

**STATE OF MICHIGAN**  
**COURT OF APPEALS**

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GERALD F. GLIWA, JR.,

Plaintiff-Appellee,

v

COUNTY OF LENAWEЕ, LENAWEЕ COUNTY  
BOARD OF COMMISSIONERS, and LENAWEЕ  
COUNTY EMERGENCY TELEPHONE  
DISTRICT BOARD,

Defendants-Appellants,

and

LENAWEЕ COUNTY SHERIFF'S  
DEPARTMENT and LENAWEЕ COUNTY  
SHERIFF,

Defendants.

UNPUBLISHED  
May 27, 2014

No. 313958  
Lenawee Circuit Court  
LC No. 11-004288-CD

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GERALD F. GLIWA, JR.,

Plaintiff-Appellee,

v

COUNTY OF LENAWEЕ, LENAWEЕ COUNTY  
BOARD OF COMMISSIONERS, and LENAWEЕ  
COUNTY EMERGENCY TELEPHONE  
DISTRICT BOARD,

Defendants-Appellants,

and

LENAWEЕ COUNTY SHERIFF'S  
DEPARTMENT and LENAWEЕ COUNTY  
SHERIFF,

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No. 313966  
Lenawee Circuit Court  
LC No. 11-004288-CD

Defendants.

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GERALD F. GLIWA, JR.,

Plaintiff-Appellee,

v

COUNTY OF LENAWEЕ, LENAWEЕ COUNTY  
BOARD OF COMMISSIONERS, LENAWEЕ  
COUNTY EMERGENCY TELEPHONE  
DISTRICT BOARD, and LENAWEЕ COUNTY  
SHERIFF'S DEPARTMENT,

Defendants,

and

LENAWEЕ COUNTY SHERIFF,

Defendant-Appellant.

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GERALD F. GLIWA, JR.,

Plaintiff-Appellee,

v

COUNTY OF LENAWEЕ, LENAWEЕ COUNTY  
BOARD OF COMMISSIONERS, and LENAWEЕ  
COUNTY EMERGENCY TELEPHONE  
DISTRICT BOARD,

Defendants-Appellees,

and

LENAWEЕ COUNTY SHERIFF'S  
DEPARTMENT,

Defendant,

and

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No. 313967

Lenawee Circuit Court

LC No. 11-004288-CD

No. 314034

Lenawee Circuit Court

LC No. 11-004288-CD

LENAWEE COUNTY SHERIFF,

Defendant-Appellant.

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Before: MURRAY, P.J., and JANSEN and SHAPIRO, JJ.

PER CURIAM.

These consolidated appeals arise out of the termination of plaintiff's employment as the 911 dispatch director for Lenawee County, Michigan. Defendants appeal from the trial court order that denied their motion for summary disposition pursuant to MCR 2.116(C)(7)<sup>1</sup> and (C)(10). For the reasons set forth below, we reverse.

Defendant Lenawee County (County) is a political subdivision of the State of Michigan, governed by defendant Lenawee County Board of Commissioners (BOC). Defendant Lenawee County Emergency Telephone District Board (ETDB) is a statutory body created under the Emergency 9-1-1 Service Enabling Act, MLC 484.1101 *et seq.*, in 1995 for the purpose of administering the County's 911 system. Defendant Jack Welsh (Sheriff) is the elected sheriff of Lenawee County tasked with overseeing the daily operations of defendant Lenawee County Sheriff's Department (LCSD). Plaintiff was hired as the County's 911 dispatch director in June 2008. After his employment was terminated in June 2011, he brought the instant suit against defendants.

Plaintiff was hired as the County's 911 dispatch director in June 2008. He was tasked with supervising the County's emergency telephone dispatchers employed by the LCSD. The dispatchers were members of a collective bargaining unit represented by the Police Officers Labor Council (Union), a union that had a collective bargaining agreement (CBA) with the BOC and the Sheriff.

Soon after he was hired, plaintiff learned that the Union had filed a grievance against the LCSD under the CBA challenging the removal of the 911 dispatch director position, i.e., plaintiff's position, from the collective bargaining unit. The initial grievance was dated April 9, 2008. According to the union grievance, Randall Kelly held the 911 dispatch director position prior to plaintiff's hiring. Kelly retired from the LCSD on March 29, 2008. On April 3, 2008, Kelly was rehired on a contract basis and assumed the same job responsibilities as he had previously. The Union alleged that Kelly's contract was in violation of the CBA,

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<sup>1</sup> Defendants' motion for summary disposition incorrectly cited MCR 2.116(C)(8) for their governmental immunity claim and we will address it under MCR 2.116(C)(7). See *Buhalis v Trinity Continuing Care Servs*, 296 Mich App 685, 691-692; 822 NW2d 254 (2012) (Courts are not bound by the procedural labels that parties attach to their claims).

particularly Section 1.0 which states that the Union is the exclusive representative for purposes of collective bargaining and Section 1.1 in that the Employer agrees not to enter into any agreement or contract with said employees individually or collectively, which in any way conflicts with the provisions of the [collective bargaining] agreement.

On February 12, 2009, the Union filed an unfair labor practice charge with the Michigan Employment Relations Commission (MERC) against the ETDB. The Union alleged that the 911 dispatch director position was unlawfully removed from the collective bargaining unit in violation of the CBA. The Union requested that the MERC order defendants to cease and desist from such further conduct and restore the dispatch director position to the collective bargaining unit.

The MERC administrative law judge issued his ruling on March 28, 2011, which was adopted by the MERC on May 31, 2011. The ruling found that the County, the LCSD, and the ETDB had unlawfully removed the position of 911 dispatch director from the collective bargaining unit and ordered that the position be restored to the bargaining unit. Plaintiff was subsequently terminated in June 2011.

On December 5, 2011, plaintiff brought suit against defendants, alleging four counts: (1) breach of contract and detrimental reliance; (2) breach of implied employment contract; (3) discharge against public policy, and; (4) breach of implied covenant of good faith and fair dealing.<sup>2</sup> Defendants moved for summary disposition on all counts. After a hearing, the trial court denied summary disposition on all counts as to all defendants, and defendants appealed.<sup>3</sup>

The trial court erred by failing to grant summary disposition in favor of defendants under MCR 2.116(C)(7) on plaintiff's claims of breach of contract and detrimental reliance, breach of implied employment contract, and breach of implied covenant of good faith and fair dealing. The MERC decision placed plaintiff in the collective bargaining unit. As such, he was bound by the CBA and his failure to engage the required union grievance procedure requires summary disposition in favor of defendants. See *AFSCME, AFL-CIO, Michigan Council 25 & Local 146 v Highland Park Bd of Ed*, 214 Mich App 182, 191; 542 NW2d 333 (1995) (“[W]here a collective bargaining agreement mandates that internal remedies be pursued to resolve disputes, a party must exhaust those remedies before filing a court action”).<sup>4</sup>

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<sup>2</sup> We note that plaintiff has not alleged that he was terminated on the basis of unlawful discrimination under the Elliot-Larsen Civil Rights Act, MCL 37.2101 *et seq.*

<sup>3</sup> We review *de novo* a trial court's grant of summary disposition. See *Ernsting v Ave Maria College*, 274 Mich App 506, 509; 736 NW2d 574 (2007).

<sup>4</sup> There is an exception to this rule when a union employee can demonstrate that the union has prevented exhaustion by its wrongful refusal to process a grievance or by its refusal to do so in the past. See *Vaca v Sipes*, 386 US 171, 185-186; 87 S Ct 903; 17 L Ed 2d 842 (1967). There is no allegation or evidence of such behavior of the part of the Union in this case.

The MERC has exclusive jurisdiction to enforce the Public Employment Relations Act (PERA), MCL 423.201 *et seq.*, which is the “dominant law regulation public employee labor relations[.]” *Rockwell v Bd of Ed of Sch Dist of Crestwood*, 393 Mich 616, 629; 227 NW2d 736 (1975). Indeed, “MERC alone has jurisdiction and administrative expertise to entertain and reconcile competing allegations of unfair labor practices and misconduct under the PERA.” *Id.*

There is no indication that the MERC decision was appealed to or reversed by any appellate authority. Accordingly, the decision was final and bound the parties. See MCL 423.216(b) (A MERC ruling becomes effective if no exceptions are filed within 20 days after service of the recommended order). The MERC ruling provided explicitly that plaintiff was part of the collective bargaining unit and was, therefore, bound by the provisions of the CBA, which provides:

The Employer and the Union support and subscribe to an orderly method of adjusting grievances. To this end, the Employer and the Union agree that the procedure set forth herein shall serve as the means for the peaceful settlement of *all disputes that may arise between them concerning the interpretation [or] application of this Agreement*, without an interruption or disturbances of any sort whatsoever in the normal operations of the Employer. *A grievance shall be deemed to exist whenever there develops a disagreement between the Employer and one or more of the employees represented by the Union as to the interpretation or application of this Agreement.* An earnest effort shall be made to settle the grievances promptly in accordance with the following procedures, and these procedures shall not bar discussion of disagreement between the Sheriff and employees of the bargaining unit prior to these procedures. [Emphasis added.]

The CBA goes on to provide a detailed and extensive grievance procedure culminating in potential arbitration. Thus, if plaintiff had any “dispute” with defendants concerning the “interpretation or application of” the contract, he was required to utilize the grievance procedure provided for in the CBA. It is undisputed that plaintiff did not engage the grievance procedure with regard to his termination prior to filing the instant suit.

The record reveals that the trial court believed that questions of fact existed with regard to the type of plaintiff’s employment, i.e., whether he was a mere at-will employee or whether he could not be terminated absent just cause.<sup>5</sup> The CBA explicitly provides that nonprobationary

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<sup>5</sup> Any contention that plaintiff himself was not a member of the Union or did not pay union dues is irrelevant to whether he was bound by the MERC decision and the CBA:

Membership in the Union is not compulsory and is a matter separate, distinct, and apart from any employee’s obligation to share equally the cost of administering and negotiating this Agreement. All employees have the right to join or not join the Union as they see fit. The Union recognizes, however, that it is required under this Agreement to represent all employees included within the

employees covered by the CBA could not be discharged without just cause. At the time of plaintiff's termination, he was long past his probationary period and, therefore, could not be terminated without just cause. However, the just cause nature of plaintiff's employment does not alter the fact that he was required to utilize the grievance procedure if he believed he had been terminated without just cause:

The Sheriff shall not discharge or discipline a nonprobationary employee without just cause. Should a nonprobationary employee who has been discharged or given a disciplinary suspension consider such discipline to be improper, a written grievance shall, within five (5) working days after the notice of the discharge or disciplinary action is given to the affected employee, be filed at Step 2 or the Grievance Procedure. All grievances relating to the discharge or disciplinary suspension of a nonprobationary employee must be filed within the time limits contained in this Section. *Any such grievance which is not presented within these time limits shall be considered abandoned and no appeal shall be allowed.* All other disciplinary grievances shall follow the normal Grievance Procedure. [Emphasis added.]

Again, there is no indication that plaintiff engaged the grievance procedure with regard to his termination.

Due to plaintiff's failure to pursue the grievance procedure under the CBA, his breach of contract and detrimental reliance claim must fail. *AFSCME*, 214 Mich App at 191. Plaintiff's claims of breach of implied employment contract and breach of implied covenant of good faith and fair dealing also fail due to the existence of the express CBA, which provides that the Union is the exclusive representative of covered employees with respect to all conditions of employment and that "[t]he Employer agrees not to enter into any . . . contract with the [] employees, individually or collectively, which in any way conflicts with the terms or provisions of this Agreement." The CBA also provides:

It is the intent of the parties hereto that the provisions of this Agreement, which supersedes all prior agreements and understandings, individual or collective in nature, oral or written, express or implied, between such parties, shall govern their entire relationship and shall be the sole source of any rights or claims which may be asserted in arbitration hereunder, or otherwise.

There is no indication that the Union represented plaintiff in obtaining his alleged implied employment contracts, and the CBA explicitly prohibits any individual contracts or prior implied contracts. See *Morris Pumps v Centerline Piping, Inc*, 273 Mich App 187, 194; 729 NW2d 898 (2006) (citations and quotation marks omitted) ("[A] contract will be implied only if there is no express contract covering the same subject matter. Generally, an implied contract may not be

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bargaining unit without regard to whether or not the employee is a member of the Union.

found if there is an express contract *between the same parties* on the same subject matter”). Accordingly, defendants are entitled to summary disposition under MCR 2.116(C)(7) on plaintiff’s breach of contract claim and implied contract claims. See *Sankar v Detroit Bd of Ed*, 160 Mich App 470, 473 n 1; 409 NW2d 213 (1987) (MCR 2.116(C)(7)[] is the proper manner in which to raise the affirmative defense of failure to exhaust the grievance and arbitration procedures”).<sup>6</sup>

The trial court also erred by failing to grant summary disposition in favor of defendants under MCR 2.116(C)(10) on plaintiff’s claim that he was discharged in violation of public policy. Assuming, arguendo, that such a claim falls outside the CBA and its attendant grievance procedure, the claim nonetheless cannot survive summary disposition.

Absent a contract provision providing otherwise, an employment contract for an indefinite term is generally considered “at-will” and terminable by either party at any time for any, or no, reason. *Suchodolski v Mich Consol Gas Co*, 412 Mich 692, 694-695; 316 NW2d 710 (1982). “However, an exception has been recognized to that rule, based on the principle that some grounds for discharging an employee are so contrary to public policy as to be actionable.” *Id.* at 695. This Court has recognized three such exceptions:

when (1) the employee is discharged in violation of an explicit legislative statement prohibiting discharge of employees who act in accordance with a statutory right or duty, (2) the employee is discharged for the failure or refusal to violate the law in the course of employment, and (3) the employee is discharged for exercising a right conferred by a well-established legislative enactment. [*Edelberg v Leco Corp*, 236 Mich App 177, 180; 599 NW2d 785 (1999).]

A claim for discharge against public policy exists as an exception to the at-will employment doctrine, i.e., the presumption that all employment is at will in the absence of any indications to the contrary. See *McNeil v Charlevoix Co*, 484 Mich 69, 78-79; 772 NW2d 18 (2009); *Kimmelman v Heather Downs Mgt Ltd*, 278 Mich App 569, 572; 753 NW2d 265 (2008). Plaintiff, a just-cause employee under the CBA, has pointed to no authority to suggest that such a claim may exist in a just-cause employment relationship. Moreover, plaintiff has not identified which of the three exceptions apply to his discharge. He argues that only the ETDB, not the Sheriff, was authorized to terminate his employment. Therefore, he asserts that his unauthorized termination by the Sheriff was against public policy or that he was terminated by the ETDB in secret, which would be a violation of the Open Meetings Act (OMA), MCL 15.261 *et seq.* As quoted above, the CBA explicitly provides that the “Sheriff” could discharge employees with just cause. Further, if plaintiff disagreed with his discharge, he was required to engage the grievance procedure provided by the CBA. Plaintiff has also failed to point to any authority to suggest that an OMA violation constitutes a discharge against public policy. See *Edelberg*, 236

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<sup>6</sup> Defendants’ motion for summary disposition under MCR 2.116(C)(7) related to governmental immunity. Nonetheless, defendants have consistently asserted that plaintiff failed to exhaust his remedies under the CBA, and, in any event, we are not bound by the procedural labels a party attaches to its claim. See *Buhalis*, 296 Mich App at 691-692.

Mich App at 180. Discharges against public policy are found where an employee is terminated for his refusal to violate the law or for exercising a legal right. See *id.* There is no such allegation here. Accordingly, defendants are entitled to summary disposition on plaintiff's claim of discharge against public policy.<sup>7</sup>

Reversed and remanded for entry of an order granting summary disposition in favor of defendants consistent with this opinion. We do not retain jurisdiction.

/s/ Christopher M. Murray

/s/ Kathleen Jansen

/s/ Douglas B. Shapiro

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<sup>7</sup> Because we find that defendants are entitled to summary disposition under MCR 2.116(C)(10) on plaintiff's claim of discharge against public policy, we decline to address defendants' alternative argument – that this particular claim is barred by governmental immunity.