

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

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JENNIFER POWELL,

Plaintiff-Appellant,

v

ST. IGNACE AREA SCHOOLS and ST. IGNACE  
BOARD OF EDUCATION,

Defendants-Appellees.

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UNPUBLISHED

March 1, 2011

No. 295553

Mackinac Circuit Court

LC No. 2009-006702-AW

Before: CAVANAGH, P.J., and STEPHENS and RONAYNE KRAUSE, JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court's order granting defendants' motion for summary disposition based on its conclusion that it lacked subject-matter jurisdiction because plaintiff failed to exhaust her contractual remedies. We affirm. This appeal has been decided without oral argument pursuant to MCR 7.214(E).

Plaintiff was first employed by defendant Board as a teacher in 1987. She was tenured in the 2001-2002 school year. Two years later, she was laid off by the Board, effective June 30, 2004. For the next three school years, there were no vacancies for which plaintiff was qualified and so she was not recalled from layoff. In a letter dated July 11, 2007, the Superintendent, Michael Springsteen, sent plaintiff a letter notifying her, "your name has been removed from the [school's] seniority list" because she had been on layoff for over three years. Plaintiff did not file a grievance concerning this decision. In May 2008, defendants posted opening notices for four positions for which plaintiff was qualified. However, defendants hired new employees rather than recalling plaintiff.

Plaintiff filed a grievance through her union on July 28, 2008, in accord with the 2006-2008 Collective Bargaining Agreement (CBA) then existing. The grievance alleged the nature of her complaint as: "Failure to recall in violation of seniority rights; Failure to recognize seniority." It was her theory that her right to be recalled existed as defined by the 2002-2006 CBA in effect at the time of her initial layoff and vested at that time. Under that CBA, there was no time limit specified for how long a teacher could be on layoff and still maintain seniority. The 2002-2006 CBA layoff procedures provided, in relevant part, "A tenure teacher who is laid off pursuant to this policy has the right to be placed in a teaching position for which he/she is certified and qualified to fill and which is occupied by a teacher with less seniority." The 2002-

2006 CBA recall provision read, in relevant part, “Any teacher on layoff shall be recalled in inverse order of layoff provided the teacher is certified and qualified for the vacancy.” All of this language was included identically in the 2006-2008 CBA. However, the latter CBA also added language to the definition of “qualified.” The new provision read:

Under the layoff-recall procedures, any teacher eligible for recall or transfer must meet the Highly Qualified requirement of the district, and the qualifications established for the “newly vacated” position, as developed above. Contractual procedures that govern layoff and recall shall be consistent with state tenure laws and federal highly qualified laws.

The 2002-2006 CBA included an express provision stating that it expired on August 31, 2006.

The grievance wound its way through several levels as dictated by the CBA, ultimately being denied by the Board at its meeting on September 8, 2008. Instead of appealing that decision to binding arbitration, as required by the CBA, plaintiff filed suit. Defendants moved for summary disposition, arguing that plaintiff failed to exhaust administrative remedies because she was required to go to arbitration; that plaintiff’s right to recall did not “vest” at the time she was laid off but instead was controlled by the CBA in effect at the time of the possible recall; and that her right to recall terminated under both the CBA and the statute when she exceeded three years of layoff. Plaintiff asserted in response that arbitration would have been futile because the arbitrator would have to operate under the 2006-2008 CBA and would exceed his or her jurisdiction if he or she awarded a remedy available under only the 2002-2006 CBA. Therefore, plaintiff was not required to submit to arbitration. Moreover, because plaintiff was laid off while the 2002-2006 CBA was in effect, its terms concerning recall were the terms that applied to her and her rights as defined by *that* CBA were vested. Even if her rights did not vest, and her recall is controlled by the later CBA, the language of the statute does not preclude a school district from extending the recall period past the statutory, three-year minimum.

The trial court issued a written opinion, concluding that arbitration would not have been futile because the arbitrator might have decided in plaintiff’s favor. Allowing a party to bypass arbitration “violates the basic tenets of the collective bargaining process.” The case on which plaintiff relied for her theory of futility, *Huron Intermediate Sch Dist v Huron Intermediate Ed Ass’n*, unpublished opinion per curiam of the Court of Appeals, issued June 15, 2006 (Docket No. 257580), did not support plaintiff because in that case, the teacher’s certification had expired and she was no longer a member of the union. Thus, the arbitration clause of the CBA in that case did not apply to her because she was no longer bound by the contract. In contrast, plaintiff here was at all times certified. Thus, the arbitrator might have found he was without jurisdiction, or he might have found plaintiff was bound by the current CBA. Accordingly, the trial court found plaintiff failed to exhaust her remedies under the CBA, making the court without jurisdiction.

We review de novo a trial court’s decision to grant or deny a motion for summary disposition. *Spiek v Dep’t of Transp*, 456 Mich 331, 337; 572 NW2d 201 (1998). Questions concerning the jurisdiction of the trial court are questions of law reviewed de novo. *Glen Lake-Crystal River Watershed Riparians v Glen Lake Ass’n*, 264 Mich App 523, 527; 695 NW2d 508 (2004).

The statute here at issue, MCL 38.105, reads in relevant part:

For a period of 3 years after the effective date of the termination of the teacher's services, a teacher on continuing tenure whose services are terminated because of a necessary reduction in personnel shall be appointed to the first vacancy in the school district for which the teacher is certificated and qualified . . . . This section does not prevent a school district from reemploying after the 3-year period specified in this section a teacher described in this section who was previously employed in that school district.

In general, an employee may not sue an employer for breach of contract unless the employee has exhausted the remedies provided under the CBA. *Pompey v General Motors Corp*, 385 Mich 537, 560; 189 NW2d 243 (1971). Here, both the 2002-2006 and the 2006-2008 CBAs provided for arbitration as the final step of the grievance procedure. Plaintiff filed a grievance, but instead of pursuing that through the requisite steps, she filed a suit making breach of contract claims identical to those in the grievance. Although pursuit of a contractual remedy is not required where it is deemed futile, case law indicates the plaintiff must at least *attempt* to pursue the remedy. See *Glover v St Louis-San Francisco R Co*, 393 US 324, 330; 89 S Ct 548; 21 L Ed 2d 519 (1969). Futility has been approved as a defense where the claims do not arise under the contract, such as tort claims or constitutional claims, or where the union is alleged to have failed to protect the individual's contractual rights. *Id.*; *Sankar v Detroit Bd of Ed*, 160 Mich App 470, 474-475; 409 NW2d 213 (1987); *Harrison v Arrow Metal Prod Corp*, 20 Mich App 590, 603-604; 174 NW2d 875 (1969). Here, the initial question is which CBA controls plaintiff's recall rights. Plaintiff has shown no reason why it would be futile to seek an arbitrator's decision on at least that matter.

The unpublished case plaintiff cites, *Huron Intermediate School Dist*, is readily distinguished. The plaintiff there was no longer an employee and no longer a member of the bargaining unit covered by the CBA. Here, there is no claim that plaintiff was not a member of the bargaining unit covered by the CBA at the time she was notified of the termination of her contractual recall rights. In fact, she initially filed a grievance as a member of that bargaining unit, and followed the CBA's steps in pursuing her grievance through several steps. Plaintiff's bald assertion that defendants did not consider her to be certified personnel is without any factual support. She also does not explain how she has any right of recall at all if she is, in fact, no longer an employee and no longer covered by the CBA. Defendants accepted and processed the grievance in accord with the CBA. Because plaintiff failed to pursue her contractual remedies, the trial court properly dismissed the substantive breach of contract claims brought in the complaint.

Affirmed.

/s/ Mark J. Cavanagh  
/s/ Cynthia Diane Stephens  
/s/ Amy Ronayne Krause