

STATE OF WISCONSIN

PERSONNEL COMMISSION

SHANNON R. BARE,
Complainant,

v.

**Secretary, DEPARTMENT OF
TRANSPORTATION,**
Respondent.

RULING ON
MOTION TO DISMISS
FOR
UNTIMELY FILING

Case No. 99-0119-PC-ER

NATURE OF THE CASE

This matter is before the Commission on respondent's motion to dismiss filed August 12, 1999. The parties' attorneys have filed briefs. The facts do not appear to be in dispute and are set forth in the following findings of fact. These findings are made for the sole purpose of resolving this motion.

FINDINGS OF FACT

1. Respondent informed complainant by a letter dated and given to her on September 10, 1998, that her probationary employment with respondent's DSP (Division of State Patrol) was terminated effective September 10, 1998.

2. On July 7, 1999, at 4:30 p.m., the Commission received a facsimile (fax) transmission of a complaint of WFEA (Wisconsin Fair Employment Act; Subch. II, Ch. 111, Stats.) discrimination alleging discrimination on the basis of sex and disability with respect to "the manner and form in which she was treated during the period of [her] employment, commencing with the outset of her cadet status on or about July 6, 1998, through the date of her termination from the State Patrol Academy on September 10, 1998." The complaint form on which the complaint was set forth was not signed.

3. On July 7, 1999, at 4:43 p.m., the Commission received a fax transmission of the same complaint, but this complaint form was signed and notarized.

4. On July 16, 1999, the Commission received the original signed and notarized complaint.

OPINION

Pursuant to §111.39(1), Stats., complaints of WFEA discrimination must be “filed with the [Commission] no more than 300 days after the alleged discrimination . . . occurred.” The first fax transmission of this complaint was received by the Commission on July 7, 1999, at 4:30 p.m., which was exactly 300 days after the last possible date on which discrimination allegedly occurred—i. e., the date of the termination of complainant’s probationary employment.

The Commission rules provide at §PC 1.01(12), Wis. Adm. Code, that “‘Filing’ means the physical receipt of a document at the commission’s office.” There are at least two ways that a document can be physically received at the Commission’s office. It could arrive by mail, or via personal delivery by someone such as a process server. In either case, the end result is that the Commission receives the document at its office. When a document is faxed to the Commission, this process also results in the Commission receiving a document at its office. The facts of this case frame an issue of first impression¹ for this Commission which §PC 1.01(12) does not address directly—whether a complaint is considered “filed” when the Commission receives a copy of the original complaint by fax transmission rather than by mail or personal service. Before addressing this question, there are some general principles that apply to the decision of an issue of this nature.

It is a familiar axiom that proceedings before administrative agencies are not required to be conducted with all the formality of a trial or proceeding in court. *See Wisconsin Tel. Co. v. Public Service Commission*, 232 Wis. 274, 287 N. W. 122 (1939); *Gray Well Drilling Co. v. State Board of Health*, 263 Wis. 417, 419, 58 N. W. 64 (1953) (“Not only pleadings, but all proceedings before administrative agencies are

¹ At the same time as the Commission decides this case, it also decides related issues in *Raisanan v. DOC*, 98-0052-PC-ER, and *Wyman v. UW-Madison*, 99-0078-PC-ER.

generally simple and informal. The functions of administrative agencies and courts are so different that rules governing judicial proceedings are not ordinarily applicable to administrative agencies, unless made so by statute.”); *Loomis v. Wisconsin Personnel Commission*, 179 Wis. 2d 25, 30, 505 N. W. 2d 462 (Ct. App. 1993).

In *Verhaagh v. LIRC*, 204 Wis. 2d 154, 554 N. W. 2d 678 (Ct. App. 1996), the Court stated that it did not agree “that the civil law standards applied to courts in extending time to answer controls and administrative agency’s determination of whether to grant default judgment,” 204 Wis. 2d at 159. The Court went on to hold as follows:

Veerhagh [a workers compensation claimant] contends that the surprise, mistake or excusable neglect standard enunciated in *Hedtke v. Sentry Ins. Co.*, 109 Wis. 2d 461, 326 N. W. 2d 727 (1982), is the standard that must be applied by LIRC. *Heidtcke*, however, in enunciating the standard to be applied to courts was interpreting §801.01(2), STATS., which is contained within the rules of civil procedure. The rules of civil procedure apply to the courts of this state but are not applicable to administrative agency proceedings. . . .

Because of the limited application of the rules of civil procedure to the administrative agencies of this state, we reject Veerhagh’s contention that the appropriate legal standard to be applied by LIRC in determining whether to grant his motion for a default order is based upon a finding of surprise, mistake, or excusable neglect. Rather the agency is entitled to exercise its discretion based on its interpretation of its own rules of procedure, the period of time elapsing before the answer was filed, the extent to which the applicant has been prejudiced by the employer’s tardiness and the reasons, if any, advanced for the tardiness. (citations omitted) 204 Wis. 2d at 161.

In evaluating the agency action before it, the Court also considered another general principle:

The law does not look kindly at defaults., *Dugenske v. Dugenske*, 80 Wis. 2d 64, 68, 257 N. W. 2d 865, 867 (1977), and the ability of all parties to assert their claim and defense before an appropriate tribunal will not lightly be discarded. 204 Wis. 2d at 162.

Returning to the specific issue before it, the Commission is aware of only one reported case in Wisconsin dealing with the question of filing by facsimile. In *Pratsch v. Pratsch*, 201 Wis. 2d 491, 548 N. W. 2d 852 (Ct. App. 1996), a notice of appeal

was transmitted by fax transmission to the clerk's office on the last day for filing. The Court stated that this raised the issue of first impression of "whether a notice of appeal can be filed by facsimile transfer." 201 Wis. 2d at 494. The Court noted that the Supreme Court had dealt with this general area by enacting §801.16(2), Stats.:

2) For papers that do not require a filing fee:

(a) A court may adopt a local rule, if it is approved by the chief judge, that requires the use of a plain-paper facsimile machine and permits the filing of those papers by facsimile transmission to the clerk of circuit court.

(b) If no rule has been adopted under par. (a), a judge may permit a party or attorney in a specific matter to file those papers with the clerk of circuit court by facsimile transmission to a plain-paper facsimile machine.

(c) The party or attorney, by filing papers by facsimile transmission, certifies that permission of the judge or court for filing by facsimile transmission has been granted. Papers filed by facsimile transmission are considered filed when transmitted except that papers filed by facsimile transmission completed after regular business hours of the clerk of court's office are considered filed the next business day.

Although awkwardly constructed, s. 801.16(2), STATS., plainly means that only those papers that do not require a filing fee may be filed by facsimile transmission. The Judicial Council Note, 1991, confirms that interpretation: "Sub. (2) clarifies that papers (other than those requiring a filing fee) may be filed by facsimile transmission to the judge or clerk, if a local court rule, or the judge in a specific matter, so permits." A notice of appeal is a paper that requires the payment of a filing fee. RULE 809.25(2)(a)1, STATS. Therefore, s. 801.16(2), STATS., does not permit the filing of a notice of appeal by facsimile transmission.

We note that "filing under sec. 809.10 means physical delivery of the notice of appeal to and receipt by the clerk of the trial court." *Boston Old Colony Ins. Co. v. International Rectifier Corp.*, 91 Wis.2d 813, 822, 284 N.W.2d 93, 97 (1979). *In one sense, the clerk of the trial*

court received the notice of appeal when the facsimile transmission occurred on January 4, 1996. However, we conclude that Boston Old Colony does not answer this issue because it predated facsimile technology and the creation of s. 801.16(2), STATS. Section 801.16(2) represents an explicit exception to the general rule set forth in Boston Old Colony. (emphasis added) 201 Wis. 2d at 494-95.

This holding applies by its terms to proceedings in court. The principle embodied in this holding can not be applied automatically to Commission proceedings, but, consistent with the foregoing authorities, proceedings before administrative agencies are in general less formal than court proceedings. This suggests the Commission should not adopt any approach to this issue which is more stringent than the principle adopted in *Pratsch*.

In the emphasized language in *Pratsch*, the Court acknowledges that the clerk's office received a copy of the document when it received the fax transmission. The Court implies that there would have been compliance with the statutory filing requirement of "physical delivery of the notice of appeal and receipt by the clerk of court," *id.*, but for the rule allowing fax filing only where the document in question was not required to be accompanied by a filing fee. This clearly leaves the door open to the conclusion that an effective filing occurs on the day the document is received by fax transmission when there is no rule limiting fax filing to particular types of documents. This, of course, is the case in the instant matter. *See Calabrese v. Springer Personnel of New York, Inc.* 141 Misc. 2d 566, 534 N. Y. S. 2d 83 (1988) ("Faxing patently satisfied the plain intent of the subdivision [which governs service of documents but does not address the use of fax].").

In the Commission's opinion, the Court's holding in *Pratsch*, along with the general principles of liberality and informality in applying rules in administrative proceedings, support the interpretation of §1.01(12), Wis. Adm. Code, that filing is complete when the Commission receives a fax copy of the complaint, and the Commission so holds under the facts and circumstances of the instant case.

In reaching this conclusion, the Commission has considered various policy-oriented factors. Relying on fax transmissions can be problematical because technical difficulties can occur with fax transmissions. However, a party who elects to rely on a fax transmission assumes the risk of a technical problem, just as a party who drops a letter in a mail box assumes the risk of a problem occurring in the postal delivery system. In the instant case, the fax transmission occurred in a timely manner and without incident.

Another relevant factor is that fax transmissions shift the costs of reproduction of copies of the documents transmitted from the sender to the recipient (here, the Commission). This is a concern, but in many cases, such as the instant one, there will not be a great number of pages involved. To the extent that both parties and the Commission may utilize fax transmissions, the cost factor may be largely balanced out over a period of time. Also, an application of § PC 1.01(12), Wis. Adm. Code, to permit service and filing by fax should not prevent the Commission from addressing on a case by case basis any abusive excesses that may occur.

The Commission also considers the policy factor raised by a recently enacted (1997 Act 212, effective May 13, 1998) law. Section 16.72(9), Stats., provides that "every agency include[] on all stationery utilized by the agency . . . at least one facsimile transmission number for the agency, if the agency has a number" This reflects a legislative policy that encourages agency accessibility utilizing the technology that has become so widespread in recent years. Furthermore, the Commission's publication of its fax number on its stationery inevitably will have the effect of encouraging parties to communicate with the Commission by fax, the kind of outcome of which the legislature must have been aware.

The Commission also holds that the filing of the complaint was not untimely because the copy that was filed with the Commission on July 7, 1999, at 4:30 p. m., was not signed, verified or notarized. While the Commission rules provide at §2.01(2), Wis. Adm. Code, that complaints "shall be signed, verified and notarized," the rules also provide that "[a] complaint may be amended by the complainant, subject to

approval by the commission, to cure technical defects or omissions. . . and those amendments shall relate back to the original filing date." §PC 2.02(3), Wis. Adm. Code. In this case the complainant subsequently filed a complaint that cured the technical defects and thus relates back to the original date of filing by fax.

CONCLUSIONS OF LAW

1. The Commission's receipt by fax transmission of the complaint of discrimination at 4:30 p.m. on July 7, 1999, was an effective filing of the complaint on July 7, 1999.

2. This complaint was timely filed to the extent that it relates to the subject matter of the complainant's probationary termination.²

ORDER

Respondent's August 12, 1999, motion to dismiss this complaint as untimely filed is denied.

Dated: January 25, 2000 STATE PERSONNEL COMMISSION


LAURIE R. McCALLUM, Chairperson


DONALD R. MURPHY, Commissioner


JUDY M. ROGERS, Commissioner

AJT:990119Cru11.4

² Complainant's counsel concludes his brief with the contention that "her complaint regarding her termination from employment, based upon discrimination should remain before the commission." (emphasis added). The Commission does not address any question of a possible continuing violation, because complainant has not advanced such an argument, but rather has waived any such argument.