

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

June 17, 1999

Marilyn L. Graves  
Clerk, Court of Appeals  
of Wisconsin

**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 § 808.10 and RULE 809.62, STATS.

**No. 97-3782**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT IV**

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**STATE OF WISCONSIN EX REL. OSKAR B. MCMILLIAN,**

**PETITIONER-APPELLANT,**

**v.**

**TERRY L. LANDWEHR, GARY R. MCCAUGHTRY,  
PATRICIA GARRO, KENNETH PERRE,**

**RESPONDENTS-RESPONDENTS.**

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APPEAL from an order of the circuit court for Dane County:  
MORIA KRUEGER, Judge. *Affirmed.*

Before Vergeront, Roggensack and Deininger, JJ.

PER CURIAM. Oskar McMillian appeals from an order of the circuit court granting summary judgment to the defendants.<sup>1</sup> McMillian brought

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<sup>1</sup> Although additional plaintiffs were added in the circuit court, McMillian, acting pro se, is the only plaintiff who has appealed the circuit court's order.

suit against certain Department of Corrections employees alleging that new policies being implemented in the prison in which he was incarcerated discriminated against him and violated certain of his constitutional rights. The issue on appeal is whether the circuit court properly exercised its discretion when it dismissed McMillian's action. Because we conclude that the circuit court properly exercised its discretion, we affirm.

### **BACKGROUND**

This case has an exceedingly complicated procedural history. We will discuss only those parts relevant to the issue on appeal. McMillian is an inmate at Green Bay Correctional Institution. Prior to September 1995, he was incarcerated at Waupun Correctional Institution. In 1993 McMillian brought suit against Terry Lanwehr, who at all times relevant to this action was the administrator of the DOC's Division of Adult Institutions, and Gary McCaughtry, the warden of WCI.<sup>2</sup> He challenged the implementation of certain internal provisions which controlled the amount and type of property which an inmate could possess. McMillian alleged that these provisions discriminated against him,

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<sup>2</sup> In 1995 McMillian filed a supplemental complaint which named Landwehr as well as Patricia Garro and Kenneth Perre, who at all relevant times were correctional officers at WCI. McCaughtry was not served with the original summons and complaint and therefore the court dismissed the complaint as to him. He was not named in the supplemental complaint. Hence, he is not a party to this appeal.

among other things, on the basis of his marital status and gender. He also claimed the defendants violated certain of his constitutional and state statutory rights.<sup>3</sup>

Eventually, in November 1996, the defendants moved for summary judgment. The defendants submitted many affidavits in support of their motion, an extensive brief, and 281 proposed findings of fact.<sup>4</sup> During the next year, McMillian obtained lengthy extensions to file his response to the summary judgment motion. Some of these extensions were granted by the circuit court, while others occurred de facto as a result of McMillian's motions, motions to reconsider, and his interlocutory appeals.

Finally, in August 1997, the circuit court entered an order denying McMillian's outstanding motions, including certain discovery requests and his request for an extension of time to file a response to the summary judgment motion. The court denied the extension, among other reasons, because McMillian had already received lengthy extensions, the motion was filed nearly nine months previously, and, the court found, McMillian had been using his own motions to delay his response to the summary judgment motion. The court observed that McMillian had, in fact, obtained an extension because of all the motions he had filed. The court granted McMillian until August 25, 1997, to file his response to the defendant's summary judgment motion. The court warned McMillian that if

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<sup>3</sup> Specifically, McMillian contended that the provisions which prohibited unmarried inmates from wearing a ring while allowing married inmates to wear a ring discriminated against him on the basis of his marital status. He alleged that the provisions which allowed female inmates more articles of personal property than were allowed to male inmates discriminated against him on the basis of gender. He also challenged the regulation that limited the quantity of legal material he could keep in his cell. He further claimed the defendants and their subordinates had taken certain retaliatory actions against him, including destroying his personal property and filing false conduct reports against him.

<sup>4</sup> The brief is not part of the appellate record.

no response were received, “this court will proceed on the defendants’ motion despite the lack of a response by the plaintiffs.”

McMillian then filed two petitions for supervisory writs. This court denied one in August and the supreme court denied one in October. A month after the supreme court denied the supervisory writ, the circuit court granted the defendants’ motion for summary judgment, dismissing the case with prejudice and awarding costs against McMillian. McMillian had not filed a response to that motion.

In its decision and order, the circuit court found that McMillian had acted in bad faith and his conduct had been egregious and that he had engaged in misconduct and inexcusable neglect. The court noted that the case presented complex and important legal issues that had been treated seriously both by the court and the defendants, and the court had been impressed with the potential merit of some aspects of the case. The court further noted the great amount of time the defendants had spent preparing their summary judgment motion, a motion that addressed each of the issues raised by the plaintiffs; and that McMillian was not acting for himself alone, but had joined other inmates as plaintiffs.

In support of its finding that McMillian had engaged in egregious conduct and had acted in bad faith, the court observed that McMillian had been granted lengthy extensions in order to respond to the summary judgment motion and had repeatedly refused to comply with the deadlines set by the court. In addition, McMillian had filed “unmeritorious motions” to “force another, but totally unwarranted, extension” of time to respond. The court concluded: “Clearly, the ploys utilized to put off this deadline were not only disingenuous, but egregious and representative of bad faith.” In support of its finding of inexcusable

neglect, the court observed that McMillian had been warned by the court that if he failed to respond to the motion by the deadline, the court would decide the motion without his response. The court found that McMillian had not even attempted to offer an excuse for his failure to file a response this time. The court found that his failures “were not only repeated, they were aggravated and extended.” The court concluded there was no basis to find excusable neglect under these circumstances.

### ANALYSIS

A circuit court’s decision to dismiss an action is discretionary, and will not be disturbed on appeal unless the circuit court erroneously exercised that discretion. *Lee v. LIRC*, 202 Wis.2d 558, 562, 550 N.W.2d 449, 450 (Ct. App. 1996).<sup>5</sup> A discretionary decision will be sustained if the circuit court examined the relevant facts, applied a proper standard of law, and, using a demonstrated rational process, reached a conclusion that a reasonable judge could reach. *Johnson v. Allis Chalmers Corp.*, 162 Wis.2d 261, 273, 470 N.W.2d 859, 863 (1991). Under this standard, the circuit court properly exercised its discretion.

Circuit courts have both statutory and inherent authority to dismiss an action if the party seeking judicial relief fails to follow court orders or fails to prosecute his or her action. *Lee*, 202 Wis.2d at 562-63, 550 N.W.2d at 450-51. In this case, when McMillian was unsuccessful in obtaining the extensions he wanted directly from the circuit court, he challenged those orders by filing motions that lacked merit and by seeking interlocutory review, all unsuccessfully. McMillian

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<sup>5</sup> While the circuit court stated it was granting summary judgment, it also stated that it was dismissing the action based on the egregious conduct of the plaintiff. Since the reasons offered in the court’s decision primarily address the conduct of the plaintiff, and not the legal merits of the defendants’ submissions, we analyze the dismissal as one for egregious conduct.

managed to obtain many months of extensions by this method. The circuit court finally ordered him to file a response to the motion. The court told him that if he did not file a response, it would proceed on the defendants' motion. Rather than heeding that warning, McMillian chose to file supervisory writs in this court and the supreme court. Despite the fact that he was a prolific, and in the past successful, litigator, he chose not to file the one document necessary to prevent his action from being dismissed. He did not respond to the defendants' summary judgment motion.

McMillian appears to now argue that his failure to respond to the summary judgment motion was justified because the circuit court improperly denied his discovery requests.<sup>6</sup> This decision by the circuit court, however, does not justify McMillian's complete failure to respond to the summary judgment motion. McMillian could have responded to the motion with the information he had received. If he had lost the motion on its merits, he could have appealed the denial of his discovery requests.

Given McMillian's history of delay and egregious conduct in prosecuting this action, the length of time the case had been pending in the circuit court, and McMillian's failure to file a response by the date the court ordered, we conclude that the circuit court properly exercised its discretion when it dismissed his case with prejudice.

*By the Court.*—Order affirmed.

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<sup>6</sup> The record indicates that while McMillian received numerous documents from the defendants, they refused to provide certain documents requested on the grounds that they contained highly sensitive material not relevant to the action, or did not exist. The circuit court spent an extensive amount of time considering McMillian's discovery requests, ultimately concluding that he was not entitled to the material he sought.

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

