**Where a claimant reasonably believed that her job could be in jeopardy if she did not take a separation package, in light of the CEO's comments about the future of the company, the lack of information provided to her about her job security, and her supervisor's persistent questioning as to whether she would take the package, the claimant is not subject to disqualification under G.L. c. 151A, § 25(e)(1).**

**Board of Review**
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**Issue ID: 0022 4851 54**

# BOARD OF REVIEW DECISION

Introduction and Procedural History of this Appeal

The claimant appeals a decision by Krista Tibby, 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 June 30, 2017. She filed a claim for unemployment benefits with the DUA, which was denied in a determination issued on November 1, 2017. The claimant appealed the determination to the DUA hearings department. Following a hearing on the merits, attended only by the claimant, the review examiner affirmed the agency's initial determination and denied benefits in a decision rendered on December 5, 2017.

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 from receiving unemployment benefits 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 make subsidiary findings of fact from the record regarding the reason why the claimant accepted the separation package from the employer. 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 conclusion that the claimant is not eligible to receive unemployment benefits is supported by substantial and credible evidence and is free from error of law, where the employer offered a separation package to employees over the age of fifty-five, the employer's Chief Executive Officer (CEO) told employees that "Millennials will take us into the future," and no one from management told the claimant that her job would still be available to her if she did not take the package.

Findings of Fact

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

1. The claimant was employed as a senior supply planner for the employer, a food business, from February, 1988, until June 30, 2017.

2. The claimant quit her job by accepting a separation package, the Voluntary Early Retirement Separation Agreement and General Release of Claims (VERSA), which had been offered by the employer to 125 employees over the age of fifty-five (55) years old and had at least ten (10) years of service in the company.

3. On February 14, 2017, the employer held a corporate wide meeting for all of its employees. During the meeting, the employer's Chief Executive Officer (CEO) introduced the VERSA to the employees. The CEO said in the meeting that he was excited because "Millennials will take us into the future." He said that the employer was "not in bad shape, but could be better".

4. After the meeting on February 14, 2017, the claimant received the VERSA from the human resources department. The human resources representative that gave the claimant the VERSA did not notify her that her job was in jeopardy or that she would be laid off if she did not participate in the VERSA.

5. At the time of the VERSA offer, the claimant had twenty-nine (29) years of service and was fifty-eight (58) years old.

6. Approximately three (3) hours after the claimant received the VERSA package from human resources, her immediate supervisor, the Manager of Foods Planning (Manager) asked if she read the VERSA and asked if she was going to take it. She responded that she had not read it at that time.

7. The employer gave employees forty-five (45) [days] to decide whether they were going to accept the VERSA.

8. During the forty-five (45) day decision period, the employer sponsored workshops for resume writing, how to look for jobs and how to go on interviews.

9. After the forty-five (45) day decision period, there were no additional meetings or workshops.

10. The employer did not announce that layoffs would be made if it did not meet budgetary needs or if not enough people accepted the VERSA.

11. The VERSA was optional, not mandatory.

12. Each time the claimant asked the Manager if her job was in jeopardy if she did not accept the VERSA, he told her he did not know if her job would be available for her if she did not accept the VERSA.

13. The claimant was never told by the employer that her job was in jeopardy or that she would be laid off if she did not participate in the VERSA.

14. The Manager asked the claimant on a weekly basis if she was going to accept the VERSA.

15. On March 28, 2017, the claimant completed the VERSA paperwork and submitted it to human resources department.

16. After the claimant submitted the VERSA to the human resources department, she asked the Manager what her last [day] of work was. The Manager told her she could choose her last day and she chose June 1, 2017.

17. On an unknown date, the Manager's supervisor (the Senior Manager) asked the claimant to remain employed until the end of June 2017. The claimant agreed.

18. On June 30, 2017, the claimant quit her job when [she] accepted the VERSA.

19. The claimant accepted the VERSA because she believed her job was in jeopardy.

**CREDIBILITY ASSESSMENT:**

According to the undisputed testimony of the claimant, the employer put its employees on notice that it was offering a VERSA to its employees over the age of fifty-five (55), with at least ten (10) years of service. At the time the VERSA was offered, the claimant met the criteria as she had twenty-nine (29) years of service and was fifty-eight (58) years old. Although the claimant testified she was not told her job was in danger, she applied for the separation package from the employer because she believed that her job was in jeopardy. The claimant's belief was reasonable as the CEO commented that "Millennials will take us into the future" and that the employer was "not in bad shape, but could be better" leading one to believe the CEO was looking to hire younger employees to move the company into the future.

Ruling of the Board

In accordance with our statutory obligation, we review 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 ultimate 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.[1] As discussed more fully below, we reject the review examiner's legal conclusion that the claimant is not eligible to receive unemployment benefits.

The claimant separated from her position after she accepted the employer's Voluntary Early Retirement Separation Agreement (VERSA), which was offered to her and other employees on February 14, 2017. The VERSA was optional. Consolidated Finding of Fact # 11. Because the claimant's action in taking the VERSA caused the separation, rather than any employer-initiated action, G.L. c. 151A, § 25(e)(2), which generally applies in discharge cases, is not applicable here. Rather, G.L. c. 151A, § 25(e)(1), is applicable and 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 . . . [or] if such individual established to the satisfaction of the commissioner that his reasons for leaving were for such an urgent, compelling and necessitous nature as to make his separation involuntary.

Under these statutory provisions, the claimant has the burden to show that she is eligible to receive unemployment benefits. Following the initial hearing, the review examiner concluded that the claimant had not carried her burden. After our review of the record, and the new consolidated findings of fact, we reach the opposite conclusion.

We have noted two distinct circumstances in which a claimant can be eligible for benefits in cases where the claimant 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 he has a reasonable basis for believing that layoffs are a possibility if he does not take the separation/retirement package. This can be shown by presenting evidence that the employer has

[1] Insofar as it focuses on the claimant's testimony and factual matters, we also accept the review examiner's credibility assessment as reasonable and supported by the record. We do not accept or adopt the final sentence of the assessment, which draws a legal conclusion from the consolidated findings of fact. At this point of the administrative process, after the Board has accepted jurisdiction over the case and remanded it to the review examiner for further proceedings, the review examiner is responsible for making factual and credibility determinations, and the Board is tasked with making legal conclusions. *See* Dir. of Division of Employment Security v. Fingerman, 378 Mass. 461, 463–464 (1979) (noting that "application of law to fact" is task given to Board of Review).

announced that involuntary layoffs could follow the offer of the package, or by showing that the circumstances surrounding the offer of the package indicate that layoffs would be likely if enough employees did not accept it. Then, the claimant has to show that either the White situation or the State Street situation is applicable. In other words, he must show that he had a reasonable belief that he, specifically, was in danger of separation if he did not take the separation package, or that the employer had hindered his ability to ascertain if he, specifically, would be laid off if he did not take the package. *See* Board of Review Decision 0018 6461 03 (January 31, 2017).[2] Generally, the initial inquiry focuses on the overall potential for layoffs, and the subsequent analysis focuses on a claimant's specific circumstances.

In this case, the review examiner found that the employer did not announce that layoffs could happen if a sufficient number of employees did not accept the VERSA. However, we think that the circumstances attendant to the VERSA offer were sufficient for the claimant to reasonably conclude that layoffs could happen in the near future. The VERSA was offered only to employees over fifty-five years of age, and the CEO told all employees that "Millennials will take us into the future." He also indicated that the state of the company "could be better." Given that the claimant is not a Millennial, this could have made her reasonably believe that the employer was looking to get rid of older employees and replace them with a younger workforce. In addition, during the decision period, the employer offered workshops focusing on resume-writing, job search efforts, and interviewing. Consolidated Finding of Fact #8. There would be no reason to offer these workshops if the employer did not think, or perhaps know, that some employees would soon be out of work. It is entirely possible that the employer was gearing the workshops toward the persons who were strongly considering taking the VERSA anyway; however, those who were unsure of their status could have viewed these workshops as an indication that employees should be looking into other employment options as soon as possible, in the event of involuntary separations. Moreover, when the claimant persistently asked her supervisor if her job could be in jeopardy if she did not take the VERSA, the supervisor could not tell the claimant if her job would be available to her if she did not take the VERSA. The lack of information regarding the security of her job could reasonably have signaled that the employer was looking to separate employees involuntarily, if necessary. Viewed together, these circumstances are sufficient for the claimant to have reasonably believed that the employer could resort to adverse employment actions after the VERSA process was over.

As to whether the claimant herself could have reasonably believed that she was at risk of a layoff, we think that she did have such a reasonable belief. Again, the employer was clearly targeting older employees with the VERSA. The claimant's supervisor also persistently asked her if she was going to take the VERSA. Although such inquiries may actually have been innocuous, given what else was going on in the workplace and the CEO's comment, the claimant could have reasonably thought that she, and others in her age range, would be targets of involuntary layoffs. Moreover, when she specifically asked the employer about her job status, she received no concrete information which would have eased her concern about her job security. Indeed, the type of response given to her was much like the response in State Street, where management employees were instructed not to talk with employees about whether to take the separation package. *See* State Street, 66 Mass. App. Ct. at 3–4. The employees in State

[2] Board of Review Decision 0018 6461 03 is an unpublished decision, available upon request. For privacy reasons, identifying information is redacted.

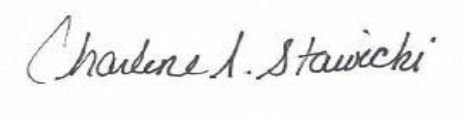
Street and the claimant in this case were left with the same level of assurance about the status of their jobs: practically none. Based on the CEO's comment, the persistent questioning by the claimant's supervisor, and the lack of information provided to her about her job security, we think that the claimant has shown both that she reasonably believed that her job was in jeopardy at the time she took the VERSA and that the employer hindered her ability to assess whether her job might be in jeopardy. The claimant did the best she could with limited information, and she chose to take the VERSA. Under these circumstances, she did not bring her separation upon herself, and, thus, she is not subject to disqualification under G.L. c. 151A, § 25(e)(1).

We, therefore, conclude as a matter of law that the review examiner's initial decision to deny benefits is not based on substantial and credible evidence in the record or free from error of law, because (1) the employer hindered the claimant's ability to assess whether her job was in jeopardy at the time she took the VERSA and (2) with the information she did have, the claimant reasonably believed that her job was in jeopardy.

The review examiner's decision is reversed. The claimant is entitled to receive benefits for the week beginning June 25, 2017, and for subsequent weeks if otherwise eligible.

**BOSTON, MASSACHUSETTS**
**DATE OF DECISION - February 27, 2018**

Paul T. Fitzgerald, Esq.
Chairman



Charlene A. Stawicki, Esq.
Member

**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