COURT OF APPEALS
DECISION
DATED AND FILED

January 25, 2006

Cornelia G. Clark
Clerk of Court of Appeals

Appeal No. 2005AP575 **Cir. Ct. No. 2004CV388**

STATE OF WISCONSIN **IN COURT OF APPEALS**
DISTRICT II

TIMOTHY REPETTI,

PLAINTIFF-APPELLANT,

V.

SYSCO CORPORATION AND SYSCO FOOD SERVICES OF EASTERN WISCONSIN, LLC.,

DEFENDANTS-RESPONDENTS.

APPEAL from an order of the circuit court for Washington County: PATRICK J. FARAGHER, Judge. *Reversed and cause remanded with directions*.

Before Brown, Nettesheim and Anderson, JJ.

¶1 PER CURIAM. Timothy Repetti has appealed from an order entered in the trial court on December 9, 2004, denying his motion to vacate and reconsider an order entered by the trial court on September 9, 2004, dismissing his

complaint against the respondents, Sysco Corporation and Sysco Food Services of Eastern Wisconsin, LLC. (Sysco). We reverse the December 9, 2004 order and remand the matter for further proceedings consistent with this decision.

¶2 Repetti filed a complaint against Sysco in May 2004, alleging wrongful discharge from his employment. He alleged that Sysco terminated him after he complained to the company comptroller and president that Sysco officers were violating Security and Exchange Commission (SEC) revenue reporting requirements and after he refused to take part in the activity. Repetti alleged that his discharge was contrary to well-defined public policy and a violation of specific and unambiguous law.

¶3 On July 23, 2004, Sysco moved to dismiss Repetti's complaint for lack of jurisdiction and failure to state a claim upon which relief could be granted. In its motion, it contended:

> Section 806 of the Sarbanes-Oxley Act of 2002, 18 U.S.C. § 1514A, prohibits the conduct alleged in the Complaint; establishes specific procedures for investigating and enforcing alleged violations; and, provides a comprehensive remedy for the harm alleged and damages sought, precluding, as a matter of law, a wrongful discharge based upon the same conduct. "Where the legislature has created a statutory remedy for a wrongful discharge, that remedy is exclusive." ***Brockmeyer v. Dun & Bradstreet***, 113 Wis. 2d 561, 576 n.17, 335 N.W.2d 834 (1983); ***Hausman v. St. Croix Care Center***, 214 Wis. 2d 655, 571 N.W.2d 393 (1997).

¶4 In its initial brief in support of its motion, Sysco reiterated that it was moving to dismiss the complaint "for lack of jurisdiction and/or failure to state a claim upon which relief can be granted, because the remedy sought by the Plaintiff is already provided in Section 806 of the Sarbanes-Oxley Act, 18 U.S.C. § 1514A." It contended that the Sarbanes-Oxley Act prohibited publicly traded

companies from terminating employees who provided information about alleged SEC violations to their supervisors. It contended that the Act also provided procedures for pursuing complaints and remedies. It argued that the existence of remedies under the Sarbanes-Oxley Act deprived the trial court of jurisdiction over Repetti's claim and "precludes the Plaintiff, as a matter of law, from seeking additional recourse for his alleged harm through a claim for wrongful discharge." It responded to Repetti's claim that his termination was contrary to public policy by contending that Repetti was "restricted" to the remedy created by the Sarbanes-Oxley Act. While acknowledging that ***Brockmeyer*** permits an employee to pursue a wrongful discharge action when the employee's termination is contrary to a well-defined public policy as evidenced by existing law, it contended that such an action was available only in the absence of legislation that provided the employee with a remedy for the harm. It repeatedly contended that because the Sarbanes-Oxley Act provides a remedy for whistleblowers who complain of SEC reporting violations, that remedy is "exclusive."

¶5 In his brief, Repetti responded to Sysco's contention that his remedy under the Sarbanes-Oxley Act was exclusive. He contended that the argument was at root a claim of federal preemption. He argued that the Act did not preempt a state wrongful discharge action, citing 18 U.S.C. § 1514A(d), which provides: "Nothing in this section shall be deemed to diminish the rights, privileges, or remedies of any employee under any Federal or State law." Based upon this provision, Repetti contended that Sysco's argument that the Sarbanes-Oxley Act was the exclusive remedy for his claim was wrong.

¶6 In a reply brief filed on August 27, 2004, Sysco denied that it was raising a preemption argument. It stated: "The issue … is not whether the provisions of the Sarbanes-Oxley Act preempt Wisconsin law, but rather, whether

Wisconsin law should be expanded to recognize a new exception to the at-will doctrine, when federal law already provides a complete remedy for the alleged harm." While acknowledging that the Sarbanes-Oxley Act expressly provided that it did not diminish rights and remedies under state law, Sysco contended that the remedy sought by Repetti does not currently exist under Wisconsin law and that the question is whether the Wisconsin courts should allow another exception to the employment-at-will doctrine for SEC whistleblowing when federal law already provides a remedy. It contended that under ***Brockmeyer***, a wrongful discharge action should be permitted only when no other remedy exists. It stated: "We contend, not that the remedial provisions of the Sarbanes-Oxley Act preempt State law, but rather, that the existence of those remedies eliminate the need to further expand the 'public policy' exception in Wisconsin."

¶7 The trial court issued a memorandum decision on September 1, 2004, granting Sysco's motion to dismiss for failure to state a claim.[1] It did so on the grounds that the Sarbanes-Oxley Act provided Repetti with an adequate remedy at law and that there was no need to further extend public policy exceptions to the employment-at-will doctrine. In doing so, it essentially adopted the argument set forth by Sysco in its reply brief.[2]

¶8 Based upon the trial court's decision, an order dismissing Repetti's complaint for failure to state a claim upon which relief could be granted was entered on September 9, 2004. On October 20, 2004, Repetti filed a motion to

[1] The trial court declined to consider Sysco's claim that it lacked jurisdiction.

[2] Repetti attempted to respond to Sysco's reply brief argument on September 2, 2004, but the trial court issued its memorandum decision on September 1, 2004.

vacate the order and reconsider the September 1, 2004 decision. He based his motion on both the common law and WIS. STAT. § 806.07(1)(c) and (h) (2003-04).[3] In support of the motion, he contended that Sysco had raised a new issue in its reply brief. He asked the trial court to vacate its order and decision, and provide him with an opportunity to respond to the argument in the reply brief.

¶9 The trial court denied Repetti's motion on December 9, 2004, on multiple grounds. It stated that Sysco's reply brief "shifted focus to an argument based on ***Brockmeyer***," and that its "virtual abandonment of its preemption theory simply recognize[d] the plaintiff's solid response on that issue." However, relying on WIS. STAT. § 805.17(3), it held that a motion for reconsideration must be filed within twenty days of entry of the order being challenged, and that Repetti's motion was therefore untimely. It held that Sysco's change of focus in the reply brief did not constitute fraud, misrepresentation, misconduct, or any other reasons justifying relief under WIS. STAT. § 806.07(1)(c) or (h). In addition, it discussed the merits of Repetti's underlying claim and stated that even if the motion for reconsideration was timely and provided a basis for relief under § 806.07, it was reluctant to extend the public policy exception to the employment-at-will doctrine.

¶10 On March 2, 2005, Repetti filed a notice of appeal from the December 9, 2004 order denying his motion to vacate and for reconsideration.[4] We review a trial court's decision on a motion for reconsideration under an erroneous exercise of discretion standard. ***Koepsell's Olde Popcorn Wagons, Inc.***

[3] All references to the Wisconsin Statutes are to the 2003-04 version.

[4] In orders dated May 12 and June 22, 2005, we clarified that we have jurisdiction over this appeal but that the issues on appeal are limited to the new issues raised by Repetti's motion for reconsideration and decided by the trial court on December 9, 2004.

v. Koepsell's Festival Popcorn Wagons Ltd., 2004 WI App 129, ¶6, 275 Wis. 2d 397, 685 N.W.2d 853. Because we conclude that the trial court erroneously exercised its discretion in denying the motion, we reverse the order. We remand the matter with directions to the trial court to permit Repetti to file a brief in response to Sysco's reply brief and to reconsider Sysco's motion to dismiss after completion of briefing.[5]

¶11 Initially, we conclude that the trial court erred when it held that Repetti's motion for reconsideration was untimely under WIS. STAT. § 805.17(3). Section 805.17(3) applies to bench trials and similar situations where a trial court engages in fact-finding at an evidentiary hearing. *See* ***Schessler v. Schessler***, 179 Wis. 2d 781, 784-85, 508 N.W.2d 65 (Ct. App. 1993). It is inapplicable to a motion for reconsideration of an order granting a motion to dismiss for failure to state a claim. *See* ***Continental Cas. Co. v. Milwaukee Metro. Sewerage Dist.***, 175 Wis. 2d 527, 533, 499 N.W.2d 282 (Ct. App. 1993).

¶12 We also reject Sysco's argument that motions for reconsideration may be filed only under WIS. STAT. § 806.07. Motions for reconsideration have become part of the common law. *See* ***Fritsche v. Ford Motor Credit Co.***, 171 Wis. 2d 280, 295, 491 N.W.2d 119 (Ct. App. 1992). Wisconsin courts encourage litigants to request reconsideration by the trial court as a method of correcting errors. *See* ***Harris v. Reivitz***, 142 Wis. 2d 82, 89, 417 N.W.2d 50 (Ct. App. 1987). An order denying a motion for reconsideration is appealable when it raises new

[5] We do not address whether dismissal of Repetti's complaint is or is not warranted. That issue cannot be decided by the trial court until Repetti is given an opportunity to file an additional brief in the trial court.

issues that were not disposed of by the original order. ***Id.*** at 88-89. The new issues test must be liberally applied. ***Id.*** at 88.

¶13 Repetti's motion for reconsideration raised a new issue; namely, whether he was denied an opportunity to respond to an issue raised for the first time in Sysco's reply brief. Raising an issue for the first time in a reply brief is impermissible because it is fundamentally unfair, depriving the other party of an opportunity to respond to the issue. ***A.O. Smith Corp. v. Allstate Ins. Co.***, 222 Wis. 2d 475, 492, 588 N.W.2d 285 (Ct. App. 1998). Despite Sysco's protestations to the contrary, we conclude that it raised a new issue in its reply brief. We also conclude that the trial court erroneously exercised its discretion when it failed to vacate its order granting the motion to dismiss in order to give Repetti an opportunity to brief the issue.

¶14 In concluding that Sysco's reply brief raised a new issue, we acknowledge that Sysco relied on ***Brockmeyer*** in both of its briefs. However, regardless of whether the case law citations were the same in both briefs, Sysco's theory changed, a fact recognized by the trial court in its December 9, 2004 decision. In its initial brief, Sysco contended that Repetti's complaint failed to state a claim and the trial court lacked jurisdiction to address it because the remedy created by the Sarbanes-Oxley Act precluded a wrongful discharge claim by Repetti. Although it did not use the word "preemption," its contention that the remedy provided by the Sarbanes-Oxley Act was exclusive was tantamount to a preemption claim. This is the argument to which Repetti reasonably responded. However, in its reply brief, Sysco changed the nature of its argument, contending that the Wisconsin court should not expand the public policy exceptions to the

employment-at-will doctrine to encompass allegations of SEC violations because the Sarbanes-Oxley Act already provided a remedy.[6]

¶15 Because Sysco raised a new issue in its reply brief, and because the trial court relied on Sysco's new argument in its September 1, 2004 decision, Repetti was entitled to file a motion to vacate and reconsider the order dismissing his complaint. The trial court's order denying reconsideration is reversed, and the matter is remanded with directions to the trial court to permit Repetti to file a brief in response to Sysco's reply brief and to reconsider Sysco's motion to dismiss after completion of briefing.

By the Court.—Order reversed and cause remanded with directions.

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

[6] Admittedly, Sysco included one sentence in its initial ten-page brief stating: "The fact that [Repetti] chose not to avail himself of those remedies [under the Sarbanes-Oxley Act] is no basis for now expanding the narrow public policy exception." However, the argument reiterated repeatedly in its motion and brief was that the remedy under the Sarbanes-Oxley Act was exclusive, not that the Wisconsin court should decline to expand the public policy exception to the employment-at-will doctrine because another remedy was available. The initial argument was that the Wisconsin court was precluded from addressing Repetti's wrongful discharge action in light of the Sarbanes-Oxley Act, not that it should consider whether to expand the public policy exception and reject the expansion.