have machinery perform work.
20. The claimant didn't ask management or the Human Resource Department whether she would be laid off, if she didn't accept the VSP.
21. The claimant didn't inquire of the employer's procedure for how layoffs are decided.
22. The employer did not tell the claimant she would be laid off, if she didn't accept the VSP.
23. On October 6, 2017, the claimant accepted the VSP.
24. The employer permitted the claimant to work through March 3, 2018 based on the needs of the employer.
25. The claimant would not have left work, if she wasn't offered the VSP and its benefits.
26. After the deadline to accept the VSP, the employer laid off 50 employees, which included only physicians and administration employees.
27. After the deadline to accept the VSP, none of the employees in the claimant's department were laid off.
28. On November 17, 2017, an article was posted in a newspaper, which stated the employer was "laying off about 50 employees."
29. The laboratory technician with more seniority than the claimant didn't accept the VSP and is still employed in her same position.
30. The claimant quit work to accept the VSP and receive its benefits offered by the employer.

31. On February 15, 2019, the Department of Unemployment Assistance (the DUA) issued the claimant a Notice of Disqualification under Section 25(e)(1) of the Law beginning February 25, 2018.

[Credibility Assessment:]¹

The claimant testified that she accepted the VSP and quit work because she believed she would be laid off, if she didn't accept it. She based this on the fact that she was a long-term employee and earned a higher wage than most of the employees in her department. She also testified there were rumors of layoffs amongst employees and the Lab Supervisor and Lab Manager said the employer was going to consolidate the labs and have machinery perform the work. However, the claimant never asked any questions of the Human Resource Department about how the employer's layoff process was decided, or the statements made by management about the labs consolidating. In addition, the claimant was never told by any member of management or the Human Resource Department that she would be laid off, if she didn't accept the package. Based on the employer's process of layoffs, most of the other employees in the claimant's department would have been laid off prior to 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 original conclusion is free from error of law. After such review, the Board adopts the review examiner's findings of fact except as follows. We reject Finding of Fact # 7, which states that the VSP was not offered due to a reduction in force, as it is misleading. Finding of Fact # 6 states that the employer offered the VSP in order to reduce costs, which meant payroll costs, as it was evident that the goal of the VSP was to induce a number of current employees to separate from employment.² In adopting the remaining findings, we deem 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 ineligible for 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

¹ We have copied and placed here the portion of the review examiner's Conclusions & Reasoning section, which explains her basis for determining that the claimant did not reasonably believe that she would be laid off.

² See also Exhibit 10, paragraph # 1 of a letter from the employer's President and CEO to employees being offered the VSP, and Exhibit 12, the VSP Frequently Asked Questions, dated September 1, 2017, question # 2. Although not explicitly incorporated into the review examiner's findings, these exhibits are part of the unchallenged evidence introduced at the hearing and placed in the record, and they are thus properly referred to in our decision today. 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).

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

The express language of this section of law places the burden upon the claimant 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).

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).

The record before us shows that, at the time the claimant accepted the VSP offer, she had a reasonable basis for believing that layoffs were a possibility. At the outset, we note that the VSP Election Agreement itself states that the attached Exhibit A is a list of the job titles and ages of all employees who have been *selected for layoff* at this time.³ Moreover, the claimant's Lab Manager and Lab Supervisor told employees that the employer intended to consolidate labs and have machinery perform work, which suggests that her department could lose personnel. Finding of Fact # 19.

In this case, we also believe that the employer hindered the claimant's ability to ascertain whether she specifically would be laid off. Findings of Fact ## 1, 12, and 13 show that the claimant had been a long term employee and that she had a lot of seniority in relation to others at her site. The review examiner further found that the employer maintained a policy to lay off employees by seniority and that the policy was accessible to employees online. Finding of Fact # 15. However, this policy is not in evidence. Nor is there a finding that the claimant was aware of the policy, or whether layoffs by seniority would be by department or across the entire

³ *See* item 9(a) of the employer's Voluntary Separation Incentive Plan Election and General Release Agreement, entered into evidence as Exhibit 6. This is also part of the unchallenged evidence in the record.

hospital group. We also do not know whether the employer was bound to follow this layoff policy for non-union employees, like the claimant.⁴

Findings of Fact ## 20 and 22 state that the employer did not tell the claimant that she would be laid off if she did not accept the VSP, and she did not ask. We can reasonably infer that this was because supervisors, managers, and Human Resources employees were prohibited from providing this information. *See* Finding of Fact # 17 and Exhibit 12. Therefore, it would have been futile to ask. The 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. 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 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 February 25, 2018, and for subsequent weeks if otherwise eligible.

BOSTON, MASSACHUSETTS
DATE OF DECISION - August 21, 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)**

⁴ All of the findings and evidence about layoffs that transpired after the claimant accepted the VSP package on October 6, 2017, are immaterial, as the claimant’s eligibility for unemployment benefits is based upon the claimant’s belief at the time she made the decision to resign. *See* Findings of Fact ## 23, 26–29.

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.

AB/rh