

Claimant, who quit because her pay stubs did not accurately report her hourly wage, did not establish good cause attributable to the employer or reasonable efforts to preserve. The employer paid her at the rates set forth in the collective bargaining agreement, the claimant failed to address her questions to the human resources department before quitting, and she failed to allege any violations during the 4 months prior to her going out on leave.

**Board of Review
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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 affirm.

The claimant separated from her position with the employer on July 12, 2017. She filed a claim for unemployment benefits with the DUA, which was approved in a determination issued on September 9, 2017. The employer appealed the determination to the DUA hearings department. Following a hearing on the merits, attended only by the employer, the review examiner overturned the agency's initial determination and denied benefits in a decision rendered on December 1, 2017. 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 without 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 remanded the case to the review examiner to allow the claimant to present testimony and evidence. Both parties attended the remand hearing. Thereafter, the review examiner issued his consolidated findings of fact and credibility assessment. 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 decision not to return to work from a maternity leave of absence was voluntary without good cause attributable to the employer and without urgent, compelling, and necessitous reasons is supported by substantial and credible evidence and is free from error of law.

Findings of Fact

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

1. The claimant worked part-time for the instant employer, a human services agency, as a residential counselor, from January 13, 2016 until July 11, 2017.
2. For the year 2016 the claimant, a union member, pursuant to a Collective Bargaining Agreement (CBA), was paid \$10.00 per hour categorized as "Asleep Rate 2" versus a \$11.50/\$11.60 Regular (non-asleep) hourly rate.
3. The claimant's pay stubs for the following weeks state, in part:

<u>Period Ending</u>	<u>Earnings</u>	<u>Rate</u>	<u>Hours</u>	<u>This period</u>
04/22/2016	Asleep Rate 2	\$11.50	23.80	\$238.80 (EX 12, P11)
05/06/2016	Asleep Rate 2	\$11.50	39.00	\$390.00 (EX 12, P12)
05/20/2016	Asleep Rate 2	\$11.50	32.50	\$325.00 (EX 12, P13)
06/03/2016	Asleep Rate 2	\$11.50	31.40	\$314.00 (EX 12, P14)
06/17/2016	Asleep Rate 2	\$11.50	39.00	\$390.00 (EX 12, P15)
08/12/2016	Asleep Rate 2	\$11.50	39.00	\$390.00 (EX 12, P16)
08/26/2016	Asleep Rate 2	\$11.60	28.00	\$280.00 (EX 12, P17)
09/09/2016	Asleep Rate 2	\$11.60	39.00	\$390.00 (EX 12, P18)
10/07/2016	Asleep Rate 2	\$11.60	39.00	\$390.00 (EX 12, P19)
11/04/2016	Asleep Rate 2	\$11.60	42.00	\$420.00 (EX 12, P20)
11/18/2016	Asleep Rate 2	\$12.00	39.00	\$468.00 (EX 12, P21)
12/16/2016	Asleep Rate 2	\$12.00	39.00	\$468.00 (EX 12, P22)

4. The claimant computed the hourly rate and number of hours worked for these weeks and determined the amount actually paid for each week was incorrect [sic]. The claimant did not know whether she was overpaid or underpaid. (Exhibit 11)
5. The claimant wanted the pay stub to be corrected and accurately reflect hours worked, rate paid and wages earned.
6. Prior to April 16, [2017], when the claimant went on maternity leave under the Family Medical Leave Act (FMLA), the claimant complained to the Program Director on a number of occasions about the pay stubs. The claimant's complaint was solely the inaccuracy of the pay stub and not overpayment or underpayment of wages.
7. The Program Director instructed the claimant to talk with Human Resources. Human Resources instructed the claimant to talk with the Program Director.
8. The pay stub matter was not resolved prior to the claimant's maternity leave.

9. While on maternity leave, the claimant spoke with the Assistant Director of Human Resources (ADHR) who corrected the claimant's pay for the week of April 9, 2017.
10. The claimant did not complain to the ADHR about the (12) twelve 2016 pay stubs.
11. The claimant never asked the employer what her hourly rate was or for an explanation of the discrepancy between the stated hours and "Asleep Rate 2" hourly rate on the pay stub and the actual amount of wages paid.
12. The 2016 pay stub matter was not resolved prior to the claimant's maternity leave.
13. The employer utilizes a third party administrator (TPA) to process its payroll.
14. The employer has no control over the TPA's payroll system.
15. The TPA, despite a request by the ADHR, was, due to its system, unable to insert the correct CBA \$10.00 per hour "Asleep Rate 2" on the claimant's pay stubs.
16. The claimant's paystubs accurately computed the claimant's "Asleep Rate 2" pay at \$10.00 per hour despite the incorrect stated "Asleep Rate 2" of \$11.50/\$11.60 on the pay stub.
17. The claimant was correctly paid \$10.00 per hour for "Asleep Rate 2" hours worked.
18. The claimant's return to work date from her maternity leave was set at July 12, 2017.
19. A few days before her scheduled her return to work date, the claimant spoke with the Program Manager who told the claimant the stubs could not be fixed.
20. The claimant also spoke with the Assistant Director of Human Resources (ADHR) and told her she was not returning to work and to inform the Program Director.
21. The claimant did not report for work on July 12, 2017.
22. On July 12, 2017, the employer sent a letter to the claimant notifying her of her termination effective July 12, 2017 which was delivered to the claimant on July 15, 2017. (Exhibit 13).
23. The claimant last reported for work on April 15, 2017.

Credibility Assessment:

The claimant testified at the time of hire she was not informed of her hourly rate or any shift differential rate for asleep hours. It is unreasonable to believe the claimant was not told by the employer what she would be paid for various shifts worked at the time of hire.

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 and credibility assessment are supported by substantial and credible evidence; and (2) whether the review examiner's ultimate conclusion is free from error of law. After such review, the Board adopts the review examiner's consolidated findings of fact and credibility assessment except for the part of Finding # 4 which states "the amount actually paid for each week was incorrect." While the calculations for each week presented in Hearings Exhibit # 11 appeared mathematically incorrect, the review examiner found in Findings ## 16 and 17 that the employer properly paid the claimant everything she was owed.¹ In adopting the remaining findings, we deem them to be supported by substantial and credible evidence.

The review examiner denied benefits after analyzing the claimant's separation 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

Under G.L. c. 151A, § 25(e)(1), it is the claimant's burden to establish that her separation was for good cause attributable to the employer. Based on the employer's undisputed testimony at the initial hearing, the review examiner concluded the claimant had not met her burden. We remanded the case to take the claimant's testimony. After remand, we conclude that the claimant has not met her burden.

We note at the outset that in addition to establishing good cause attributable to the employer for quitting, an employee who quits also has the burden to show that she made a reasonable attempt to preserve her job, or that such attempt would have been futile. Guarino v. Dir. of Division of Employment Security, 393 Mass. 89, 93-94 (1984). We also conclude that the claimant has not met her burden regarding the requirement that she try to preserve her job before quitting.

After remand, the review examiner found that the claimant noticed discrepancies on some of her pay stubs between April and December 2016 (the 2016 pay stubs). Specifically, for shifts when

¹ Moreover, as set forth in Findings ## 13 through 15, the apparent miscalculation arose from the employer's third-party payroll administrator, which was unable to resolve the issue of showing the proper "asleep" pay rate, but which made proper calculations based on the collective bargaining agreement between the employer and the claimant's union.

she worked at the employer's "asleep rate," some of her pay stubs listed the hours she worked at that rate and showed an hourly rate for that shift, but the amount paid for that line item was mathematically incorrect.² The review examiner found that the claimant did not know whether she was overpaid or underpaid, but just wanted the 2016 pay stubs to be corrected to accurately reflect the hours worked, rates paid, and wages earned.

The claimant complained to her supervisor, the program director, about the 2016 pay stubs. The program director told the claimant to talk with the human resources department. The review examiner found that the claimant did not complain to the assistant director of human resources (ADHR) about the 2016 pay stub issue.

The claimant went on maternity leave on April 16, 2017. She was expected to return to work on July 12, 2017. When the claimant contacted the ADHR in June 2017 to correct an issue with her pay for the week of April 9, 2017, the claimant did not raise the issue of the 2016 pay stubs. Shortly before the claimant's return to work date, the program manager told her the 2016 pay stubs could not be fixed. The claimant also spoke with the ADHR, telling her she was not returning to work and to inform the program director. The claimant did not return to work as scheduled on July 12, 2017. The employer sent her a letter that day confirming her separation, pursuant to her having told human resources the day before that she "did not want to return at this time." *See* Hearings Exhibit # 13.

With regard to the claimant's 2016 pay stubs, the review examiner found that the claimant was a member of a union, and the collective bargaining agreement between the union and employer set the pay rates for employees. The claimant was paid \$11.50 (later \$11.60) per hour at her regular hourly rate, but only \$10.00 per hour at the asleep rate.

The review examiner credited the ADHR's direct testimony that the employer uses a third-party administrator (TPA) for its payroll, and cannot control the TPA's payroll system. Although the ADHR had asked the TPA to put the proper hourly rate for asleep time on its pay stubs, the TPA was unable to correct this problem. The review examiner found that the claimant's 2016 pay stubs accurately compute her asleep pay at the correct \$10.00 per hour rate, notwithstanding the incorrect "asleep" hourly rate printed on the pay stubs themselves. As noted above, the review examiner also credited the ADHR's testimony that the claimant never complained to her about the 2016 pay stub discrepancies.

The review examiner did not explicitly issue a finding stating the reason the claimant quit. At the initial hearing, the employer testified the claimant told human resources she simply did not want to return to work. This was summarized in the employer's letter confirming her separation, as well as in Consolidated Finding # 20.

² For example, on the claimant's pay stub for the period ending April 22, 2016, it shows she worked 23.80 hours at the employer's "Asleep Rate 2." Since the pay stub listed the asleep rate as \$11.50 per hour, it appeared the claimant should have been paid \$273.70 under this category (the claimant's own incorrect arithmetic on the pay stub argued she was owed \$264.50). However, the pay stub showed the claimant was paid \$238.00 for this category of hours worked. *See* Hearings Exhibit # 12, p. 11. Since the collective bargaining agreement rate for "asleep" time was \$10.00 per hour, the \$238.00 actually paid to the claimant was the correct amount.

The review examiner did find that the claimant wanted her pay stubs to be corrected, to accurately reflect the hours she worked, the rate she was paid, and the wages she earned. This was consistent with her testimony on remand. Our analysis of the separation accepts this as the claimant's reason for quitting, since it is also consistent with the reason she gave in her adjudication statement. *See* Hearings Exhibit # 1.

First and foremost, while it is understandable that the claimant would expect the employer to provide an accurate statement of the hours she worked, the rates at which she was paid, and the actual amount she was paid, the review examiner found the claimant was paid everything that she was owed by the employer.

Further, the review examiner found that the claimant failed to address her concerns with the ADHR. We note that during the remand hearing, the ADHR candidly explained she had unsuccessfully raised the issue with the TPA to print the accurate "asleep" rate, but was told they could not resolve the issue; and she volunteered that the hourly rates for employees are set forth in the collective bargaining agreement between the employer and the claimant's union. Had the claimant actually taken her concerns to the ADHR or her union, she almost certainly would have been provided with the same information.

Additionally, the review examiner rejected as not credible the claimant's testimony that she was not informed of her hourly rate or shift differential for asleep hours. We note that in addition to the review examiner determining the claimant's testimony was "unreasonable," it is also inconsistent with what she represented in her initial adjudication statement — where she claimed the hourly rate quoted was "not what I was told I would be paid when I got hired." *See* Hearings Exhibit # 1, p. 2. The review examiner's credibility assessment falls within the scope of the fact finder's role and unless it is unreasonable in relation to the evidence presented, it will not be disturbed on appeal. *See School Committee of Brockton v. Massachusetts Commission Against Discrimination*, 423 Mass. 7, 15 (1996). Where the claimant disingenuously claims not to know what she was supposed to be paid, it undercuts her argument that the employer was not paying her what she was owed.

Finally, we note that the claimant failed to provide any allegedly incorrect statements from the last four months when she performed work for the employer. She made no allegation that the employer's pay stubs after December 16, 2016, were incorrect, all the way through her last day worked on April 15, 2017.

The claimant's professed concern about her 2016 pay stubs does not constitute good cause attributable to the employer for quitting, particularly where the employer paid her what she was owed, she did not allege the problem was ongoing for the last four months she worked, and where her claim that she did not know what her proper hourly rates were was properly discredited by the review examiner.

The claimant also failed to make reasonable efforts to preserve her employment before quitting. As the ADHR's testimony established, the issue with the incorrect pay stub information arose from the employer's TPA payroll provider, and the claimant's hourly rates were established through a collective bargaining agreement. But the claimant never bothered to ask the ADHR about the 2016 pay stubs, even when she was (successfully) pursuing a pay discrepancy that

arose in April 2017. There is also no evidence the claimant pursued this issue through her union. Her success in resolving the April issue strongly suggests that it would not have been futile to raise the 2016 pay stub issue, had she chosen to do so with the ADHR. We, therefore, conclude as a matter of law that the claimant quit without good cause attributable to the employer, and without making reasonable attempts to preserve her job before quitting.

The review examiner's decision is affirmed. The claimant is denied benefits for the week ending July 15, 2017, and for subsequent weeks, until such time as she has had at least eight weeks of work and has earned an amount equivalent to or in excess of eight times her weekly benefit amount.

BOSTON, MASSACHUSETTS
DATE OF DECISION - March 28, 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.

JPC/rh