

**COURT OF APPEALS
DECISION
DATED AND FILED**

December 9, 2008

David R. Schanker
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. 2008AP93
STATE OF WISCONSIN**

Cir. Ct. No. 2007CV10031

**IN COURT OF APPEALS
DISTRICT I**

MARY T. JOHNSON,

PETITIONER-APPELLANT,

v.

**WISCONSIN STATE LABOR & INDUSTRY REVIEW COMMISSION AND WHEATON
FRANCISCAN HEALTHCARE,**

RESPONDENTS-RESPONDENTS.

APPEAL from an order of the circuit court for Milwaukee County:
JOHN A. FRANKE, Judge. *Affirmed.*

Before Fine, Kessler and Brennan, JJ.

¶1 PER CURIAM. Mary T. Johnson, *pro se*, appeals from the order dismissing her petition for judicial review of a decision by the Labor and Industry Review Commission (LIRC). The circuit court concluded that it lacked competency to proceed because Johnson failed to comply with the service

requirements of WIS. STAT. § 227.53(1)(c) (2005-06).¹ The circuit court also determined that the petition should be dismissed as a sanction for Johnson's failure to prosecute her action. We affirm.

BACKGROUND

¶2 Covenant Healthcare Systems, Inc., (Covenant), terminated Johnson's employment in 2004.² Johnson filed a complaint with the Equal Rights Division of the Department of Workforce Development alleging that Covenant had discriminated against her on the basis of her age and sexual orientation. An administrative law judge dismissed the complaint. LIRC affirmed the dismissal in a memorandum decision dated and mailed on July 27, 2007.

¶3 On August 22, 2007, Johnson timely filed a petition in circuit court for judicial review of LIRC's decision. Within thirty days of filing her petition, Johnson served LIRC with a copy of her petition by certified mail, and she served Covenant's attorney, Lucinda Schettler, by first class mail.

¶4 On September 7, 2007, the circuit court set a briefing schedule that established a deadline of October 9, 2007, for Johnson to file and serve a brief addressing the merits of her petition. In response to Johnson's request for more time, the court extended her filing deadline through October 22, 2007.

¹ All references to the Wisconsin Statutes are to the 2005-06 version unless otherwise noted.

² Covenant Healthcare Systems, Inc., Johnson's former employer, is now known as Wheaton Franciscan Healthcare-Southeast Wisconsin, Inc. We refer to this entity as "Covenant" throughout our opinion.

¶5 On October 12, 2007, LIRC moved to dismiss the circuit court proceeding. As grounds, LIRC asserted that the circuit court lacked competency to proceed because Johnson failed to serve either Covenant or Attorney Schettler with the petition for review in any of the three ways allowed by WIS. STAT. § 227.53(1)(c): “personally or by certified mail or, when service is timely admitted in writing, by first class mail” *See id.*

¶6 By letter dated October 19, 2007, the circuit court, *sua sponte*, extended Johnson’s briefing deadline through November 7, 2007. The court advised Johnson that the deadline applied both to her brief in support of the petition and her response to LIRC’s motion to dismiss.

¶7 Instead of submitting a brief, Johnson filed a letter stating that she would “be taking a little more time” than the briefing schedule allowed. Covenant responded by requesting that the court dismiss the case as a sanction for Johnson’s failure to prosecute. One month later, Johnson filed a request for an indefinite extension of her briefing deadline “so that when I start my job and have the money I can file the brief and affidavit as well as look at the record of the case in your court.”

¶8 By order dated December 11, 2007, the circuit court denied Johnson’s request for a further extension, concluding that Johnson’s financial difficulties could not justify an indefinite delay of the legal proceedings. Additionally, the court resolved the two pending motions for dismissal. The court determined that Johnson failed to accomplish effective service on Covenant, and it dismissed the proceedings on that ground. Additionally, the court concluded that Johnson’s failure to prosecute provided an independent basis for dismissal. Johnson appeals.

DISCUSSION

¶9 We first examine the circuit court's conclusion that Johnson failed to serve Covenant properly, necessitating dismissal of the case. WISCONSIN STAT. § 227.53(1)(c), governing service of Johnson's petition for judicial review, provides in pertinent part:

(c) A copy of the petition shall be served personally or by certified mail or, when service is timely admitted in writing, by first class mail, not later than 30 days after the institution of the proceeding, upon each party who appeared before the agency in the proceeding in which the decision sought to be reviewed was made or upon the party's attorney of record. A court may not dismiss the proceeding for review solely because of a failure to serve a copy of the petition upon a party or the party's attorney of record unless the petitioner fails to serve a person listed as a party for purposes of review in the agency's decision under s. 227.47 or the person's attorney of record.

Application of § 227.53(1)(c) to the undisputed facts of this case presents a question of law that we review independently. See *Wisconsin Power & Light Co. v. PSC*, 2006 WI App 221, ¶8, 296 Wis. 2d 705, 725 N.W.2d 423.

¶10 Covenant appeared as a party in the administrative proceeding, and it was listed as a party in LIRC's memorandum decision. Accordingly, Johnson was required to serve either Covenant or its attorney with a copy of the petition for judicial review within thirty days after she instituted the circuit court proceeding. See WIS. STAT. § 227.53(1)(c). Johnson had three options to effect service: personal service, service by certified mail, or service by first class mail if such service is timely admitted in writing. See *id.* Attorney Schettler filed an affidavit reflecting that Johnson exercised none of these options within the thirty days allowed. Rather, Johnson served Attorney Schettler by first class mail without

securing an admission of service. The record thus reflects that Johnson failed to comply with the statutory service requirement.³

¶11 A party's right to judicial review of an agency's decision is dependent upon strict compliance with WIS. STAT. § 227.53(1). See *Cudahy v. DOR*, 66 Wis. 2d 253, 259, 224 N.W.2d 570 (1974) (discussing WIS. STAT. § 227.16 (1973-74)).⁴ The circuit court loses competency to proceed when a party fails to complete timely service pursuant to the statute. See *Wisconsin Power & Light Co.*, 296 Wis. 2d 705, ¶11. "Dismissal may be a harsh penalty for failure to comply with statutory service requirements, but 'uniformity, consistency and compliance with procedural rules are necessary to maintain a simple, orderly and uniform system of conducting business in the courts.'" *Weisensel v. DHSS*, 179 Wis. 2d 637, 647, 508 N.W.2d 33 (Ct. App. 1993) (citation omitted). The circuit court properly dismissed the petition here.

¶12 Our determination that the circuit court lacked competency to proceed is dispositive of Johnson's appeal. For the sake of completeness, however, we also consider whether Johnson's failure to prosecute constituted an independent basis for the circuit court's decision to dismiss the case. We conclude that it did.

³ In her brief, Johnson asserts that a representative of the Department of Workforce Development told her that "[Attorney] Schettler was to receive only a copy" of the petition and "that is why [Attorney Schettler] received a mailed copy." This allegation is not accompanied by a citation to the record, and we did not independently uncover any record support for Johnson's claim. "The rule is well established that reviewing courts are limited to the record, and are bound by the record." *State v. Aderhold*, 91 Wis. 2d 306, 314, 284 N.W.2d 108 (1979). Therefore, we have not considered Johnson's unsubstantiated allegation in reaching our decision.

⁴ WISCONSIN STAT. § 227.16 was renumbered § 227.53, effective April 22, 1986. See 1985 Wis. Act 182, §§ 37, 58.

¶13 The decision to dismiss a case lies within the sound discretion of the circuit court. *Lee v. LIRC*, 202 Wis. 2d 558, 562, 550 N.W.2d 449 (Ct. App. 1996). Only if the circuit court erroneously exercised its discretion will we disturb the circuit court's decision. *Id.*

¶14 The circuit court may dismiss a case for failure to prosecute if a party's actions are egregious. *Industrial Roofing Servs. Inc. v. Marquardt*, 2007 WI 19, ¶43, 299 Wis. 2d 81, 726 N.W.2d 898. The dilatory party may, however, avoid dismissal by showing a "clear and justifiable excuse" for its conduct. *Trispel v. Haefer*, 89 Wis. 2d 725, 733, 279 N.W.2d 242 (1979). We will uphold a dismissal if the circuit court reasonably concluded that a party's conduct was egregious and lacked a clear and justifiable excuse. *See Schneller v. St. Mary's Hosp. Med. Ctr.*, 162 Wis. 2d 296, 311, 470 N.W.2d 873 (1991). The circuit court need not make an explicit finding of egregious conduct. *Id.* An implicit finding is sufficient if the facts of record support the conclusion. *Id.*

¶15 "Egregious conduct is conduct that, although unintentional, is 'extreme, substantial and persistent.'" *Teff v. Unity Health Plans Ins. Corp.*, 2003 WI App 115, ¶14, 265 Wis. 2d 703, 666 N.W.2d 38 (citation omitted). The record reflects a reasonable basis for the circuit court to find that Johnson's conduct was egregious. Johnson did not meet the original or the extended briefing deadlines set by the court. After the court granted her two extensions, Johnson notified the court by letter that she would "be taking a little more time" than the court had allowed, but she did not indicate in her letter when she anticipated completing a brief. A month after the last deadline had passed, Johnson requested an indefinite continuance.

¶16 Thus, Johnson disregarded the briefing deadlines and offered no concrete timeframe within which she could prepare a submission. The record indicates that Johnson's inaction was not only extreme, persistent, and substantial, but also was without any foreseeable end. The circuit court could reasonably find Johnson's conduct egregious.

¶17 Johnson may show that her egregious conduct did not warrant dismissal of the petition by demonstrating that she had a "clear and justifiable excuse" for her inaction. See *Trispel*, 89 Wis. 2d at 733. The required showing represents a "strict standard." See *id.* The circuit courts have a "'duty' ... to discourage protraction of litigation and to 'refuse their aid to those who negligently or abusively fail to prosecute the actions which they commence.'" *Id.* (citation omitted).

¶18 Johnson claims that her inaction was justified because it stemmed from the hardships that she suffered when she lost her job in 2004. We are not persuaded. Johnson's specific reasons for failing to prosecute her action in 2007 include her minimal financial resources, her transportation problems, and her need to expend "a lot of effort" on preserving her belongings. These difficulties may well have impeded Johnson's progress. Nonetheless, in her final letter to the circuit court, Johnson did not suggest that any of her time was engaged in researching or writing her brief. Indeed, she disclosed that she had not yet reviewed the record of the administrative proceedings, and she indicated that she would be unable to proceed until she had money and a job at some unstated time in the future. The record reflects a reasonable basis for the circuit court's findings that Johnson failed to attend to her legal obligations and that her request for an indefinite delay was unjustified.

¶19 Our inquiry is whether the circuit court properly exercised its discretion, not whether the court might have exercised its discretion differently. *Industrial Roofing Servs. Inc.*, 299 Wis. 2d 81, ¶40. In light of the record here, the court did not erroneously exercise its discretion in dismissing Johnson’s petition on the ground that she failed to prosecute her case.⁵

By the Court.—Order affirmed.

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

⁵ We resolve this appeal solely on procedural grounds. Therefore, we do not consider Johnson’s substantive claims that the administrative law judge improperly dismissed the administrative proceeding at a prehearing conference and that Johnson was not timely served with transcripts. See *State v. Jipson*, 2003 WI App 222, ¶17 n.5, 267 Wis. 2d 467, 671 N.W.2d 18 (only dispositive issue need be addressed).

