

STATE OF WISCONSIN

PERSONNEL COMMISSION

**JOHN B. WYMAN,**  
*Complainant,*

v.

**Chancellor, UNIVERSITY OF  
WISCONSIN (MADISON)**  
*Respondent.*

**RULING ON TIMELINESS  
OF COMPLAINANT'S  
RESPONSE TO REQUEST  
FOR INFORMATION**

Case No. 99-0078-PC-ER

#### NATURE OF THE CASE

This matter is before the Commission to decide an issue concerning the timeliness of a response to a request for information the Commission sent out pursuant to §111.39(3), Stats. The following findings appear to be undisputed and are made for the sole purpose of deciding this issue.

#### FINDINGS OF FACT

1. By a certified letter dated August 2, 1999, Commission staff directed complainant's counsel to provide certain information concerning this age discrimination complaint within 20 days, by August 23, 1999. This letter includes the following:

The Personnel Commission previously wrote to you on June 18, 1999, and asked you to provide information regarding the above discrimination/retaliation complaint. To date, we have received no response.

If you wish to proceed with your complaint, you must submit the information as described in the enclosed correspondence dated June 18, 1999. Your response must be **received** by the Commission within 20 calendar days of the date of this certified letter. If you do not file your response with the Commission within the 20 day time period (**by August 23, 1999**), I will recommend that your case be dismissed for lack of prosecution.

Pursuant to §111.39(3), Stats., which relates to claims filed under the Fair Employment Act:

The (commission) shall dismiss a complaint if the person filing the complaint fails to respond within 20 days to any correspondence from the (commission) concerning the complaint and if the correspondence is sent by certified mail to the last known address of the person.

2. Complainant's attorney transmitted to the Commission by facsimile (fax) transmission a 13 page response to this letter. This fax transmission was received by the Commission at 1:05 p. m. on August 23, 1999. The Commission received the original of this response on August 25, 1999.

### OPINION

Pursuant to §111.39(3), Stats., once the Commission sends a certified letter to a complainant, it is to dismiss the complaint if the complainant fails to respond to the letter within 20 days—i. e., by August 23, 1999. Since complainant's response was received by fax transmission on the last possible day for compliance, and the original response was not received until two days later, there would not be a timely response unless it can be concluded that the receipt of the fax constituted effective filing.

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, via delivery by postal employees, 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 impression<sup>1</sup> for this Commission which §PC 1.01(12) does not address directly—whether a document is considered filed

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<sup>1</sup> At the same time as the Commission decides this case, it also decides related issues in *Bare v. DOT*, 99-0119-PC-ER, and *Raisanen v. DOC*, 98-0052-PC-ER.

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 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 an 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 of court'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 did 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 of a response pursuant to §111.39(3), Stats., is complete when the Commission receives a fax copy of the documents, 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 problems can occur with fax transmissions. However, a party who elects to rely on a fax transmission assumes the risk of a technical difficulty, 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 filing by fax should not prevent the Commission from addressing on a case by case basis any real abusive excesses that may occur.

Another policy consideration involves a recently enacted law (1997 Act 212, effective May 13, 1998). 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 such a number . . . .” This reflects a legislative policy that encourages agency accessibility utilizing the technology that has

become so widespread in recent years. Furthermore, as complainant has pointed out, the publication by an agency, such as the Commission, of its fax number on its stationery inevitably has the effect of encouraging parties to use that number to communicate with the Commission by fax, an outcome of which the legislature must have been aware.

#### CONCLUSIONS OF LAW

1. This case is before the Commission pursuant to §§230.45(1)(b) and 111.375(2), Stats.
2. Complainant's response to the Commission's August 2, 1999, letter, which was submitted by fax transmission on August 23, 1999, was timely filed pursuant to §111.39(3), Stats., and §PC 1.01(12), Wis. Adm. Code.

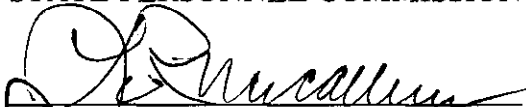
#### ORDER

Based on the conclusion that complainant's response filed on August 23, 1999, constituted timely compliance with §PC 1.01(12), Wis. Adm. Code, and §111.39(3), Stats., this complaint will not be dismissed but will continue to be processed.

Dated: January 25, 2000.

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STATE PERSONNEL COMMISSION

  
LAURIE R. McCALLUM, Chairperson

  
DONALD R. MURPHY, Commissioner

  
JUDY M. ROGERS, Commissioner