A claimant, who reasonably believed that involuntary termination could occur if he and a sufficient number of other employees did not take an early retirement incentive package, carried his burden to show that he separated voluntarily with good cause attributable to the employer pursuant to G.L. c. 151A, § 25(e)(1).

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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 his position with the employer on August 30, 2019. He filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on December 10, 2019. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits attended only by the claimant,[1] the review examiner affirmed the agency's initial determination and denied benefits in a decision rendered on February 19, 2020.

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 accept the claimant's application for review. 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 left his job to take an early retirement incentive package.

Findings of Fact

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

1. The claimant worked as an Engineer for the employer, a paper company, from 12/17/10 until he separated from the employer on 8/30/19.

[1] The employer is not an interested party in this matter. *See* Exhibit #3, p. 1 (responding that the claimant separated due to a lack of work and, therefore, was giving up its right to challenge the claimant's claim for benefits).

2. The claimant was hired to work fulltime, varying hours earning an annual salary of $120,000.

3. The claimant left work in order to take advantage of an early retirement package offered by the employer.

4. Without this offer, the claimant would have had to continue working before he could have retired. With the offer, the claimant was given five additional years of creditable service and added 5 years to his age. The package also included 9 months of health insurance contributed to by the employer.

5. The claimant asked if the enhanced package was negotiable and was told by the employer it was not so he could either take it or leave it. The claimant needed to accept the offer by 6/24/19 if he planned to do so.

6. The claimant could have rejected the offer and continued working. The claimant had not been told his job would be in jeopardy if he did not accept the package.

7. There were 59 people world-wide in the company and 44 employees who worked in the claimant's building.

8. A few employees who did not accept the package were let go.

9. The claimant accepted the offer of early retirement because he was 63 years old and felt it would be difficult to find a job at his age if he had to. The claimant also had health issues and couldn't risk having health issues with no health insurance.

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 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 findings of fact and deems 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 failed to show that he separated from his job for good cause attributable to the employing unit. The full record, when properly considered, supports a conclusion that the claimant is eligible for benefits.

In this case, the claimant elected to participate in the employer's Early Retirement Incentive Plan (ERIP). It was not mandatory that the claimant take the ERIP. *See* Finding of Fact # 5. Because the claimant's action in choosing to take the ERIP triggered his separation, the claimant's separation is analyzed under G.L. c. 151A, § 25(e)(1), which provides, in pertinent 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 . . . .

By its terms, this section of law places the burden upon the claimant to show that he is eligible for unemployment benefits.

Generally, there are two types of cases in which a claimant can be eligible for benefits in cases where he accepts a compensation package in exchange for ending his employment. The first is characterized as an involuntary departure. It is deemed to be involuntary if the claimant can show that he had a reasonable belief that he would soon be terminated if he 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 he would be terminated and that the employer "substantially hindered the ability of the [employee] to make a realistic assessment of the likelihood that he would be involuntarily separated" if he 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 he has a reasonable basis for believing that layoffs are a possibility if he does not take the separation package. Then, the claimant has to show that he either had a reasonable belief that he specifically was in danger of imminent separation if he did not take the separation package, as in White, or that the employer had hindered his ability to ascertain if he, specifically, would be laid off if he did not take the package, as in State Street. *See* Board of Review Decision 0018 6461 03 (January 31, 2017).

In her decision, the review examiner concluded, in part, the following:

> The claimant left work only to take advantage of the early retirement package. He acknowledged that he had not been told his job would be in jeopardy if he did not accept the package and that he could have rejected the package and continued working. The claimant testified that he accepted the package because he was 63 years old and felt it would be difficult to find a job at his age if he had to. The claimant also had health issues and couldn't risk having health issues with no health insurance.

This conclusion does not demonstrate that the review examiner applied all of the proper legal principles to deny benefits. The review examiner did not consider whether the claimant reasonably believed that his job could be eliminated if he did not take the ERIP, regardless of whether he was specifically told that his job was in jeopardy. The review examiner also did not consider whether the employer had hindered the claimant's ability to decide if he could be involuntarily terminated if he did not take the ERIP.

As an initial matter, we note that the undisputed record contains sufficient evidence to infer that the claimant believed that his job was in jeopardy if he did not take the ERIP, and that he accepted

the ERIP in large part because of that belief.[2] Although the review examiner focused her decision on his age and the health insurance benefits, *see* Finding of Fact # 9, there is little doubt that the claimant feared for his job in light of the ERIP documents, the benefits offered, and what he was told when he asked about the ERIP provisions. *See* Exhibit 2, p. 3 and Exhibit 6, p. 1.[3]

Based on the documentary evidence in the record, and the undisputed testimony offered by the claimant during the hearing, we conclude that the State Street standard is most applicable to the circumstances of this case, and that the claimant is eligible for benefits. In State Street, the employer announced that layoffs would occur if a sufficient number of employees did not take a voluntary separation package. Specifically, the employer was looking for 1,800 employees to take the package to avoid involuntary layoffs. State Street, 66 Mass. App. Ct. at 2–3. Here, while it is true that the employer did not announce that layoffs would occur or that the employer was seeking a specific number of employees to leave the company, the paperwork provided to the claimant strongly suggested that there would be a workforce reduction if enough employees did not leave the company via the ERIP. In the Frequently Asked Questions document given to the claimant, the employer laid out what would happen if the claimant declined the early retirement offer. According to the document, if enough employees did not voluntarily leave, the employer "would still need to reduce the people costs in the business and some selected positions may be at risk of elimination." *See* Exhibit 4, p. 4.[4]

In this case, the employer structured the ERIP in the same way that State Street had structured its separation package. The first phase was the offer of the ERIP, and the second phase would, in all likelihood, be reductions in the workforce if a sufficient number of people did not take the ERIP. The fact that the employer in this case did not give a number or conclusively say that layoffs would happen does not meaningfully distinguish this situation from State Street. Moreover, if the possibility of layoffs is in question, it is resolved by noting that several employees were separated after the ERIP was offered and the election period had passed. *See* Finding of Fact # 8. In short, based on the information provided to him and the evidence in the full record, the claimant could reasonably think that the employer would resort to involuntary layoffs if he, and a sufficient number of others, did not take the ERIP[5]

The question remains then as to whether there is sufficient evidence in the record to conclude that the employer substantially hindered the ability of claimant to assess the likelihood that he could be laid off if he did not take the ERIP. Without the employer present at any stage of the administrative process, we are left only with the claimant's testimony during the hearing and the documentation in the record to determine if the claimant acted reasonably in "adopt[ing] the

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[2] The claimant's testimony about being able to get a new job and having health insurance implicitly related to his concern about his job security. Similar health insurance benefits may not have been offered if he was laid off after the ERIP process concluded. *See* Finding of Fact # 9 and Exhibit 4, p. 5.

[3] Exhibit 2 is the claimant's completed DUA fact-finding questionnaire. Exhibit 6 is the claimant's request for a hearing. 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).

[4] Exhibit 4 is a frequently asked questions and answers documents from the employer. This document is also part of the unchallenged evidence in the record.

[5] The answer to a question in the Frequently Asked Questions document about future involuntary terminations clearly sidesteps giving employees any insight into whether jobs could be in jeopardy. It offered them no substantive assistance in deciding whether to take the ERIP. *See* Exhibit 4, pp. 4–5.

mitigating strategy of accepting the [ERIP] and leaving." State Street, 66 Mass. App. Ct. at 11–12. In rendering our conclusion, we must keep in mind that "'[i]f there remains room for doubt, it should be resolved in favor of the [employee] in light of the expressed policy of liberal construction of the law in aid of its purpose to lighten the burden falling on the unemployed worker. G.L. c. 151A, § 74.'" Id. at 10, *citing* O'Reilly v. Dir. of Division of Employment Security, 377 Mass. 840, 846 (1979).

We note that when the claimant attempted to speak with the employer about the ERIP, he was told that he could "take it or leave it." Finding of Fact # 5. Such a response does not suggest that the claimant would have received any further information about layoffs or job security if he had questioned the employer further about it. Moreover, the circumstances which were at play in State Street also appear in this case. The situation in State Street was as follows:

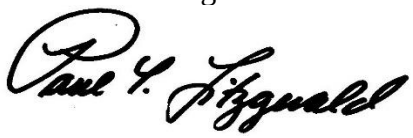
> State Street did not announce that involuntary separations would proceed randomly or disclose the nonrandom criteria it would use to implement them. Each employee or group of employees, therefore, was left to speculate about the criteria State Street would use without any insight into State Street's actual plans and without knowing whether their personal experience, knowledge, seniority, wage level, or performance ratings would have any impact on State Street's decision. Moreover, because it elected not to tell employees how the VSP was proceeding, employees were unable to determine whether the program's progress was increasing or decreasing the likelihood that they would be involuntarily terminated. By constructing the VSP the way it did, then, State Street created an environment in which all employees were required to guess, speculate, and cobble together as best they could information on which to base a decision as to whether they would be involuntarily separated.

State Street, 66 Mass. App. Ct. at 11.

The employer gave the claimant in this case no information as to how involuntary separations could happen if enough people did not take the ERIP and leave employment. Therefore, there is substantial and credible evidence to conclude that the employer hindered the ability of the claimant to assess whether he could be laid off if he did not take the ERIP.

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 showed that he quit his position voluntarily with good cause attributable to the employer.

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week beginning August 25, 2019, and for subsequent weeks if otherwise eligible.



BOSTON, MASSACHUSETTS
DATE OF DECISION - March 31, 2020

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
(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