

**COURT OF APPEALS  
DECISION  
DATED AND FILED**

**March 17, 2009**

David R. Schanker  
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. 2008AP734**

**Cir. Ct. No. 2007CV14590**

**STATE OF WISCONSIN**

**IN COURT OF APPEALS  
DISTRICT I**

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**STEPHANIE LAMPONE,**

**PLAINTIFF-APPELLANT,**

**v.**

**LABOR & INDUSTRY REVIEW COMMISSION,**

**DEFENDANT-RESPONDENT.**

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APPEAL from an order of the circuit court for Milwaukee County:  
JOHN J. DIMOTTO, Judge. *Affirmed.*

Before Curley, P.J., Fine and Brennan, JJ.

¶1 CURLEY, P.J. Stephanie Lampone (Lampone) appeals an order dismissing her action that sought to overturn the Labor and Industry Review Commission's (LIRC) denial of her request for reconsideration of its decision denying her unemployment insurance benefits. She also sought a *de novo* hearing

on the underlying decision denying her unemployment insurance benefits. Lampone contends that the trial court erred when it dismissed her action based on the “Doctrine of Preclusion.” We conclude that Lampone’s failure to comply with the statutory appeal process precludes judicial review of LIRC’s decision. Therefore, this court affirms the trial court’s ruling, albeit on other grounds. *See State v. Holt*, 128 Wis. 2d 110, 124-25, 382 N.W.2d 679 (Ct. App. 1985) (We may affirm a trial court’s decision on other grounds even if we do not agree with its reasoning.).

### I. BACKGROUND.

¶2 On September 15, 2006, Lampone initiated a claim for unemployment benefits with the Department of Workforce Development (DWD), Unemployment Insurance Division.<sup>1</sup> DWD issued an initial determination on November 18, 2006, finding that Lampone had quit her employment with Easy Method—North Shore Driving School (Easy Method), within the meaning of WIS. STAT. § 108.04(7)(a) (2005-06), and, therefore, was ineligible to receive unemployment benefits.<sup>2</sup> Lampone appealed DWD’s determination, and after a hearing, the administrative law judge (ALJ) reversed the initial determination,

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<sup>1</sup> In its brief, LIRC explains: “Due to the dismissal of Lampone’s appeals on jurisdictional and preclusive grounds, records of the administrative proceedings that constitute the genesis of this case were never submitted to the court. Accordingly, [LIRC] will provide relevant portions of those records as appendices to this brief.” We may take judicial notice of these records. “[A] court must take judicial notice when ...: (1) the fact for which judicial notice is requested is capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned; and (2) a party asks the court to take judicial notice and gives the court the necessary information.” *Sisson v. Hansen Storage Co.*, 2008 WI App 111, ¶11, \_\_\_ Wis. 2d \_\_\_, 756 N.W.2d 667 (citation and internal quotations marks omitted); *see also* WIS. STAT. § 902.01 (2007-08).

<sup>2</sup> All references to the Wisconsin Statutes are to the 2007-08 version unless otherwise noted.

finding that Lampone had quit her employment with good cause attributable to the employer, within the meaning of § 108.04(7)(b), and as a result, was eligible for unemployment benefits if she otherwise qualified. Easy Method appealed the ALJ's decision to LIRC. LIRC reversed the ALJ's decision, concluding that Lampone had "quit her employment with the employer, but not with good cause attributable thereto or for any other reason constituting an exception to the quit disqualification of WIS. STAT. § 108.04(7)(a)," and was, consequently, ineligible for unemployment benefits." As a consequence, on March 22, 2007, LIRC ordered Lampone to repay the Unemployment Reserve Fund \$3,863.00 in unemployment benefits to which she was not entitled, but which she received in error.

¶3 LIRC's decision contained a written summary of Lampone's appeal rights, including the statutory procedures set forth in WIS. STAT. § 102.23(1). These appeal rights were explained in part, as follows:

Either party may commence a legal action for review of the commission decision in circuit court within 30 calendar days from the date the decision was mailed to the party's last known address. Wis. Stat. § 108.09(7)(a). Such action is commenced only by filing a summons and complaint with the circuit court and serving an authenticated copy of the summons and of the complaint upon the commission. Both the filing of the summons and complaint with the court and service of authenticated copies (date stamped and showing case number assigned by the court clerk) must be completed within 30 calendar days of the decision date.

- Service must be made upon a commissioner of the Labor and Industry Review Commission or an agent authorized by the commission to accept service.

....

- The action must be commenced against the commission and any other adverse party or parties must also be made a defendant or

defendants. An adverse party is a party in whose favor the decision was made.

For disputed benefit claims involving an employer and employee, the prevailing employer or employee must be joined as a defendant in addition to the commission.

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It is the responsibility of the appealing party to arrange for preparation of the necessary legal documents since neither the commission nor its representatives can assist in such preparation.

(Underlining in original.) The summary also included LIRC's addresses for purposes of accomplishing service.

¶4 On April 19, 2007, Lampone filed a petition for a writ of certiorari naming as defendant only "HAL BERGAN, Administrator, Wisconsin Department of Workforce Development Unemployment Insurance Division." (Case No. 07CV4436.) A writ was issued and, in response, DWD submitted a motion to quash the writ and dismiss the action. As part of its motion, DWD claimed that Lampone failed to follow the statutory appeal procedures set forth in WIS. STAT. § 102.23(1) by: (1) failing to file a summons and complaint with the court within the thirty-day appeal period set forth in the statute; (2) failing to serve a summons and complaint on LIRC within that appeal period; (3) failing to name LIRC as party to the action; and (4) failing to state a claim upon which relief could be granted. The trial court issued an order granting the motion to quash the writ, and dismissed the action.

¶5 On August 2, 2007, Lampone submitted a motion to LIRC asking it to reconsider its March 22, 2007 decision, pursuant to LIRC's discretionary authority granted in WIS. STAT. § 108.09(6)(c). In her motion, Lampone alleged that she had filed a timely motion for judicial review; however, the Department of

Administration (DOA) told Lampone, in error, that it, rather than LIRC, was the proper party to be served. Additionally, Lampone claimed that LIRC should reconsider its decision on grounds of newly-discovered evidence, or, in the alternative, on the grounds of mistake. LIRC denied Lampone's request to reconsider.

¶6 Lampone then filed a second petition for a writ of certiorari apparently appealing the denial of her motion to reconsider, this time before a different trial court judge, and naming LIRC as the sole defendant.<sup>3</sup> (Case No. 07CV10747.) On November 21, 2007, while the action before the court in Case No. 07CV10747 was still pending, Lampone filed another petition for a writ of certiorari in front of a third trial court judge. (Case No. 07CV14590.) In Case No. 07CV14590, Lampone asked the court to issue an order to show cause as to why LIRC's denial of her motion for reconsideration should not be reversed and to grant a *de novo* hearing on her unemployment insurance claim. Lampone's second action, Case No. 07CV10747, was dismissed due to Lampone's failure to prosecute. Five days after the dismissal in Case No. 07CV10747, the trial court presiding over Lampone's third petition for a writ of certiorari, Case No. 07CV14590, issued a decision and order dismissing the action with prejudice based on "the Doctrine of Preclusion." Lampone now appeals.

## II. ANALYSIS.

¶7 The issue presented by this appeal is whether Lampone complied with the statutory appeal process set forth in WIS. STAT. § 102.23(1) by filing three

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<sup>3</sup> Lampone's second petition for a writ of certiorari is not in the record.

separate petitions for writs of certiorari with the trial court. Resolution of this issue requires an application of a statute to undisputed facts. This is a matter of law that we review *de novo*. **Miller Brewing Co. v. LIRC**, 166 Wis. 2d 830, 836, 480 N.W.2d 532 (Ct. App. 1992), *aff'd*, 173 Wis. 2d 700, 495 N.W.2d 660 (1993). We hold that she did not.

¶8 “Judicial review of unemployment compensation determinations is conducted pursuant to [WIS. STAT. §] 102.23.” **Brandt v. LIRC**, 166 Wis. 2d 623, 630 n.7, 480 N.W.2d 494 (1992). Generally, “[w]here a statute provides for judicial review of an agency determination in the form of an action, that action is ordinarily the exclusive means of redress for all parties.” **Miller Brewing Co.**, 166 Wis. 2d at 837. The exclusivity of the statutory method of review “is a rule of policy, convenience and discretion.” **State ex rel. First Nat’l Bank of Wis. Rapids v. M & I Peoples Bank of Coloma**, 82 Wis. 2d 529, 542, 263 N.W.2d 196 (1978). Our supreme court in **First National Bank of Wisconsin Rapids** stated: “In a continuing line of cases this court has set forth the general principle that where a statute specifies a method of review, the method so prescribed is exclusive. We have not excluded from the operation of this rule proceedings initiated by the writs of mandamus and certiorari.” **Id.** at 537-38 (footnote omitted).

¶9 Furthermore, the right to commence an action for review customarily requires strict compliance with the procedures in WIS. STAT. § 102.23(1). **Miller Brewing Co.**, 166 Wis. 2d at 837. The supreme court in **Brandt** noted: “[T]he requirements for obtaining judicial review of a commission decision involving unemployment benefits are clearly set forth in [WIS. STAT. §] 108.09(7) and [§] 102.23(1).... We must therefore require strict compliance.” **Brandt**, 166 Wis. 2d at 634-35. Consequently, if the requirements are not met, the

proponent of the action cannot invoke a trial court's competence to exercise its subject-matter jurisdiction.<sup>4</sup> *Miller Brewing Co.*, 166 Wis. 2d at 837.

¶10 WISCONSIN STAT. § 102.23(1) provides, in part:

**102.23 Judicial Review. (1)** (a) The findings of fact made by the commission acting within its powers shall, in the absence of fraud, be conclusive. The order or award granting or denying compensation, either interlocutory or final, whether judgment has been rendered on it or not, is subject to review *only as provided in this section* and not under ch. 227 or s. 801.02. Within 30 days after the date of an order or award made by the commission either originally or after the filing of a petition for review with the department under s. 102.18 any party aggrieved thereby may by serving a complaint as provided in par. (b) and filing the summons and complaint with the clerk of the circuit court commence, in circuit court, an action against the commission for the review of the order or award, in which action the adverse party shall also be made a defendant....

(b) In such an action a complaint shall be served with an authenticated copy of the summons. The complaint need not be verified, but shall state the grounds upon which a review is sought. Service upon a commissioner or agent authorized by the commission to accept service constitutes complete service on all parties....

(Emphasis added.)

¶11 Lampone did not comply with the requirements of WIS. STAT. § 102.23(1) in any of her several attempts to appeal LIRC's March 22, 2007 decision. To obtain judicial review of LIRC's decision, Lampone was required to

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<sup>4</sup> "Subject-matter jurisdiction relates to the power of the court to address issues in an action. Subject-matter jurisdiction is conferred on a court by the constitution and statutes. Competency, a narrower concept, relates to the power of the court to exercise its subject-matter jurisdiction." *Miller Brewing Co. v. LIRC*, 166 Wis. 2d 830, 833 n.1, 480 N.W.2d 532 (Ct. App. 1992), *aff'd*, 173 Wis. 2d 700, 495 N.W.2d 660 (1993).

file and serve a summons and complaint, state a cause of action, and name both LIRC and Easy Method as adverse parties, all within thirty days of LIRC's decision. Lampone failed to fulfill any of these requirements. LIRC argues that "[t]hese failures precluded any judicial review of [LIRC]'s decision, and [the trial court] properly issued an order to quash the writ [it] had previously issued, and to dismiss Lampone's attempt to appeal [LIRC]'s decision." We agree.

¶12 Additionally, in her original action before the trial court, Lampone filed a petition for writ of certiorari, a method not prescribed in WIS. STAT. § 102.23(1) as a method of review. Section 102.23(1) provides the *exclusive* means of review. See *First Nat'l Bank of Wis. Rapids*, 82 Wis. 2d at 537-38. Furthermore, although Lampone filed three writs of certiorari, only her original action was filed within thirty days after the date of the order made by LIRC. Therefore, we need not consider the procedural infirmities of the second and third writs of certiorari, as neither was filed within the thirty-day time limit set forth in the statute.

¶13 Finally, we note that Lampone did not file a reply brief. By not doing so, she chose not to address LIRC's contention that her failure to follow the requisite statutory procedures deprives this court of competency to proceed. Accordingly, we take this as a concession. See *Charolais Breeding Ranches, Ltd. v. FPC Secs. Corp.*, 90 Wis. 2d 97, 109, 279 N.W.2d 493 (Ct. App. 1979) (noting that a matter not refuted is deemed admitted).

¶14 Therefore, we conclude that because Lampone failed to follow the statutory appeal process, she is precluded from seeking any judicial review of LIRC's decision. Accordingly, we affirm.

*By the Court.*—Order affirmed.

Not recommended for publication in the official reports.

