

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**November 14, 2002**

Cornelia G. Clark  
Clerk of Court of Appeals

**NOTICE**

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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. 02-0092**

**Cir. Ct. No. 01-CV-826**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

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**KRIS POTTS,**

**PETITIONER-APPELLANT,**

**V.**

**WISCONSIN LABOR AND INDUSTRY REVIEW COMMISSION  
AND MAGNA PUBLICATIONS, INC.,**

**RESPONDENTS-RESPONDENTS.**

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APPEAL from an order of the circuit court for Dane County:  
DANIEL R. MOESER, Judge. *Affirmed.*

Before Dykman, Roggensack and Deininger, JJ.

¶1 ROGGENSACK, J. Kris Potts appeals the circuit court's order dismissing his petition for certiorari review of the Wisconsin Labor and Industry Review Commission's (LIRC) dismissal of his employment discrimination complaint against Magna Publications, Inc. (Magna). Potts argues that the circuit

court erroneously exercised its discretion by dismissing his petition for failing to comply with court orders. Because Potts failed to comply with court orders and unnecessarily delayed prosecution of the case, for which conduct he had no clear and justifiable excuse, we conclude that the circuit court properly exercised its discretion in dismissing Potts's certiorari petition. Therefore, we affirm the circuit court's order.

### **BACKGROUND**

¶2 In May 1997, Potts filed an employment discrimination claim against Magna alleging retaliatory termination based on his opposition to one or more allegedly discriminatory practices in the workplace. Following an extensive hearing, an administrative law judge for the Wisconsin Department of Workforce Development, Equal Rights Division dismissed Potts's complaint because he failed to prove that Magna violated the Wisconsin Fair Employment Act. LIRC affirmed the order.

¶3 Potts, *pro se*, filed a petition for judicial review. The circuit court established a briefing schedule that required Potts to file his brief with the court and serve it on opposing counsel by June 30, 2001, with response briefs by July 30 and Potts's reply brief by August 15. On June 25, Potts moved to extend his briefing deadline because of injuries sustained in two automobile accidents. The court granted his motion and amended the briefing schedule which then required Potts to file, and serve on opposing counsel, his first brief by October 15, 2001.

¶4 On October 5, Potts moved the court to remand the case to the administrative law judge to consider what he asserted was "new information," including sworn statements that showed Magna offered false testimony, engaged

in witness tampering and suborned perjury. Magna denied Potts's allegations, but concurred with LIRC that pursuant to WIS. STAT. § 227.56(1) (1999-2000),<sup>1</sup> the court should hold a hearing to determine whether the evidence was material and whether there existed a good reason for his failure to present it at the agency proceeding. Accordingly, the court ordered that by October 19, Potts was to file the new information with the court and serve it on opposing counsel. The court also extended Potts's briefing deadline to October 26.

¶5 Five days later, Potts filed yet another motion requesting a sixty-day extension for his brief and the filing deadline for his "new information," citing a physical disability, the wide range of information and the extensive cost of providing copies for each party. Magna opposed the motion, arguing that it was just another tactic to delay the case. Potts then filed an amended motion requesting that the court "seal" the documents he was to file because it would be unfair to require him to "reveal his hand" by providing a copy of the documents to Magna before they were reviewed by the administrative law judge.

¶6 The court did not address this motion. Potts filed his "new information" with the court on October 19. He also filed a letter requesting that the court seal his submissions. The letter indicated that he had sent copies to

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<sup>1</sup> WISCONSIN STAT. § 227.56(1) provides in relevant part:

If ... application is made to the circuit court for leave to present additional evidence on the issues in the case, and it is shown to the satisfaction of the court that the additional evidence is material and that there were good reasons for failure to present it in the proceedings before the agency, the court may order that the additional evidence be taken before the agency ....

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

opposing counsel. However, neither Magna nor LIRC received a copy of the letter or the documents he filed with the court. On October 26, Potts filed a forty-four page brief. Once again, he did not send copies of the brief to opposing counsel. On November 7, having still not received a brief or documents supporting Potts's allegation of misconduct by Magna, Magna moved to dismiss, with prejudice, for failure to prosecute.

¶7 On November 20, the circuit court, denied Potts's motion to remand and granted Magna's motion to dismiss. The court related that it had reviewed the materials filed by Potts and concluded that they did not constitute "information and sworn statements" that would support his motion to remand. The court also found that Potts had failed to prosecute in the following ways: (1) failing to provide "information and sworn affidavits" to support his motion for remand, (2) failing to provide opposing counsel with copies of all filings and (3) failing to file a brief despite receiving three extensions. Because Potts had filed a brief on October 26, he moved for reconsideration based on the circuit court's "erroneous" conclusion that he had not done so. The circuit court reviewed the file and modified its decision with regard to Potts's failure to file a timely brief, but denied his motion, noting that he had not complied with the court's order because he had not provided copies of his brief to opposing counsel. Potts appeals.

## DISCUSSION

### **Standard of Review.**

¶8 A discretionary decision will be sustained if the circuit court examined the relevant facts, applied a proper standard of law and reached a conclusion that a reasonable judge could reach using a demonstrated rational process. *Loy v. Bunderson*, 107 Wis.2d 400, 414-15, 320 N.W.2d 175, 184

(1982). Additionally, we will not overturn the factual findings of a circuit court unless they are clearly erroneous. *Hur v. Holler*, 206 Wis.2d 335, 342, 557 N.W.2d 429, 432 (Ct. App. 1996).

### **Dismissal.**

¶9 A circuit court’s decision to dismiss an action for failing to prosecute is discretionary. *Zeis v. Fruehauf Corp.*, 56 Wis. 2d 486, 489, 202 N.W.2d 225, 226 (1972). Potts argues that the circuit court erroneously exercised its discretion due to its “biased and inappropriate” conduct. However, he fails to identify and develop any legal argument, cite to legal authority or cite to the record to support his argument. His primary contention is that the court erroneously dismissed his petition for certiorari review because he did comply with all court orders. Alternatively, Potts argues that if there was any delay in complying with court orders, it was due to a medical condition. After a thorough and independent review of the record, we conclude that the circuit court did not erroneously exercise its discretion when it dismissed Potts’s case.

¶10 A petition for judicial review of an administrative agency’s decision or order is governed by WIS. STAT. ch. 227. *See Lee v. LIRC*, 202 Wis. 2d 558, 561, 550 N.W.2d 449, 450 (Ct. App. 1996). However, compliance with ch. 227 does not alter existing statutes and rules that govern civil actions, “as long as those provisions do not conflict with Chapter 227.” *Id.* at 561, 550 N.W.2d at 450. WISCONSIN STAT. § 805.03 is such a provision. *Lee*, 202 Wis. 2d at 563, 550 N.W.2d at 451.

¶11 WISCONSIN STAT. § 805.03 authorizes a circuit court to dismiss an action if a “claimant” fails to prosecute his or her case or fails to obey a court order. A circuit court is also vested, independent of statute, with the inherent

power to dismiss a case for failure to prosecute or to comply with court orders. *Neylan v. Vorwald*, 124 Wis. 2d 85, 94, 368 N.W.2d 648, 653 (1985). As the supreme court has explained:

The court's authority to dismiss actions emanates not merely from a need to prevent injustice to the parties in the particular action, but also from a need to prevent injustice to the operation of the judicial system as a whole. The circuit courts have a duty to discourage the protraction of litigation, preserve judicial integrity, and promote the orderly processing of cases. Dismissal, in some instances, is necessary to maintain these interests. Each time the court's orders are disregarded, the administration of justice suffers because the court's time is misused to accommodate the noncomplying party's dilatoriness at the expense of the other party and all other litigants awaiting the court's attention.

*Johnson v. Allis Chalmers Corp.*, 162 Wis. 2d 261, 281-82, 470 N.W.2d 859, 867 (1991) (citation omitted).

¶12 Because dismissal abrogates the noncomplying party's property interest in his or her claim, it should be imposed only when a harsh sanction is appropriate. *Id.* at 274, 470 N.W.2d at 864. Dismissal is appropriate where a party has engaged in bad faith or egregious conduct. The noncomplying party's failure to follow a court order may be found to be egregious unless he demonstrates a "clear and justifiable excuse" for the failure. *Id.* at 275-76, 470 N.W.2d at 864. In applying this standard, a circuit court is not required to analyze a specific set of factors, but rather it focuses on "the degree to which the party's conduct offends the standards of trial practice." *Id.* at 286, 470 N.W.2d at 869.

¶13 On April 17, 2001, the circuit court entered a scheduling order requiring Potts to file a brief and to serve it on opposing counsel by June 30. At Potts's request, the court extended the briefing schedule and notified Potts that he

was to “serve[] upon opposing counsel” a brief limited to twenty pages by October 15. The court then extended this deadline a second time to October 26, subject to the same requirements. Despite the court’s clear and unambiguous directive and two extensions, Potts failed to serve opposing counsel a copy of his brief by October 26, and he filed a forty-four page brief contrary to court order.

¶14 In addition, Potts failed to comply with the court’s order directing him to file and serve on opposing counsel, by October 19, “information and sworn statements” to support his allegation that Magna tampered with witnesses and suborned perjury. Instead, Potts filed more than four hundred pages of documents consisting of reproduced depositions, testimony from the administrative hearing, personnel tests, an internet access log, confirmation of a Wisconsin Women’s basketball ticket order and a reproduced letter to a Cuban patriot written in 1889. The circuit court reviewed the documents Potts filed, and we agree with its determination that they do not constitute “information and sworn statements” which support Potts’s claim that remand to LIRC is appropriate. Furthermore, Potts’s did not tie his motion to remand for Magna’s alleged misconduct to any part of the materials submitted. Rather, it appears he expected the court to find something in the hundreds of pages of documents he submitted that would support his claim of misconduct. However, it is not the duty of a circuit court to ferret out support for a movant’s claim when no document is linked to a particular claim of misconduct. See *Mogged v. Mogged*, 2000 WI App 39, ¶19, 233 Wis. 2d 90, 607 N.W.2d 662; *State v. Shaffer*, 96 Wis. 2d 531, 545-46, 292 N.W.2d 370, 377-78 (Ct. App. 1980). And finally, the record demonstrates unequivocally that Potts understood that the court order required him to serve duplicate copies of the

evidence he asserted supported his request for remand on Magna and LIRC by October 19, yet he did not do so.<sup>2</sup>

¶15 We conclude that the facts described by the court that underlay its order dismissing the petition are not clearly erroneous. Potts did not comply with court orders and employed dilatory tactics that served only to “cloud the issues and delay the proceedings,” for which there was no clear and justifiable excuse.<sup>3</sup> His tactics offend standards of trial practice by impeding the circuit court’s ability to effectively manage the case before it. *Johnson*, 162 Wis. 2d at 281-82, 470 N.W.2d at 867; *Brandon Apparel Group, Inc. v. Pearson Properties, Ltd.*, 2001 WI App 205, ¶12, 247 Wis. 2d 521, 634 N.W.2d 544, *review denied*, 2001 WI 117, 247 Wis. 2d 1035, 635 N.W.2d 783 (Wis. Oct. 23, 2001) (No. 00-2532). Accordingly, we affirm the order of the circuit court.

## CONCLUSION

¶16 Because Potts failed to comply with court orders and unnecessarily delayed prosecution of the case, for which conduct he had no clear and justifiable excuse, we conclude that the circuit court properly exercised its discretion in

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<sup>2</sup> For example, immediately following the court’s order to submit the additional evidence, Potts requested a sixty-day extension to file the material because “it would not be possible to provide the proper documentation to all parties as required by law.” He later amended the motion to argue that it would be unfair to require him to give copies to opposing counsel.

<sup>3</sup> We note that Potts’s claim that the pressure of meeting the court’s deadline caused him severe health complications is questionable and supported only by his personal affidavit. We also note that Potts’s October 16, 2001 motion requesting a sixty-day extension alleged financial hardship and a physical disability, but made no mention of a pressing gall bladder problem. Finally, according to his affidavit, Potts was hospitalized on October 29. His hospitalization does not, therefore, excuse his failure to provide opposing counsel with what he represented to be additional evidence on October 19 or his brief on October 26.

dismissing Potts's certiorari petition. Therefore, we affirm the circuit court's order.

*By the Court.*—Order affirmed.

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