

**COURT OF APPEALS
DECISION
DATED AND FILED**

August 26, 2004

Cornelia G. Clark
Clerk of Court of Appeals

NOTICE

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

A party may file with the Supreme Court a petition to review an adverse decision by the Court of Appeals. See WIS. STAT. § 808.10 and RULE 809.62.

Appeal No. 03-3407

Cir. Ct. No. 03CV001817

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

MELANIE O'KANE,

PLAINTIFF-APPELLANT,

V.

**LABOR AND INDUSTRY REVIEW COMMISSION AND
MADISON METROPOLITAN SCHOOL DISTRICT,**

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Dane County:
MICHAEL N. NOWAKOWSKI, Judge. *Affirmed.*

Before Deininger, P.J., Vergeront and Lundsten, JJ.

¶1 PER CURIAM. Melanie O'Kane appeals an order affirming a Labor and Industry Review Commission (LIRC) decision denying her unemployment compensation. The dispositive issue is whether substantial evidence supports LIRC's findings of fact concerning O'Kane's job performance.

We review LIRC's decision directly, *see Bunker v. LIRC*, 2002 WI App 216, ¶13, 257 Wis. 2d 255, 650 N.W.2d 864, and we affirm.

¶2 O'Kane worked for the Madison School District between July 2000 and May 2002 in a clerical position. Her duties included computer entry of payroll information for herself, another clerical worker, and several teachers and staff. The School District fired her after concluding that she had deliberately failed to report numerous days on which she was absent from work.

¶3 O'Kane applied for unemployment compensation after her termination. The Department of Workforce Development initially denied benefits, concluding that she was fired for misconduct. O'Kane appealed and received a hearing before an administrative law judge (ALJ). She did not dispute the fact that she had numerous absences in her last few months of work that she failed to record in a payroll database. However, she testified that she had been overwhelmed by personal and family problems for sometime, was on medication, and was unable to properly concentrate or keep up with her work during that time. She stated that the failure to record all of her absences was the unintended result of her emotional state, rather than a deliberate attempt to defraud the District by taking vacation and sick time in excess of what she had earned.

¶4 O'Kane's supervisor, Lynette Russell, testified that she had expressed concern to O'Kane about her frequent absences in December 2001 and early April 2002. Russell also testified that in contrast to the errors O'Kane made in her own payroll entries, she made no errors in her co-worker's entries. O'Kane's unreported absences totaled fourteen days plus several hours of work. She would not have received pay for those days and hours if she had reported them.

¶5 O’Kane raised the possibility that she had reported the absences, or some of them, in writing, despite failing to enter them in the computer. She could not produce any documentary evidence for this assertion, however.

¶6 The ALJ ruled that O’Kane was eligible for unemployment compensation, concluding that the School District had not met its burden of establishing that O’Kane’s failure to report was intentional. Instead, the ALJ was persuaded by O’Kane’s testimony “that she was overwhelmed by her work and personal circumstances and simply erred in not entering her absences properly.”

¶7 On the District’s appeal, LIRC reversed the ALJ’s decision. LIRC concluded that O’Kane’s omissions were deliberate attempts to defraud the School District. LIRC relied primarily on evidence that O’Kane made accurate entries for her co-worker while failing to report many of her own absences, that she had been warned about her frequent absences and had an incentive to hide them, and that O’Kane was not credible when she testified that she paid no attention to her sick leave and vacation balances during this time when her number of absences clearly exceeded her accrued days in both categories. Consequently, LIRC concluded the non-reporting was deliberate and therefore misconduct. This appeal follows the trial court’s decision to affirm LIRC.

¶8 A person discharged for misconduct is generally ineligible for unemployment compensation benefits. WIS. STAT. § 108.04(5) (2001-02).¹ Misconduct includes:

¹ All references to the Wisconsin Statutes are to the 2001-02 version unless otherwise noted.

[C]onduct evincing such wilful or wanton disregard of an employer's interests as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee, ... mere inefficiency, unsatisfactory conduct, failure in good performance as the result of inability or incapacity, inadvertencies or ordinary negligence in isolated instances, or good faith errors in judgment or discretion are not to be deemed "misconduct" within the meaning of the statute.

Boynton Cab Co. v. Neubeck, 237 Wis. 249, 259-60, 296 N.W. 636 (1941).

¶9 We will uphold LIRC's findings of fact if they are supported by substantial evidence in the record. WIS. STAT. § 102.23(6); ***Langhus v. LIRC***, 206 Wis. 2d 494, 501, 557 N.W.2d 450 (Ct. App. 1996). Evidence is substantial if a reasonable person might rely on it to make the determination in question. See ***Bucyrus-Erie Co. v. DILHR***, 90 Wis. 2d 408, 418, 280 N.W.2d 142 (1979). The credibility of witnesses and the weight given to their testimony are for the agency to determine, as is the determination of what inference to draw when the evidence allows more than one reasonable inference. ***Stein v. State Psychology Examining Bd.***, 2003 WI App 147, ¶33, 265 Wis. 2d 781, 668 N.W.2d 112. If the inference is reasonable, it is conclusive. See ***CBS, Inc. v. LIRC***, 219 Wis. 2d 564, 570, 579 N.W.2d 668 (1998).

¶10 Substantial evidence supports LIRC's decision. That evidence included O'Kane's failure to record many of her absences while accurately recording that of at least one other co-worker, the fact that frequent absences were of special concern to her supervisor and the subject of at least two warnings, and the fact that O'Kane would have lost pay had she accurately reported her absences. It was LIRC's prerogative not to believe O'Kane's explanation that the omissions were inadvertent and to draw the opposite inference from this evidence.

¶11 O’Kane’s arguments on appeal primarily address the weakness of the District’s case against her, in contrast to what she contends is the much stronger case that her omissions were the inadvertent result of negligence. However, we will affirm a reasonable administrative decision even if it is against the great weight and clear preponderance of the evidence. *Village of Menomonee Falls v. DNR*, 140 Wis.2d 579, 594, 412 N.W.2d 505 (Ct. App. 1987). Consequently, even if we agreed with O’Kane about the relative strength of the cases for her and against her, we would nevertheless affirm LIRC’s decision because it is reasonable and therefore conclusive.

¶12 O’Kane also argues on appeal that we should not consider the transcript of her administrative proceeding in our review because it was not prepared until after LIRC made its decision. We have not relied on the transcript, and have instead based our review on the synopsis of the testimony that LIRC relied on. In any event, O’Kane fails to identify any discrepancies between the summary and the transcript that might prejudice her, even if we were to consider the latter.

¶13 Finally, O’Kane contends that LIRC violated her due process rights by failing to adequately explain why it did not believe her testimony. The reasons for LIRC’s credibility determination are clear from its opinion, however, even if not specifically addressed. LIRC made certain inferences from the evidence that were inconsistent with O’Kane’s testimony, and explained why it made those inferences.

By the Court.—Order affirmed.

This opinion will not be published. WIS. STAT. RULE 809.23(1)(b)5.

