

STATE OF MICHIGAN
COURT OF APPEALS

ANN ARBOR EDUCATION ASSOCIATION
FOR PARAPROFESSIONALS, MEA/NEA, and
SHEILA MCSPADDEN,

UNPUBLISHED
July 12, 2011

Plaintiffs-Appellants,

v

ANN ARBOR BOARD OF EDUCATION and
ANN ARBOR PUBLIC SCHOOLS,

No. 294115
Washtenaw Circuit Court
LC No. 09-000673-CL

Defendants-Appellees.

Before: SERVITTO, P.J., and GLEICHER and SHAPIRO, JJ.

PER CURIAM.

Plaintiffs Ann Arbor Education Association for Paraprofessionals (AAEA) and Sheila McSpadden appeal as of right from the trial court's order granting defendants' motion for summary disposition in this action for breach of an expired collective bargaining agreement. We affirm.

Plaintiff McSpadden is an employee of Ann Arbor Public Schools and was subject to a collective bargaining agreement. The agreement expired on June 30, 2005, but was allegedly extended to the beginning of the 2006-2007 school year. McSpadden was disciplined by defendants in 2008 in connection with her employment and filed a grievance concerning the same. Pursuant to the collective bargaining agreement, the last step in the grievance process was binding arbitration. Because the collective bargaining agreement had expired, however, the arbitrator declined to exercise jurisdiction. Plaintiffs filed their complaint in the circuit court, alleging that defendants breached a term of the collective bargaining agreement. Defendants moved for summary disposition, contending among other things that because the collective bargaining agreement had expired, there was no contract between the parties when McSpadden was disciplined and thus no breach of any contract on defendants' part. The trial court granted summary disposition in defendants' favor, finding that there was no breach of contract given that the collective bargaining agreement had expired. This appeal followed.

Plaintiffs argue that they are entitled to bring an action for breach of contract to enforce contract terms that, by operation of law, survived the expiration of a collective bargaining

agreement.¹ The parties are in agreement concerning the applicable law, but disagree on the proper outcome of this case.

A trial court's decision on a motion for summary disposition is reviewed de novo, on the entire record, to determine whether the prevailing party was entitled to judgment as a matter of law. *Maiden v Rozwood*, 461 Mich 109, 118; 597 NW2d 817 (1999). Defendants moved for summary disposition under MCR 2.116(C)(8) and (10). A motion under MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone. *Id.* at 119. "All well-pleaded factual allegations are accepted as true and construed in a light most favorable to the nonmovant." *Id.* "A motion under MCR 2.116(C)(8) may be granted only where the claims alleged are 'so clearly unenforceable as a matter of law that no factual development could possibly justify recovery.'" *Id.* A motion under MCR 2.116(C)(10) tests the factual sufficiency of a claim. When reviewing such a motion, a court must examine the documentary evidence presented by the parties and, drawing all reasonable inferences in favor of the nonmoving party, determine whether there is a genuine issue of material fact for trial. *Quinto v Cross & Peters Co*, 451 Mich 358, 361-362; 547 NW2d 314 (1996). Although the trial court did not specify under which subrule it was granting defendants' motion, it is clear that plaintiffs' claim was dismissed under subrule (C)(8), because the court found that the claim was unenforceable as a matter of law.

The parties agree that the collective bargaining agreement expired before McSpadden was disciplined. Nonetheless, plaintiffs argue that a contractual just-cause provision in the agreement survived the agreement's expiration. Therefore, plaintiffs argue, they have a right to bring an action for breach of contract for defendants' alleged violation of the just-cause provision.

The parties agree that after a collective bargaining agreement expires, an employer commits an unfair labor practice if, without bargaining to impasse, it makes a unilateral change in terms and conditions of employment that are considered to be mandatory subjects of bargaining.² See *Gibraltar Sch Dist v Gibraltar MESPA-Transp*, 443 Mich 326, 336-337; 505 NW2d 214 (1993). The parties also agree that while the grievance procedure is a mandatory subject of bargaining, an arbitration clause is an exception to the rule against unilateral changes. *Id.* at 337-338. Thus, the parties agree that, generally, there is no duty to arbitrate grievances that arise after the expiration of a collective bargaining agreement. *Id.* at 345-346.

¹ Contrary to what plaintiffs argue, the trial court did not hold that it lacked jurisdiction over plaintiffs' claim, or that plaintiffs were asserting an unfair labor practice claim rather than a breach of contract claim. Instead, the trial court found that plaintiffs could not maintain an action for breach of a collective bargaining agreement that expired before the events that gave rise to plaintiffs' claim.

² This is known as the *Katz* doctrine. See *NLRB v Katz*, 369 US 736; 82 S Ct 1107; 8 L Ed 2d 230 (1962).

Although an employer has a continuing duty to arbitrate grievances involving vested rights, *id.* at 340, 347-350; see also *Ottawa Co v Jaklinski*, 423 Mich 1, 22; 377 NW2d 668 (1985), and a duty to arbitrate grievances based on facts and occurrences that arose before the expiration of the collective bargaining agreement, *Gibraltar Sch Dist*, 443 Mich at 348, this case does not involve vested rights or a dispute that arose before the expiration of the collective bargaining agreement. Accordingly, plaintiffs have not challenged the arbitrator's decision that defendants had no duty to arbitrate McSpadden's grievance.

The parties also agree that if an employer makes a unilateral change in a mandatory subject of bargaining without first bargaining to impasse, it commits an unfair labor practice cognizable only before the Michigan Employment Relations Commission ("MERC"). *Id.* at 338-340, 343; see also *Detroit Bd of Ed v Parks*, 417 Mich 268, 283; 335 NW2d 641 (1983). However, defendants here did not change the just-cause provision in itself. Therefore, plaintiffs have not attempted to file an unfair labor practice charge concerning McSpadden's suspension.

The parties agree that absent a unilateral change in a mandatory subject of bargaining, the MERC does not have jurisdiction to adjudicate contractual disputes, and that the parties are thereby relegated to their contractual remedies.³ See *Argentine Twp v Russ*, 2007 MERC (No. C07 F-148, September 27, 2007); *Village of Romeo v Village of Romeo Fire Fighters Ass'n*, 2000 MERC (No. C99 C-46, October 3, 2000); *Grass Lake Community Sch Bd of Ed v Jackson Co Ed Ass'n*, 1978 MERC (No. C77 I-267, October 20, 1978), *aff'd* 95 Mich App 635; 291 NW2d 53 (1979). This Court has also stated that where "[t]here appears to be a bona fide dispute as to the meaning of the contractual language[,] . . . an unfair labor practice hearing is not the proper forum for the resolution of a routine contract dispute." *Schoolcraft College Ass'n of Office Personnel, MESPA v Schoolcraft Community College*, 156 Mich App 754, 761; 401 NW2d 915 (1986) (noting that arbitration could proceed concurrently with an unfair labor practice charge). But while the MERC and this Court have stated that parties should seek relief through their contractual remedies, that does not mean that contractual remedies are available where a collective bargaining agreement has expired.

Plaintiffs argue that, because defendants may not make unilateral changes to mandatory subjects of bargaining before impasse, any contractual provisions dealing with such mandatory subjects of bargaining *survive as contract terms* and, therefore, can be enforced through a breach of contract action. However, plaintiffs cite no authority in support of this argument. Rather, the prohibition against unilateral changes in mandatory subjects of bargaining arises from defendants' *statutory* obligation to bargain in good faith. See *Gibraltar Sch Dist*, 443 Mich at 334-337. That prohibition does not alter the fact that the parties' contract has expired. "Although employers are statutorily prohibited from unilaterally changing most terms and conditions of employment following the expiration of a collective bargaining agreement, in order

³ We note that an unfair labor practice charge can proceed at the same time as an arbitration arising from the same dispute because the two involve different issues. *Bay City Sch Dist v Bay City Ed Ass'n, Inc*, 425 Mich 426, 436; 390 NW2d 159 (1986).

to safeguard the duty to bargain in good faith, those terms and conditions no longer have force by virtue of the expired contract.” *Int’l Brotherhood of Teamsters, Local 1191 v Pepsi-Cola Gen Bottlers, Inc*, 958 F2d 1331, 1336 (CA 6, 1992).

Normally, arbitration would be the exclusive remedy for a claim that an employer violated a collective bargaining agreement by disciplining a union employee without just cause. See *Wallace v Recorder’s Court of Detroit*, 207 Mich App 443, 447; 525 NW2d 481 (1994). However, the parties agree that arbitration is not available in this case. We believe that plaintiffs are seeking to obtain from a court a determination that they admittedly cannot obtain from an arbitrator or from the MERC, i.e., a ruling that defendants lacked just cause to discipline McSpadden. However, because the parties’ contract has expired, there is no contractual remedy available to plaintiffs for defendants’ alleged violation of the just cause provision. Accordingly, the trial court did not err in dismissing plaintiffs’ breach of contract claim.

Affirmed.

/s/ Deborah A. Servitto
/s/ Elizabeth L. Gleicher