

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 28, 2001

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. 00-3547

Cir. Ct. No. 00-CV-1474

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT IV**

ALICE HOWARD,

PLAINTIFF-RESPONDENT,

v.

LABOR AND INDUSTRY REVIEW COMMISSION,

DEFENDANT-APPELLANT,

WOODLAND HOUSE,

DEFENDANT.

APPEAL from an order of the circuit court for Dane County:
DAVID T. FLANAGAN, Judge. *Reversed.*

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

¶1 PER CURIAM. The Labor and Industry Review Commission (LIRC) appeals a circuit court order which reversed its determination that Alice

Howard was ineligible for unemployment benefits under WIS. STAT. § 108.04(7)(a) (1999-2000)¹ because she voluntarily terminated her employment. The issue turns on the resolution of a factual dispute between Howard's testimony that she was fired and her employer's testimony that Howard effectively quit by failing to show up for work three days in a row. Based on our review of the administrative agency's decision and the record, we reverse. *See Currie v. DILHR*, 210 Wis. 2d 380, 386, 565 N.W.2d 253 (Ct. App. 1997).

¶2 We first note that LIRC's findings of fact are conclusive in the absence of fraud or action outside of its authority. WIS. STAT. § 102.23(1)(a). Therefore, we may not substitute our judgment for LIRC's as to the weight or credibility of the evidence on a finding of fact. *Advance Die Casting Co. v. LIRC*, 154 Wis. 2d 239, 249, 453 N.W.2d 487 (Ct. App. 1989). Rather, we must examine the record for any credible and substantial evidence that supports LIRC's determination. *See* § 102.23(6); *Currie*, 210 Wis. 2d at 387.

¶3 Here, LIRC adopted the administrative law judge's factual findings that Howard called in on a Friday to tell a coworker that she would not be coming in due to illness, and that she failed to show up for her weekend shifts the following two days without calling in. LIRC specifically rejected Howard's contention that her employer had notified her by telephone that she was fired.

¶4 LIRC's findings were supported by the employer's testimony that Howard had called the workplace and told a coworker that Howard would not be coming in because she was sick. The coworker then called the employer to tell her

¹ All references to the Wisconsin Statutes are to the 1999-2000 version unless otherwise noted.

that Howard was not coming in, and the employer responded that she would come in to cover Howard's shift. The employer said she did not call Howard to discuss the situation, because "it was the usual Friday night call in from Alice and there's nothing to talk about. She's done it before and what good would it do." The employer said that she called another employee to arrange for her to be on call for Howard's shifts over the weekend, in case Howard didn't show up. When that employee covered Howard's shift the next day, she told the employer that Howard had quit.

¶5 The circuit court concluded that it was "incredible on its face" that the employer would have been informed that Howard had quit and not called Howard to clarify the situation, as the employee had claimed. The circuit court's conclusion appears to overlook Howard's past history of absenteeism, which may have led the employer to believe it would be futile to call Howard. In any event, the fact that the circuit court viewed the employer's account as implausible does not render it incredible as a matter of law. Evidence is not incredible as a matter of law unless it conflicts with the uniform course of nature or with fully established facts. *Estate of Neumann v. Neumann*, 2001 WI App 61, ¶27, 242 Wis. 2d 205, 626 N.W.2d 821.

¶6 Here, Howard's account was no more "fully established" than was the employer's. To the contrary, Howard gave inconsistent stories herself, first stating that she had called her employer after a coworker had told her that the employer had fired her, and later testifying that the employer had called her to tell her to come in or be fired. In sum, LIRC had to make a credibility determination in order to choose between two conflicting accounts. LIRC was entitled to rely upon the employer's testimony, and its factual findings are conclusive. The

finding that Howard quit, in turn, supports the denial of benefits. Therefore, LIRC's determination must be reinstated.

By the Court.—Order reversed.

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

