COURT OF APPEALS
DECISION
DATED AND RELEASED

April 9, 1997

NOTICE

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.

This opinion is subject to further editing. If published, the official version will appear in the bound volume of the Official Reports.

No. 95-3304

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

JAMES LOHMILLER, JEFFREY BRISK, CHARLES LEHNINGER AND DANIEL HEWETT,

PLAINTIFFS-APPELLANTS,

v.

THIS WEEK PUBLICATIONS,

DEFENDANT-RESPONDENT.

APPEAL from a judgment of the circuit court for Waukesha County: ROBERT G. MAWDSLEY, Judge. *Affirmed.*

Before Snyder, P.J., Nettesheim and Anderson, JJ.

PER CURIAM. James Lohmiller, Jeffrey Brisk, Charles Lehninger and Daniel Hewett (collectively "the workers") appeal from a summary judgment in favor of This Week Publications. The workers allege that they were terminated by This Week Publications after suggesting that This Week was evading employment taxes on them once This Week's work rules and policies rendered them

employees, not independent contractors. The workers claim that their terminations fell within a public policy exception to the right of an employer to terminate at-will employees as set forth in ***Brockmeyer v. Dun & Bradstreet,*** 113 Wis.2d 561, 573, 335 N.W.2d 834, 840 (1983). Because we conclude that the terminations do not fall within the ***Brockmeyer*** public policy exception, we affirm the circuit court.

On appeal, we apply the same methodology used by the trial court and decide de novo whether summary judgment is appropriate. *See* ***Coopman v. State Farm Fire & Cas. Co.***, 179 Wis.2d 548, 555, 508 N.W.2d 610, 612 (Ct. App. 1993). We review the parties' submissions on summary judgment to determine whether there are any material facts in dispute which would entitle the opposing party to a trial. *See* ***Benjamin v. Dohm***, 189 Wis.2d 352, 358, 525 N.W.2d 371, 373 (Ct. App. 1994).

Lohmiller and Lehninger delivered "shoppers" [1] for This Week. Hewett was originally hired to deliver shoppers and later became a preprint manager. In January 1992, Hewett was classified as an employee carrier. Brisk was a circulation manager and was also classified as an employee.

The workers allege in their complaint that at various times from 1990 to February 1993, This Week implemented policies and practices to control and direct its carriers, thereby creating an employer-employee relationship in contravention of the workers' status as independent contractors. Lohmiller and Lehninger objected to the control and direction exerted by This Week over their work with regard to mode and time of delivery of This Week's "shoppers," the alteration of their status from independent contractors to employees, and This Week's

[1] "Shoppers" are publications containing local merchants' advertising.

failure to withhold and pay employment taxes on their behalf. Hewett refused to enforce This Week's delivery policies because they contravened the workers' independent contractor status. Brisk also objected and refused to enforce This Week's delivery policies. Shortly after counsel for the workers advised This Week by letter that they objected to the delivery policies which contravened their independent contractor status, the workers were terminated and they brought this wrongful discharge action.

This Week's summary judgment motion assumed that the workers were subject to the employment-at-will doctrine but that they had not demonstrated a public policy which barred their termination. This Week further argued that each worker conceded that he had not been asked by This Week to do anything illegal and that while the workers' status as independent contractors or employees had implications for This Week's tax obligations, there was no public policy interest in classifying them one way or the other. Even if the employees were discharged for complaining about company policies, This Week argued that the terminations did not implicate a public policy exception precluding discharge. *See* ***Bushko v. Miller Brewing Co.,*** 134 Wis.2d 136, 146, 396 N.W.2d 167, 172 (1986). This Week also submitted deposition excerpts in which each worker admitted violating This Week policies governing his position.

In opposition to This Week's summary judgment motion, the workers argued that the public policy barring their termination is found in Wisconsin's preference for treating workers as employees rather than independent contractors. They also argued that there were factual issues surrounding This Week's motivation for terminating them. The trial court granted summary judgment to This Week because the workers had not identified a fundamental and well-defined public policy

exception to the employment-at-will doctrine and their terminations did not violate any public policy exception to the doctrine. The workers appeal.

Employees-at-will may be terminated by the employer for any reason, and the employer will not be subject to a wrongful discharge action unless "the discharge is contrary to a fundamental and well-defined public policy as evidenced by existing law" or a "public policy embodied in the spirit as well as the letter of statutory and constitutional provisions" or administrative rules. ***Winkelman v. Beloit Mem'l Hosp.,*** 168 Wis.2d 12, 20-22, 483 N.W.2d 211, 214-15 (1992). An employee cannot be fired for refusing to violate "a formally stated, fundamental and well-defined public policy which has the effect of law." ***Id.*** at 22, 483 N.W.2d at 215. The burden is on the worker to identify a fundamental and well-defined public policy and that the discharge violated that policy. *See* ***id.*** at 24, 483 N.W.2d at 216. Whether the workers identified a fundamental and well-defined public policy presents a question of law which we review independently. *See* ***id.***

The workers argue that by treating them as employees and not paying federal unemployment tax on them, This Week acted contrary to the public policy embodied in federal unemployment tax policy to provide a fund for needy workers by taxing wages. *See* ***Hearst Publications, Inc. v. United States,*** 70 F. Supp. 666, 670 (N.D. Cal. 1946), *aff'd,* 168 F.2d 751 (9th Cir. 1948). The workers contend that they sought to enforce This Week's compliance with this policy and were terminated as a result.

We agree with the trial court that the workers did not identify a fundamental and well-defined public policy which precluded their termination. The public policy exception is narrow. *See* ***Bushko,*** 134 Wis.2d at 144-45, 396 N.W.2d at 171. Here, two carriers and two managers wanted the carriers freed of certain

delivery restrictions. None of the workers was charged with enforcing employment tax laws or required to participate in an alleged attempt by This Week to evade its employment tax obligations. *See* ***id.*** at 142, 396 N.W.2d at 170. The workers' claim that they were discharged for insisting that This Week pay employment taxes and for protesting various policies which undermined the carriers' independent contractor status is a far cry from claiming that the workers were terminated for refusing to act in a manner which violated constitutional, statutory or administrative provisions. *See* ***id.*** at 147, 396 N.W.2d at 172.

Although we reject the workers' arguments on appeal, we decline to deem the appeal frivolous under RULE 809.25(3), STATS.

By the Court.—Judgment affirmed.

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