

STATE OF MICHIGAN
COURT OF APPEALS

DAVID RICHIE,

UNPUBLISHED
April 1, 1997

Plaintiff-Appellant,

v

No. 186657
Wayne Circuit Court
LC No. 94409134 CZ

DETROIT FIRE FIGHTERS ASSOCIATION,
LOCAL No. 344 I.A.F.F.,

Defendant-Appellee.

Before: Hoekstra, P.J., and Marilyn Kelly and J.B. Sullivan,* JJ.

PER CURIAM.

Plaintiff appeals as of right from an order granting summary disposition to defendant on the ground that plaintiff's action was barred by the statute of limitations. MCR 2.116(C)(7). Plaintiff filed this complaint against the defendant labor organization claiming that it breached its duty of fair representation by delaying pursuit of plaintiff's grievance against his employer, the City of Detroit Fire Department (DFD). On appeal, plaintiff asserts that the trial court incorrectly determined that his claim accrued in April, 1993. We affirm.

I

Plaintiff is a firefighter employed by DFD and represented by defendant Detroit Fire Fighters Association, Local No. 344. In 1990, he was assigned to Engine Company No. 20 at Detroit City Airport. He was later transferred to Engine Company No. 57 on the city's west side. Unhappy with the transfer, he filed a grievance against DFD. Defendant declined to pursue the grievance after determining that DFD complied with the collective bargaining agreement by offering a satisfactory explanation for the transfer. Plaintiff then filed an unfair labor practice charge with the Michigan Employment Relations Commission (MERC) and later brought a federal lawsuit against DFD. Ultimately, both actions were settled when DFD agreed to reassign plaintiff to Engine Company No. 20.

* Former Court of Appeals judge, sitting on the Court of Appeals by assignment.

While the proceedings were in progress, plaintiff filed a second grievance on February 12, 1993. In it, he alleged that DFD violated the collective bargaining agreement by failing to post notice of a vacancy at Engine Company No. 20. Defendant decided to hold the grievance in abeyance until the federal lawsuit and MERC proceedings were completed. It designated the grievance as a class action and agreed with DFD to waive the time constraints for advancing a grievance to arbitration.

On March 17, 1994, defendant and DFD reached a settlement agreement concerning the grievance. DFD agreed to post notices of Engine No. 20 vacancies. Eight days later, plaintiff filed the instant lawsuit against defendant, claiming that defendant's refusal to process his February 12, 1993, grievance until the resolution of the MERC action constituted a breach of its duty of fair representation. Defendant moved for summary disposition on various grounds, including statute of limitations and lack of a genuine issue of material fact. The trial court granted its motion on the ground that the complaint was time-barred.

II

We treat defendant's motion as though it was brought under MCR 2.116(C)(7), which provides for summary disposition when a complaint is barred by the statute of limitations. A motion under MCR 2.116(C)(7) may be supported by affidavits, admissions, or other documentary evidence which, if submitted, must be considered by the court. *Id.* In reviewing this motion, we take the well-pleaded allegations in the pleadings and the factual support submitted by the nonmoving party as true. Summary disposition is properly granted only if the moving party is then shown to be entitled to judgment as a matter of law. *Home Insurance Co v Detroit Fire Extinguisher Co, Inc*, 212 Mich App 522, 527-528; 538 NW2d 424 (1995).

Under the Public Employees Relations Act (PERA),¹ a plaintiff seeking damages for an unfair labor practice must file the complaint within six months following the unfair labor practice. MCL 423.216(a); MSA 17.455(16)(a). This Court has held that a union's breach of duty of fair representation constitutes an unfair labor practice within the meaning of the PERA and is therefore subject to the six month statute of limitations. *Silbert v Lakeview Education Ass'n, Inc*, 187 Mich App 21, 25; 466 NW2d 333 (1991). The six-month limitations period begins to run from the time a final decision regarding the employee's grievance has been made or from the time the employee discovered, or in the exercise of reasonable care should have discovered, that no further action would be taken with respect to the grievance. *McCluskey v Womack*, 188 Mich App 465, 469; 470 NW2d 443 (1991).

In *Metz v Tootsie Roll Industries, Inc*,² the plaintiff filed a grievance with her union after her employer terminated her employment. *Metz*, 715 F2d 299, 300 (CA 7, 1983). When the union failed to act, the plaintiff filed an action against the union for breach of its duty of fair representation. *Id.* The third circuit affirmed the trial court's dismissal of the complaint, holding that the union's failure and refusal to file the grievance within the time specified by the collective bargaining agreement constituted a final decision which triggered the running of the statute of limitations. *Id.* at 303.

In *King v New York Telephone Co, Inc*, 785 F2d 31 (CA 2, 1986), the union failed to advance the plaintiff's grievance in a timely manner. *Id.* at 33. However, it made efforts to persuade the employer to agree to arbitration regardless of the union's failure to comply with the time constraints. *Id.* The second circuit held that the facts of this case were distinguishable from the facts of *Metz*, because the union attempted to proceed on the plaintiff's behalf and represented to her that arbitration was still available. *Id.* at 35. The Court also emphasized that the plaintiff made several attempts to inquire about the status of the grievance. *Id.* Additionally, the court found that the union continued to actively pursue the plaintiff's grievance within the statutory period of limitations. *Id.* The court held that summary judgment was inappropriate, because there was "no basis upon which to conclude that [the plaintiff] knew or had reason to know . . . that her claims against . . . the Union had accrued." *Id.* at 36.

We find that the facts of the instant case bear greater similarity to *Metz* than to *King*. Plaintiff should have known that, if defendant had followed the procedure set forth in the collective bargaining agreement, plaintiff's grievance would have been at the arbitration stage by April 7, 1993. Accordingly, plaintiff's cause of action accrued on April 7, 1993, and the complaint in the instant case should have been filed by October 7, 1993, to be timely.

This case is distinguishable from *King*. Plaintiff has not alleged that defendant actively attempted to pursue the grievance despite the passing of the deadline. On the contrary, plaintiff's action is predicated on allegations that defendant wrongfully decided to take no action on the grievance until the MERC proceedings were completed. Accordingly, plaintiff's cause of action accrued in April, 1993, when he should have realized that the grievance was not being advanced in accordance with the time constraints of the collective bargaining agreement. Evidence that defendant decided to hold the agreement in abeyance and agreed with DFD to waive the time limits does not render this case similar to *King*. The crux of plaintiff's case is that defendant wrongfully decided to delay processing the grievance. Under these circumstances, plaintiff cannot claim that the measures taken by defendant tolled the running of the limitations period, because these measures are the very basis of plaintiff's complaint.

III

We also reject plaintiff's argument that defendant fraudulently concealed the cause of action. Albert Richardson informed plaintiff in August, 1993, that the grievance had been referred to Deputy Chief Niles Sexton. He did not admit that no action was being taken on the grievance until the outcome of the MERC hearings. Michigan law provides that a defendant's fraudulent concealment of a cause of action allows the plaintiff to commence the action within two years of discovering the concealment, although the action would otherwise be barred by the period of limitations. MCL 600.5855; MSA 27A.5855. Assuming that plaintiff's allegation concerning Richardson's statement is true, nothing in the statement would have precluded plaintiff from discovering that the grievance was not being processed in a timely manner. Defendant was required by the collective bargaining agreement to have advanced through the pre-arbitration steps of the grievance procedure by April, 1993. Richardson's statement that the matter was still being considered by DFD's administrative assistant should have alerted plaintiff that defendant was not complying with the time constraints, and thus could not toll the cause of action.

Plaintiff also argues that he could not have known, based on the time limits provided in the collective bargaining agreement, that his cause of action had accrued, because defendant and DFD agreed to waive the time limits. This argument is incongruous with plaintiff's cause of action. If defendant and DFD agreed to waive the time limits, then plaintiff's contention that defendant breached the duty of fair representation by failing to comply with contractual time limits for processing a grievance cannot stand.

IV

Defendant argues in its appeal brief that the trial court erred in denying its motion for attorney fees. This argument constitutes an effort to obtain from this Court a more favorable decision than was rendered by the trial court. An appellee may not obtain a more favorable decision on appeal than was rendered by the lower court unless the appellee files a cross-appeal. *McCardel v Smolen*, 404 Mich 89, 94; 273 NW2d 3 (1978). Defendant has not filed a cross-appeal. We therefore decline to review this issue.

Affirmed. Defendant being the prevailing party, it may tax costs pursuant to MCR 7.219.

/s/ Joel P. Hoekstra
/s/ Marilyn Kelly
/s/ Joseph B. Sullivan

¹ MCL 423.201 *et seq.*; MSA 17.455(1) *et seq.*

² 715 F2d 299 (CA 7, 1983).