

STATE OF MICHIGAN
COURT OF APPEALS

AFSCME LOCAL 207,
Plaintiff-Appellee,

UNPUBLISHED
October 18, 2007

v

CITY OF DETROIT,
Defendant-Appellant.

No. 271321
Wayne Circuit Court
LC No. 06-612425-CL

Before: Murphy, P.J., and Smolenski and Schuette, JJ.

PER CURIAM.

Defendant City of Detroit (“the City”) appeals as of right from a preliminary injunction that prohibits the City from taking disciplinary action against Peavey Horton in his capacity as chief steward of plaintiff AFSCME Local 207 (“the union”), pending a hearing and decision by the Michigan Employment Relations Commission (“MERC”). We affirm.

I

A grant of injunctive relief is reviewed for an abuse of discretion. *Michigan Coalition of State Employee Unions v Civil Service Comm*, 465 Mich 212, 217; 634 NW2d 692 (2001). An abuse of discretion occurs only when the trial court’s decision is outside the range of “reasonable and principled outcome[s].” *Maldonado v Ford Motor Co*, 476 Mich 372, 388; 719 NW2d 809 (2006).

Section 9 of the Public Employment Relations Act (“PERA”), MCL 423.209, provides:

It shall be lawful for public employees to organize together or to form, join or assist in labor organizations, to engage in lawful concerted activities for the purpose of collective negotiation or bargaining or other mutual aid and protection, or to negotiate or bargain collectively with their public employers through representatives of their own free choice.

Section 10 of the PERA, MCL 423.210(1), provides:

It shall be unlawful for a public employer or an officer or agent of a public employer (a) to interfere with, restrain or coerce public employees in the exercise of their rights guaranteed in section 9; . . . (c) to discriminate in regard to hire,

terms or other conditions of employment in order to encourage or discourage membership in a labor organization[;] . . . [and] (d) to discriminate against a public employee because he has given testimony or instituted proceedings under this act

Section 16(a) of the PERA, MCL 423.216(a), provides that when an unfair labor practice charge is filed, the MERC may issue a complaint and schedule a hearing. Section 16(h) adds:

The commission or any charging party shall have power, upon issuance of a complaint as provided in subdivision (a) charging that any person has engaged in or is engaging in an unfair labor practice, to petition any circuit court within any circuit where the unfair labor practice in question is alleged to have occurred or where such person resides or exercises or may exercise its governmental authority, for appropriate temporary relief or restraining order, in accordance with the general court rules, and the court shall have jurisdiction to grant to the commission or any charging party such temporary relief or restraining order as it deems just and proper.

In determining whether to issue an injunction under § 16(h), all usual equitable requirements apply. *Local 229, Michigan Council 25, AFSCME v Detroit*, 124 Mich App 791, 793-795; 335 NW2d 695 (1983). Thus, “a court must consider (1) the likelihood that the party seeking the injunction will prevail on the merits, (2) the danger that the party seeking the injunction will suffer irreparable harm if the injunction is not issued, (3) the risk that the party seeking the injunction would be harmed more by the absence of an injunction than the opposing party would be by the granting of the relief, and (4) the harm to the public interest if the injunction is issued.” *Alliance for the Mentally Ill of Michigan v Dep’t of Community Health*, 231 Mich App 647, 660-661; 588 NW2d 133 (1998); see also *Michigan State Employees Ass’n v Dep’t of Mental Health*, 421 Mich 152, 157-158; 365 NW2d 93 (1984). “This inquiry often includes the consideration of whether an adequate legal remedy is available to the applicant.” *Id.* at 158.

II

A. Irreparable Harm and Adequacy of Remedy at Law

The City argues that the union failed to show that it would suffer irreparable harm if the injunction were not granted. Although Horton was subject to discharge upon his next suspension, the City argues that a discharge does not constitute irreparable harm because it can be compensated by money damages.

Our Supreme Court has declined to adopt a bright-line rule holding that termination from employment can never constitute irreparable harm. *Michigan State Employees Ass’n, supra* at 165-166. Rather, the Court has stated that, “[i]n all cases, the injury [alleged] must be evaluated in light of the totality of the circumstances affecting, and the alternatives available to the discharged employee.” *Id.* at 167. Nonetheless, loss of income, by itself, is not ordinarily sufficient to show irreparable harm, because the loss can be compensated monetarily. *Id.* at 167-168.

In the present case, however, loss of income and benefits is not the harm identified by the union. Rather, the union alleged that by knowing that Horton was being disciplined, and was subject to discharge for his next suspension, for exercising his rights under the PERA, other employees and union officials would be hesitant to avail themselves of their rights, defeating the purpose of the act. This is akin to a chilling effect on the exercise of free speech, and is precisely the harm addressed by PERA's anti-retaliation and anti-discrimination provisions, contained in § 10. We believe that such harm is difficult, if not impossible, to quantify, and cannot be undone or compensated by money damages. Thus, we conclude that the union made a sufficient showing that it would suffer irreparable harm if the injunction were not issued.

The City argues that, because an evidentiary hearing was not held, the union failed to provide factual support for its claim that its members and officers would be intimidated by the City's disciplining of Horton.

The union's verified complaint alleges that, if the injunction were not issued, union members and officials would be intimidated by the City's disciplining of Horton for exercising rights protected by the PERA. The complaint was accompanied by Horton's affidavit attesting to the accuracy of the allegations in the complaint. The City did not file an answer under MCR 2.111(C), contesting these factual allegations. Instead, its "answer," the only pleading it filed below, contains only a legal argument about why an injunction should not issue. Therefore, under MCR 2.111(E), the factual allegations of the complaint may be accepted. We therefore reject the City's argument that factual support for the union's claim of irreparable harm is lacking.

The City also argues that, although this Court has found that MERC remedies are sometimes inadequate because they are not immediately available, this is not such a case.

In *Detroit v Salaried Physicians Professional Ass'n, UAW*, 165 Mich App 142, 150-153; 418 NW2d 679 (1987), and in *Van Buren Pub School Dist v Wayne Circuit Judge*, 61 Mich App 6, 16-17; 232 NW2d 278 (1975), the employers threatened to take actions that would have eliminated the bargaining units, in alleged violation of their duty to bargain. This Court found that MERC remedies were inadequate because, absent an injunction, there would be nothing left for the parties to bargain about. *Salaried Physicians Professional Ass'n, supra* at 151-152; *Van Buren Public School Dist, supra* at 16-18. The City argues that the present case is distinguishable because it did not take action to eliminate the union.

We believe that the City's argument is illusory. The City does not argue that an injunction may *only* be granted to prevent the complete elimination of a bargaining unit. As discussed previously, the danger in this case is the chilling of the employees' rights under the PERA. An injunction was necessary because, as previously discussed, that harm would be irreparable, and could not be adequately compensated by money damages.

B. Likelihood of Prevailing on the Merits

The City argues that the union cannot show that it would likely prevail on the merits of some uncertain, unspecified, speculative future discipline that might be imposed on Horton. Although the City did not make this argument below, we will address the likelihood that the union will prevail on the merits with regard to both prongs of the injunction.

The union alleged, and the City does not contest, that there is a high likelihood that the union will prevail on the merits of Horton's two challenged suspensions. If the union prevails, then the suspensions will be expunged from Horton's record, and the union will have obtained the relief embodied in the second part of the injunction, i.e., precluding the City from enhancing any subsequent penalty against Horton on the basis of the two challenged suspensions.

Regarding the first prong of the injunction, we note that the City was prohibited from disciplining Horton, in the future, "for any lawful actions taken in his capacity as" union steward. The City was not enjoined from imposing legitimate discipline unrelated to Horton's performance of his duties as union steward.

Under §10, it is an unfair labor practice to discipline an employee for exercising his rights under the PERA. Therefore, if the City disciplines Horton in the future for performing his union duties, such discipline will be unlawful. Thus, there is a high likelihood that the union will prevail on the merits of a resulting challenge.

The City's reliance on *Alliance for the Mentally Ill, supra*, is misplaced. That case involved layoffs undertaken pursuant to a collective bargaining agreement that arguably reserved to management the right to lay off its employees. See *Alliance for the Mentally Ill, supra* at 661-664. Conversely, the present case involves disciplinary action that is clearly prohibited by the PERA.

C. Balancing of Resulting Harm and Harm to Public Interest

Relying on *Alliance for the Mentally Ill, supra* at 665-666, the City briefly argues that the public interest will be harmed if taxpayer dollars are spent to continue paying an employee, pending a challenge to discipline, if it is eventually determined that the discipline undertaken was lawful. As indicated previously, however, *Alliance for the Mentally Ill* involved layoffs that were arguably permitted by the collective bargaining agreement. Because Horton was not discharged, this was not a case where the City was ordered to continue employing him pending the resolution of other proceedings, potentially harming the City.¹ Additionally, the union has a high likelihood of prevailing on the merits of the pending proceedings, and of future proceedings brought to overturn any future discipline imposed in violation of the PERA. Thus, we conclude that the City was not harmed by the injunction.

There is no public interest in allowing the City to discipline Horton in violation of the PERA. On the contrary, the public interest would seem to favor compliance with the PERA and the policies expressed therein. The City may be liable for damages for its failure to comply. Further, the City remains free to discipline Horton for legitimate reasons unrelated to his union activities. Thus, the public interest was not harmed by the injunction.

¹ For the same reason, *Michigan State Employees Ass'n, supra* at 164-165, involving a civil service challenge to an employee's discharge, is inapposite.

The union and its members, on the other hand, would suffer irreparable harm if an injunction were not issued.

We conclude that the factors relevant to issuing an injunction favored granting the union's request. While the trial court's findings were brief, the record is sufficient to enable appellate review. See MCR 2.517(A)(2); see also *Fletcher v Fletcher*, 447 Mich 871, 883; 526 NW2d 889 (1994). The trial court did not abuse its discretion in granting the requested injunction.

Affirmed.

/s/ William B. Murphy
/s/ Michael R. Smolenski
/s/ Bill Schuette