Where the employer's voluntary separation agreement attached a list of job titles and ages of employees selected for layoff, which list included the claimant medical technologist's job title and age, she reasonably anticipated a possibility of layoff. Because the employer did not permit managers and human resources to advise employees whether they would be laid off, the Board held claimant separated for good cause attributable to the employer when she took the voluntary separation package and resigned.

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Issue ID: 0029 2939 07

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 April 22, 2018. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on February 21, 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 19, 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 imminent layoff 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 full time for the employer, a hospital, from December 13, 1971, until April 22, 2018, when the claimant quit.

2. The claimant's last position with the employer was as a full time medical technologist.

3. During the last four months of employment, the claimant worked 32 hours per week for the employer.

4. In September 2017, the employer offered a voluntary separation package to employees who were at least 62 years old, were regularly [sic] 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 a letter notifying employees that the voluntary separation package was offered to reduce costs.

6. The employer notified employees that questions may be directed to the HR Department.

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

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

9. 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.

10. 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.

11. The employer was required by law to provide employees the list to whom the package was offered to comply with the Federal Age Discrimination in Employment Act in order prevent discrimination.

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

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. In November 2017, the employer did not lay off employees within the claimant's position.

16. After the claimant's separation, the employer continued to recruit employees for positions within the laboratory.

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

18. The employer had work available for the claimant.

[Credibility Assessment:][1]

The employer offered a voluntary separation package to employees who were at least 62 years old and had at least 20 years of service with the employer. The claimant offered that she accepted the package because she feared being laid off by the employer. There is no evidence that a Supervisor or Manager informed her that her position would be eliminated. The claimant contends that she would be laid off because her position is listed on "exhibit A". Also, during one of the meetings, the employer's Senior Vice President of Human Resources did not guarantee if they accepted the package, they would not be laid off.

The employer's witness offered that work was available for the claimant if she did not accept the package. In addition, the employer was required by law to provide employees the list to whom the package was offered to prevent discrimination. Ultimately, after the claimant's separation, the employer continued to recruit employees for positions within the laboratory.

Based on the totality of the testimony and evidence presented, 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.

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

[1] We have copied and placed here the portion of the review examiner's Conclusions & Reasoning section, which explains her basis for rejecting the claimant's testimony that she was in jeopardy of layoff.

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. As written, Finding of Fact # 8 does not make sense to the extent it suggests that an employee asked if, by accepting the voluntary separation package (VSP), the employee would not be laid off, because if the employee accepted the VSP, his or her employment would have ended. We, therefore, assume the question was whether the employee *would* be laid off, if the employee did *not* accept the package. 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 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. 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. *See* Finding of Fact # 9. The claimant's position and age

was included on this list. *See* Finding of Fact 10. It may be, as the review examiner found, that the list in Exhibit A was attached in order to comply with the Federal Age Discrimination in Employment Act, but a plain reading of the language indicates that the employees on the list had been selected for layoff. *See* Findings of Fact ## 9–11. The employer's witness also conceded during the hearing that the employer did not clarify or correct its use of the term *selected for layoff* to the employees. Additionally, the claimant attended a meeting where the Senior Vice President of Human Resources said he could not guarantee that the employees offered the VSP would *not* be laid off. *See* Finding of Fact # 8.

In this case, we also believe that the employer hindered the claimant's ability to ascertain whether she specifically would be laid off. It is true that the claimant had been a long-term employee and from this we can infer that she had a lot of seniority. *See* Findings of Fact # 1. The review examiner further found that the employer lays off employees according to seniority within in each department and that employees have bumping rights. *See* Finding of Fact # 14. However, the employer's Human Resources witness testified that the employer did not point its layoff policy out to employees at the time, and the written policy is not in evidence.[2] There is also nothing in the record to show that the claimant was aware of the policy, no indication that layoffs by seniority would be made by department or across the entire hospital group, and we do not know whether the employer was bound to follow this layoff policy for non-union employees like the claimant. *See* Finding of Fact # 13.[3]

Finding of Fact # 12 states that the employer did not tell the claimant that she would be separated if she did not accept the VSP. Conversely, the employer did not tell the claimant that she would not be separated. We can reasonably infer that this was because supervisors, managers, and Human Resources employees were not permitted to provide this information. *See* Finding of Fact # 8 and Exhibit 16, question 17.[4] The claimant was on a list of those selected for layoff and the employer chose not to give her any other information.

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.

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[2] The employer's witness was making the point that the policy was not raised because the employer was announcing a VSP, not a layoff. This testimony, while not explicitly incorporated into the review examiner's findings, is part of the unchallenged evidence introduced at the hearing and placed in the record, and it is 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).

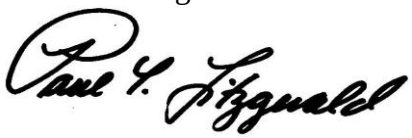
[3] The findings and evidence about layoffs in November, and whether the employer did not end up laying off employees in the claimant's laboratory, pertain to events after the claimant signed the VSP Agreement on October 4, 2017. They are immaterial to our decision, as the claimant's eligibility for unemployment benefits is based upon the claimant's belief at the time she made the decision to resign. *See* Findings of Fact ## 15 and 16, and Exhibit 7.

[4] Exhibit 16, question 17 states, in relevant part, "no [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 16 is also part of the unchallenged record.

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 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 April 22, 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)

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