

NO. A06-0959

State of Minnesota
In Court of Appeals

Sinuon Leiendecker,

Appellant,

vs.

Asian Women United of Minnesota, et al.,

Respondents.

APPELLANT'S REPLY BRIEF

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ARGUMENT

I. TORT COUNTERCLAIMS ARE NOT COMPULSORY

The language of *House* and the Committee Reports are clear, “*tort counterclaims*” are not compulsory. In adopting Rule 13.01, the Committee and the Minnesota Supreme Court’s intent to exclude “tort counterclaims” is self-evident. Rule 13.01 was adopted with the express understanding that “tort counterclaims” would not be compulsory. *House v. Hanson*, 72 N.W.2d 874, 878 (Minn. 1955). Respondent, however, argues that while the Advisory Committee used the phrase “tort counterclaims,” what it really meant was “counterclaims in a tort action,” and thus *House* only applies when the original claim was a tort claim. While such an interpretation is clearly advantageous to Respondents, it is untenable.¹

¹ Further proof that the Advisory Committee intended to exclude tort counterclaims and not simply all claims in a tort action is illustrated in an example the Committee cites during its deliberations:

'The Committee fears that compulsory counterclaims in personal injury and other tort actions may work a hardship in cases where, for instance, the defendant's injury is presently unknown or where he is not represented by an attorney who appears primarily for him, and suggests that the compulsion be limited to counterclaims arising out of the 'contract or transaction' which is the subject of the opposing party's claim.

The plain meaning of “tort counterclaim” necessitates the conclusion that the focus is on whether the possible counterclaim is a tort claim, not on whether the underlying action is a tort claim, as is evident by subsequent decisions of this Court. As set forth in Appellant’s principal brief, this Court has repeatedly recognized that the focus is on whether the claim being asserted in the subsequent action is a tort, not on whether the original action was a tort action. *Powell v. Chubb & Son, Inc.* 1993 WL 107779 (Minn.App.) (plaintiff did not need to bring her conversion claim in the prior contract action because conversion is an intentional tort); *Rhines v. Miles Home Division of Insilico Corp.*, 1987 WL 28910 (Minn.App.) (plaintiff was not barred from bringing personal injury claim simply because she did not raise the claim in the prior mechanic lien foreclosure action).

Respondent cannot rewrite history to accommodate its present position. The Advisory Committee reports and the prior decisions of this Court are clear – a tort counterclaim is not compulsory under Rule 13.01. Accordingly, Appellant was not required to bring her defamation and tortious interference with contract claim in the original action.

House, 72 N.W.2d. at 878, fn.8.

II. PLAINTIFF'S CLAIMS WERE NOT MATURE WHEN SHE ANSWERED THE UNDERLYING ACTION

Respondent argues that Appellant's whistleblower, breach of contract and violation of Minnesota Statute Section 317A claims were ripe because at the time she answered the Third-Party Complaint she had sustained *some* damage.

Respondent erroneously tries to limit the ripeness analysis to whether Appellant had sustained at least some damage at the time she answered the Third-Party Complaint.

(Respondent's Brief at 18). However, the ripeness of a claim is not solely dependent on whether some damage has been sustained. To the contrary, before one can even get to the issue of damages, there must be a colorable claim. In other words, there must be evidence that supports each and every element of the claim. Appellant, in her principal brief, has vigorously argued that at the time she answered the Third-Party Complaint, there was not evidence to support each and every element of her whistleblower, breach of contract and 317A claims.

Respondent, after improperly limiting the scope of the ripeness issue to whether or not Appellant had sustained *some* damage, goes on to argue that the pre-termination action of Respondent resulted in at least *some* damage to the Appellant. (Respondent's Brief at 19-20). However, whether or not the pre-termination

actions of AWUM caused damage to Appellant is irrelevant if the damage is not the result of some unlawful action by AWUM. Thus, the relevant inquiry is whether Respondent's pre-termination actions were unlawful, such that they give rise to a viable claim.

The pre-termination actions cited by Respondent include the fact that AWUM placed Leiendecker on probation and voted to terminate her prior to the time that she answered the Third-Party complaint. These pre-termination actions, however, are insufficient standing alone, to establish a viable whistleblower, breach of contract or 317A claim.

With respect to Appellant's whistleblower claim, the pre-termination actions cited by the Respondent do not amount to adverse action as defined by this Court. This Court, in a whistleblower action, has adopted the standard of adverse employment action used by the Eighth Circuit to evaluate retaliation claims under Title VII. *Grothe v. Ramsey Action Programs, Inc.*, 2006 WL 1629447 (Minn.App.) (citing *Lee v. Regents of the University of Minnesota*, 672 N.W.2d 366, 374 (Minn.App. 2003)). Specifically, the Court uses the "ultimate employment decision" standard, which limits actionable retaliatory conduct to acts "such as hiring, granting leave, discharging, promoting and compensating." *Manning v. Metropolitan Life Ins. Co.*, 127 F.3d 686, 692 (8th Cir. 1997). This is a much more

restrictive standard than the standard employed in other circuits which simply require that the challenged action must “result in an adverse effect on the terms, conditions, or benefits of employment.” *Von Gunten v. Maryland*, 243 F.3d 858, 866 (4th Cir. 2001).

Under this rigorous standard, it is doubtful that being placed on probation and a vote to terminate employment, which was never carried out or purposefully communicated to Appellant, would amount to adverse action. Accordingly, Appellant’s whistleblower claim was not viable until Respondent made an “ultimate employment decision” to actually terminate Appellant, which occurred on February 26, 2004, *three days after she answered the Third-Party Complaint*. As such, her whistleblower claim was not ripe and therefore is not barred under the compulsory counterclaim rule.

Furthermore, the pre-termination actions cited by Respondent do not give rise to a breach of contract or 317A claim. Respondent argues that a breach of contract claim can address breaches occurring any time during the employment relationship, not just at termination. Respondent similarly argues that 317A applies to all phases of conduct, not just discharge. We all pick and choose our “battles.” Nothing required Appellant to pursue a contract claim or 317A claim during her employment. Indeed, many employees choose not to pursue claims against their

employer while they are employed for fear of retaliation. At any rate, Respondent's argument is a red herring. Appellant's claim is not predicated on a breach or violation that occurred during her employment. As discussed in her principal brief, Plaintiff's breach of contract and violation of 317A claims are predicated on her termination. Specifically, that Respondent terminated Appellant on February 26, 2004 at a meeting held without proper notice in violation of AWUM's bylaws and Minnesota Statute Section 317A.27. Accordingly, the breach and statutory violation that constitute Appellant's claims, which are indispensable prerequisites to a viable contract and statutory claim, did not occur until February 26, 2004, three days after she answered the Third-Party Complaint. Thus, they were not ripe at the time she answered the Third-Party complaint. These claims are not barred under the compulsory counterclaim rule.²

²Respondent contends that Appellant could have sued "based upon the contingent status of her discharge on February 23, 2004." This argument is confounding. There is no dispute here that Respondent *actually terminated Appellant on February 26, 2004*. Prior to that, she had no viable claim based upon a contingent termination because, as a practical matter, there was no termination. As Appellant discusses in her principle brief, the board had not even bothered to tell her about its apparent November termination decision. Moreover, the board did not act like it had terminated Appellant. She continued to receive her compensation and benefits, and the board continued to direct her to perform her duties as Executive Director. Even if the Court accepts that Appellant could have sued Respondent prior to her termination, nothing required her to do so. She is not seeking damages for her contract and statutory claim based on conduct that occurred prior to her termination

III. THE PRESENT CLAIMS DO NOT ARISE OUT OF THE SAME TRANSACTION AS THE ORIGINAL ACTION.

The parties agree that the logical relationship test is the relevant inquiry in evaluating whether or not a claim arises out of the same transaction. The logical relationship test requires that the same aggregate of operative facts *serve as the basis for both claims*. *Fox Chemical Co. v. Amsoil, Inc.*, 445 F.Supp. 1355, 1361 (D.Minn. 1978). A mere tangential relationship between the two claims is insufficient.

Contrary to Respondent's argument, the underlying action was not about Appellant and her employment with AWUM. The underlying action was about whether or not Respondent should retain control over AWUM in light of its practices that contravened Minnesota law and its Bylaws. The present action concerns whether Respondent illegally terminated Appellant's employment. That Appellant's complaints about the old board's improprieties motivated it to terminate her is the only relationship between the original action and her present case. But the Court must bear in mind that Appellant's claim in the present action is based upon her termination, which did not occur until after she had answered the Third-Party Complaint. In other words, but for her termination, Appellant would not have on February 26, 2004. Her damages flow from Respondents' illegal termination,

viable contract and statutory claims against Respondents for the reasons discussed above. Respondent ignores this distinction and hopes the Court will, as well. Appellant's present claims do not arise out of the same transaction as the original action. And therefore do not fall within the ambit of the compulsory counterclaim rule.

IV. WHETHER OR NOT APPELLANT'S CLAIMS ARE BARRED UNDER THE DOCTRINE OF RES JUDICATA IS NOT PROPERLY BEFORE THIS COURT

The trial court dismissed Appellant's claims solely on the basis that they were barred under the compulsory counterclaim rule. The trial court did not reach the issue of whether the claims were barred under the doctrine of res judicata. Respondent did not appeal that decision. Thus, the res judicata issue is not properly before this Court. *See Thiele v. Stich*, 425 N.W.2d 580, 582 (Minn. 1988)(appellate courts generally will not review issues not considered by the trial court).

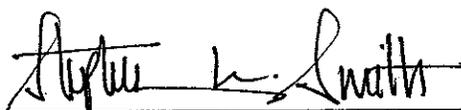
which occurred on that date.

CONCLUSION

For the foregoing reasons, and for those expressed in her principal brief, Appellant respectfully requests that this Court reverse the lower court's decision dismissing her claims.

Dated: September 21, 2006

The Law Firm of Stephen L. Smith, PLLC

A handwritten signature in black ink, appearing to read "Stephen L. Smith", written over a horizontal line.

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The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2) (with amendments effective July 1, 2007).