

**COURT OF APPEALS
DECISION
DATED AND FILED**

October 3, 2006

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. 2006AP60

Cir. Ct. No. 2005CV78

STATE OF WISCONSIN

**IN COURT OF APPEALS
DISTRICT III**

JEANNE ANDERSON,

PETITIONER-APPELLANT-CROSS-RESPONDENT,

V.

LABOR AND INDUSTRY REVIEW COMMISSION,

RESPONDENT-RESPONDENT-CROSS-APPELLANT,

AMERICAN MATERIALS CORPORATION,

RESPONDENT-RESPONDENT.

APPEAL and CROSS-APPEAL from a judgment and orders of the circuit court for Dunn County: ROD W. SMELTZER, Judge. *Reversed and cause remanded with directions.*

Before Cane, C.J., Hoover, P.J., and Peterson, J.

¶1 PER CURIAM. Jeanne Anderson appeals a judgment affirming a Labor and Industry Review Commission decision that American Materials Corporation had not fired Anderson in retaliation for her complaints about sexual harassment or because of her medical needs. The Commission cross-appeals two orders denying its motion to dismiss the case for Anderson’s failure to comply with filing deadlines. We conclude Anderson failed to timely file her petition for review in circuit court. Accordingly, we reverse the judgment and orders and remand to the circuit court with directions to dismiss the petition.

Background

¶2 Anderson began working for American Materials in 1990, operating a large, earthmover. In 1993, she was involved in an on-the-job accident and she suffered post-traumatic stress disorder requiring ongoing medical care.

¶3 In 1999, Clarence Yaeger was Anderson’s supervisor. He began engaging in “[s]exually overt and offensive conduct” toward Anderson, including both verbal comments and physical acts. Anderson first reported this behavior to higher supervisors on July 22, 1999. Vice-president Steven Stuhr made an initial investigation but it appears no action was taken beyond issuing a warning.

¶4 On a job site in August 1999, Anderson joked over her radio with fellow operator Grace Buswell that they should box in Yaeger with their machinery. This type of joking was apparently commonplace, despite a company policy against “horseplay.” Anderson and Buswell did not, however, box in Yaeger. Later that day, Yaeger intentionally collided his machine with Anderson’s, causing approximately \$3,000 in damage to Anderson’s equipment. The employee manual directed that supervisors were to file accident reports.

Because of this, and because Yaeger was the supervisor, Anderson thought he would file the report.

¶5 On August 27, 1999, safety director Robert Gates began investigating the damage to Anderson's vehicle. Gates advised Anderson she would need to complete a report, as required by the union contract. On August 30, Anderson complained to Gates about Yaeger's sexual harassment, claiming he was becoming more aggressive and she wanted it to stop.

¶6 In discussing the accident with vice-president Stuhr, Anderson had been left with the impression that only Yaeger would be disciplined because he was the supervisor. Ultimately, Yaeger was fired for his role in the accident, but Anderson was fired as well. American Materials gave the reason as "failure to report significant property damage in a timely manner" and "horseplay amongst crewmembers, that in this case escalated to ... property damages to company equipment."

¶7 Anderson filed a complaint with the Department of Workforce Development under the Wisconsin Fair Employment Act, asserting three violations. She contended American Materials: (1) allowed harassment in the workplace; (2) fired her because she complained about harassment; and (3) fired her because it no longer wanted to accommodate her post-traumatic stress disorder.

¶8 On August 9, 2000, an equal rights officer returned a split decision. The officer concluded there was, in fact, probable cause to believe American Materials violated the Fair Employment Act by engaging in or permitting harassment in the workplace. However, the officer also found there was no

probable cause to believe American Materials fired Anderson in retaliation for reporting harassment or because of a disability.

¶9 Anderson requested a hearing on the no probable cause determinations. On January 30, 2002, a hearing examiner again found no probable cause to believe American Materials fired Anderson for an improper reason. Specifically, the hearing examiner concluded American Materials fired Anderson for engaging in horseplay and failing to timely report damage to company property. The examiner also concluded that neither her harassment complaint nor her disability were factors in her termination.

¶10 On May 29, 2003, Anderson petitioned for administrative review by the Commission.¹ On January 26, 2005, the Commission affirmed the no probable cause determination, holding American Materials terminated Anderson because she failed to report an accident and her actions led to significant property damage. The Commission mailed its order on January 26, 2005.

¶11 On February 23, 2005, Anderson mailed to the Commission and the Dunn County Clerk of Court her petition for review by the circuit court. The clerk's office received the petition on February 25, but with no filing fee enclosed. The clerk's office returned Anderson's paperwork the same day with a note requesting the filing fee be forwarded. The clerk received the petition again on March 8, this time with the filing fee included.

¹ Between the January 2002 decision and the May 2003 petition, there was a second hearing on whether American Materials violated the Wisconsin Fair Employment Act by permitting harassment, the element on which the equal rights officer determined there was probable cause. This hearing had to occur before Anderson could petition the Commission for further review. The examiner in the second hearing concluded American Materials had violated the Act and ordered a remedy. Neither Anderson nor American Materials appeals that decision.

¶12 On March 11, the Commission filed a motion to dismiss the petition for review, arguing the court had lost competence because of the late filing. The court rejected the motion, finding Anderson filed her petition in “legal contemplation.” The Commission filed a motion for reconsideration, which the court also denied, finding the clerk’s office abused its discretion when it returned the petition rather than telephoning Anderson to advise her of the missing fee.

¶13 The case proceeded and the court ultimately affirmed the Commission’s determination, ruling there was no evidence American Materials fired Anderson on pretext. Rather, she was fired for a failure to report an accident and roughhousing that resulted in damage to equipment and could have caused serious injury. Anderson appeals the judgment affirming the Commission’s decision;² the Commission cross-appeals the orders denying its motions to dismiss and for reconsideration.

Discussion

¶14 Failure to comply with statutory requirements goes not to a court’s jurisdiction but to its competence. *Village of Trempealeau v. Mikrut*, 2004 WI 79, ¶13, 273 Wis. 2d 76, 681 N.W.2d 190. Whether a circuit court has lost competence to proceed is a question of law we review de novo. *Id.*, ¶7.

¶15 WISCONSIN STAT. § 227.53(1)(a)2 states that a petition for review of an administrative agency action by the circuit court *shall* be served and filed

² On appeal, Anderson makes no argument that she was fired because of her post-traumatic stress disorder.

within thirty days of service of the agency's decision.³ The word "shall" is presumed to be mandatory, not directory, when it appears in a statute. *Swatek v. County of Dane*, 192 Wis. 2d 47, 58, 531 N.W.2d 45 (1995). In other words, § 227.53(1)(a)2 is a statute of limitations requiring strict compliance. See *Cudahy v. DOR*, 66 Wis. 2d 253, 261, 224 N.W.2d 570 (1974) (referring to predecessor statute WIS. STAT. § 227.16(1) (1973)).

¶16 Here, the clerk received the petition for review for filing on the thirtieth day. It was not, however, accompanied by the required filing fee, and the clerk's office returned the paperwork, unfiled. The circuit court held the petition had been filed in "legal contemplation" under *Hamilton v. DILHR*, 56 Wis. 2d 673, 684, 203 N.W.2d 7 (1973). Accordingly, the court determined the clerk erred as a matter of law in returning the paperwork instead of calling Anderson or her attorney to notify them of the missing fee.

¶17 *Hamilton* is distinguishable. There, a pro se litigant sent a petition for review and the filing fee to the clerk's office several days before the filing deadline expired. The clerk did nothing with the petition for sixteen days before sending it back to the litigant with notice that the filing fee had increased. By that time, the filing deadline had passed.

¶18 The court, clearly dissatisfied with the clerk's inaction, held the litigant had filed his paperwork in legal contemplation and reinstated the petition for review. *Hamilton* has since been essentially limited to its facts: the clerk's unreasonable delay and the litigant's inability to do anything about the petition

³ All references to the Wisconsin Statutes are to the 2003-04 version unless otherwise noted.

while the clerk held it. *See Cudahy*, 66 Wis. 2d at 253; *see also Giese v. LIRC*, 153 Wis. 2d 212, 215, 450 N.W.2d 489 (Ct. App. 1989).

¶19 Indeed, a clerk of court has the discretion to refuse papers for filing until the required fee is paid. WIS. STAT. § 59.40(2)(b). The clerk is not obligated to extend credit. Therefore, it is not automatically an erroneous exercise of discretion to refuse to file and then return papers that are unaccompanied by the filing fee. There may be circumstances when returning paperwork could be considered an erroneous exercise of discretion; for example, when the clerk unreasonably delays performing a task or performs his or her duty in an arbitrary or discriminatory fashion. *See Giese*, 153 Wis. 2d at 216. However, there is no suggestion in this case that the clerk delayed unreasonably or arbitrarily refused this particular filing. *See id.* Rather, it is undisputed that the Dunn County clerk's practice is to return unpaid filings the same day they are received and the clerk followed that practice here.

¶20 Moreover, it would be unreasonable to require the clerk's office to call petitioners who neglect to send filing fees, or even only those petitioners filing on the last possible day. This puts the burden on the clerk's office to research and verify statutes of limitation for each and every action presented for filing. Nothing in the statute conferring discretion on the clerk implies such an onerous burden in its exercise.

¶21 Anderson's petition for review, which was not filed until March, was untimely. It was not an erroneous exercise of discretion for the clerk's office to reject the unpaid filing. Accordingly, we reverse the judgment and orders, remand the cause, and direct the circuit court to dismiss the petition for review.

By the Court.—Judgment and orders reversed and cause remanded with directions.

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

