STATE OF MICHIGAN

COURT OF APPEALS

WEYLIN GILDON,

Plaintiff-Appellant,

v

DETROIT FIRE FIGHTERS ASSOCIATION and CITY OF DETROIT,

Defendants-Appellees.

UNPUBLISHED
May 3, 1996

No. 173870
LC No. 93-301527-CZ

Before: Taylor, P.J., and Jansen and Smolenski, JJ.

PER CURIAM.

Plaintiff appeals as of right from a March 8, 1994, order of the Wayne Circuit Court granting summary disposition in defendants' favor. The trial court granted summary disposition in favor of defendant City of Detroit pursuant to MCR 2.115(C)(5) (party asserting the claim lacks the legal capacity to sue) and MCR 2.116(C)(10) (no genuine issue as to any material fact and moving party entitled to judgment as a matter of law). The trial court also granted summary disposition in favor of defendant Detroit Fire Fighters Association (DFFA) pursuant to MCR 2.116(C)(10). We affirm.

Plaintiff has been a DFFA member and Detroit Fire Department employee since July 1973. In August of 1991, plaintiff was working as a Fire Prevention Inspector with the Detroit Fire Department. Plaintiff was working as the Fire Marshal's personal assistant and was unofficially titled a "Code Coordinator." On August 13, 1991, the Fire Marshal distributed a memorandum announcing an anticipated vacancy in the position of Plan Examiner. Plaintiff and other Fire Prevention Inspectors applied for the position. The Fire Marshal recommended plaintiff for the vacancy, and the Fire Commissioner followed the recommendation. Plaintiff was appointed to the position of Plan Examiner.

Following plaintiff's appointment, Toney Hughes, another Fire Prevention Inspector who had applied for the position of Plan Examiner, filed a grievance challenging plaintiff's promotion on the ground that plaintiff did not meet the education requirement. The minimum qualifications for Plan

Examiner included the following: "Education equivalent to the completion of three years in and preferably graduation from a university of recognized standing with specialization in industrial or architectural engineering and preferably some advanced training in fire protection methods."

The DFFA pursued Hughes' grievance to arbitration. The arbitrator found that the collective bargaining agreement between the union and the city provided that promotions shall be based solely on seniority, provided that the senior employee satisfy the qualifications for the position for which he or she was to be promoted. The arbitrator ultimately determined that plaintiff did not possess the educational requirement for Plan Examiner because he did not have a college degree, nor did he have the education equivalent to the completion of three years from a university. Hughes, who graduated from Madonna College in 1976 with a Bachelor of Science degree in Fire Protection and Occupational Safety, had the educational requirements for the position of Plan Examiner. The arbitrator granted Hughes' grievance and promoted him to the position of Plan Examiner. Plaintiff was reassigned to the Technical Support Section.

Following the arbitrator's decision regarding Hughes' grievance, plaintiff filed a grievance alleging that Hughes was ineligible for the position of Plan Examiner because Hughes circumvented the contractual guidelines relative to the promotion. Two days after filing his grievance, plaintiff also filed this action in the Wayne Circuit Court. Ultimately, the DFFA and the city agreed to withdraw plaintiff's grievance without prejudice.

Plaintiff's suit in the Wayne Circuit Court alleged that the union and the city discriminated against him on the basis of race because plaintiff is African-American. Plaintiff further alleged that the union breached its duty of fair representation. Both defendants filed motions for summary disposition. The trial court granted the motions, finding that plaintiff presented no material factual dispute regarding his claims of racial discrimination and unfair representation. The trial court also found that both defendants complied with the provisions of the collective bargaining agreement, thus, there was no breach of the collective bargaining agreement.

We address first plaintiff's racial discrimination claim against both defendants. Plaintiff correctly notes that the arbitration proceedings pursued by plaintiff do not preclude his racial discrimination claim in circuit court. See *Alexander v Gardner-Denver Co*, 415 US 36; 94 S Ct 1011; 39 L Ed 2d 147 (1974); *McDonald v West Branch*, 466 US 284; 104 S Ct 1799; 80 L Ed 2d 302 (1984). However, we agree with the trial court that defendants are entitled to summary disposition on the racial discrimination claim because plaintiff failed to set forth any evidence of racial discrimination.

Plaintiff is an African-American. Toney Hughes, who was awarded the position of Plan Examiner by the arbitrator, is also an African-American. There was no dispute at Hughes' arbitration that Hughes had the necessary educational requirements for the position of Plan Examiner. The arbitrator specifically found that plaintiff did not meet the educational requirements for Plan Examiner. There is simply no evidence in the lower court record that the union processed Hughes' grievance because of racial discrimination. The entire basis of Hughes' grievance was that plaintiff was not

qualified for the position of Plan Examiner because plaintiff did not meet the educational requirements as set forth in the collective bargaining agreement.

Further, after plaintiff was reassigned from his position of Plan Examiner and Hughes was awarded that position by the arbitrator, the union did file a grievance on plaintiff's behalf and did investigate the merits of the claim. Ultimately, the union agreed to withdraw the grievance. However, plaintiff has failed to set forth any facts tending to show that the grievance was withdrawn on the basis of racial discrimination. Plaintiff's emphasis on the assertion that he was the only employee among several within the position of Plan Examiner to need a college degree as a condition of employment is (1) not supported by the record, and (2) not factually correct. First, the collective bargaining agreement clearly set forth an educational requirement so as to be qualified to be a Plan Examiner. Further, Toney Hughes is African-American and has a college degree. Plaintiff's contention that white employees who were Plan Examiners did not have college degrees is not really supportable by Donald Robinson's testimony inasmuch as plaintiff has failed to set forth when the white employees were Plan Examiners and if there was a collective bargaining agreement that required an educational background.

Accordingly, the trial court did not err in granting defendants' motions for summary disposition on plaintiff's racial discrimination claim. Plaintiff has not set forth any facts tending to show that the city or the union discriminated against him on the basis of race. Hughes, an African-American, received the position of Plan Examiner, and plaintiff was reassigned from the position because the arbitrator found that plaintiff did not meet the educational requirements as set forth in the collective bargaining agreement. There is no evidence that plaintiff was reassigned because of his race.

Next, with respect to plaintiff's breach of duty of fair representation claim against the union, we also agree with the trial court that plaintiff failed to set forth any evidence that the union breach its duty of fair representation in handling plaintiff's grievance.

We first consider whether plaintiff has standing to bring his fair representation claim. Our Supreme Court has held that the courts, both state and federal, have concurrent jurisdiction (with the Michigan Employment Relations Commission) of fair representation actions. *Demings v City of Ecorse*, 423 Mich 49, 58; 377 NW2d 275 (1985). If the union violated the duty of fair representation, then a circuit court may vacate the underlying arbitration award. *Id.*, p 69. A breach of the statutory duty of fair representation occurs only when a union's conduct toward a member of the collective bargaining unit is arbitrary, discriminatory, or in bad faith. *Goolsby v Detroit,* 419 Mich 651, 661; 358 NW2d 856 (1984).

Plaintiff, in a conclusory fashion, states that the union breached it duty of fair representation. Plaintiff must do more than simply declare that the union breached its duty of fair representation; he must establish that there are some evidentiary proofs to support his allegation as to any material fact. *McCart v J Walter Thompson USA, Inc,* 437 Mich 109, 115; 469 NW2d 284 (1991). In other words, plaintiff has failed to specify any facts in opposition to defendants' motions contained in record

evidence such as affidavits, depositions, admissions, or any other documentary evidence. *Id.*; MCR 2.116(G)(4). Plaintiff cannot make conclusory allegations in his brief that the union breached its duty of fair representation without pointing to specific record evidence to support his claim in order to survive a motion for summary disposition under MCR 2.116(C)(10).

We note that plaintiff mainly attempts to attack the arbitrator's decision, in that he claims that he was qualified for the position of Plan Examiner and that Hughes should not have been promoted to that position. However, our Supreme Court has stated that judicial review of an arbitrator's decision is limited. A court may not review an arbitrator's factual findings or decision on the merits. *Port Huron Area School Dist v Port Huron Ed Assoc*, 426 Mich 143, 150; 393 NW2d 811 (1986). Thus, plaintiff must show that the union breached the duty of fair representation in its handling of the grievance procedure.

There is no evidence in the record that the union acted in an arbitrary, discriminatory, or bad faith manner in processing and investigating plaintiff's grievance against Hughes. Accordingly, the trial court did not err in granting summary disposition in the union's favor on the breach of duty of fair representation claim pursuant to MCR 2.116(C)(10).

The trial court awarded each defendant costs and attorney fees pursuant to MCR 2.114(D) and (E). These costs are affirmed because the trial court's findings are not clearly erroneous under this court rule. *In re Pitre*, 202 Mich App 241, 244; 508 NW2d 140 (1993); *Siecinski v First State Bank of East Detroit*, 209 Mich App 459, 466; 531 NW2d 768 (1995) (a trial court's finding with respect to whether a claim is frivolous will not be disturbed on appeal unless it is clearly erroneous).

Affirmed. Defendants may tax costs.

/s/ Clifford W. Taylor
/s/ Kathleen Jansen
/s/ Michael R. Smolenski