# STATE OF MICHIGAN

# COURT OF APPEALS

SANDRA LAHTINEN,

Plaintiff-Appellee,

v

MICHIGAN EDUCATION SUPPORT PERSONNEL – WUPEAN/MEA-NEA,

Defendant-Appellant.

UNPUBLISHED
June 19, 2007

No. 266907
Gogebic Circuit Court
LC No. 04-000080-CK

Before: Schuette, P.J., and O'Connell and Davis, JJ.

PER CURIAM.

In this breach of the duty of fair representation action, defendant appeals as of right the judgment for plaintiff entered by the trial court. Defendant argues that it was entitled to summary disposition in its favor; that it was entitled to a directed verdict; and that it was entitled to judgment notwithstanding the verdict (JNOV), where plaintiff failed to establish a breach of the duty of fair representation. We affirm.

## I. FACTS

In 1977, nine employees at the Gogebic Community College (College) formed a union for the College's support staff. In 1982, plaintiff Sandra Lahtinen began working for the College in the bookstore and was obligated to join this union. By 1984, plaintiff had assumed a full-time manager position in the bookstore, which she held until 1994. In 1994, another employee with more seniority "bumped" plaintiff from the manager position. After losing her full-time position in the bookstore, plaintiff bumped another employee and accepted a three-quarter-time position in the bookstore.

In 1996, plaintiff accepted a three-quarter-time position in the College's library. Her position was then restructured into a half-time position with the library and a one-quarter-time position with another department. The College eliminated both positions in 2002. Instead of exercising her bumping rights, plaintiff opted for layoff status, which implicated her recall rights under the collective bargaining agreement. Those recall rights included the right to have the College recall plaintiff for any vacancy arising in a two-year period, so long as she was qualified. Thereafter, plaintiff filled a temporary, full-time position while a fellow employee was on maternity leave, before returning to layoff status. When a full-time vacancy was announced,

plaintiff submitted her application. However, the College hired another applicant, Marla Kangas, without giving plaintiff an opportunity to interview for the vacancy.

Plaintiff filed a grievance, which was ultimately abandoned when defendant refused to advance plaintiff's grievance to arbitration. Defendant argued that there was a past practice in place, which provided that part-time employees did not have the same rights as full-time employees. As evidence of this practice, defendant contended that a similar situation occurred more than 10 years ago, also involving Kangas. Plaintiff filed a two-count complaint alleging a breach of the collective bargaining agreement by the College and defendant, and a breach of the duty of fair representation by defendant. Plaintiff voluntarily dismissed the College, and she proceeded solely against defendant on a breach of the duty of fair representation theory.

## II. SUMMARY DISPOSITION

Defendant argues that it was entitled to summary disposition. We disagree.

### A. Standard of Review

This Court reviews de novo a trial court's ruling on a motion for summary disposition under MCR 2.116(C)(10), considering the pleadings, depositions, admissions, and other documentary evidence in the light most favorable to the nonmovant. *Morris & Doherty, PC v Lockwood*, 259 Mich App 38, 41-42; 672 NW2d 884 (2003). If the evidence fails to demonstrate a genuine issue of material fact, the movant is entitled to judgment as a matter of law. *Franchino v Franchino*, 263 Mich App 172, 181; 687 NW2d 620 (2004). A genuine issue of material fact exists when, after viewing the record in the light most favorable to the nonmovant, there remains an issue upon which reasonable minds could differ. *West v Gen Motors Corp*, 469 Mich 177, 183; 665 NW2d 468 (2003). Further, issues of contract interpretation present questions of law subject to de novo review. *46th Circuit Trial Court v Crawford Co*, 476 Mich 131, 140; 719 NW2d 553 (2006).

### B. Analysis

To prevail on a claim of unfair representation, a plaintiff must demonstrate a breach of the collective bargaining agreement and a breach of the union's duty of fair representation. *Goolsby v Detroit*, 211 Mich App 214, 223; 535 NW2d 568 (1995).

First, plaintiff must prove that the collective bargaining agreement was breached. If a contract has only one interpretation, however awkwardly worded or arranged, then it is not ambiguous. *Meagher v Wayne State Univ*, 222 Mich App 700, 722; 565 NW2d 401 (1997). The language of a contract should be given its plain and ordinary meaning. *Id.* "Public employers have a duty to bargain over 'wages, hours, and other terms and conditions of employment. . . .'" *Port Huron Ed Ass'n v Port Huron Area School Dist*, 452 Mich 309, 317; 550 NW2d 228 (1996), quoting MCL 423.215(1). By bargaining over a subject and memorializing the results in a collective bargaining agreement, the parties create an enforceable code of conduct on that subject among themselves. *Id.* at 319. Generally, "[a] past practice which does not derive from the parties' collective bargaining agreement may become a term or condition of employment which is binding on the parties." *Amalgamated Transit Union v Southeastern Michigan Transportation Auth*, 437 Mich, 441, 454; 473 NW2d 249 (1991). To create a term or condition

to a collective bargaining agreement through a past practice, both parties must mutually accept such practice. *Id.* "[T]he unambiguous contract language controls unless the past practice is so widely acknowledged and mutually accepted that it amends the contract." *Port Huron*, *supra* at 312. Comparatively, where the collective bargaining agreement is ambiguous or silent on the subject for which the past practice has developed, there need only be tacit agreement that the practice would continue. *Amalgamated Transit Union*, *supra* at 454-455.

Second, plaintiff must prove a breach of the union's duty of fair representation. This Court has opined previously that "[a] union has considerable discretion to decide which grievances shall be pressed to arbitration . . . and must be permitted to assess each grievance with a view to individual merit." *Knoke v East Jackson Pub School Dist*, 201 Mich App 480, 486; 506 NW2d 878 (1993).

> However, the union must act without fraud, bad faith, hostility, discrimination, arbitrariness, caprice, gross nonfeasance, collusion, bias, prejudice, willful, wanton, wrongful and malicious refusal, personal spite, ill will, bad feelings, improper motives, misconduct, overreaching, unreasonable action, or gross abuse of its discretion in processing or refusing or failing to process a member's grievance. [*Id.* at 487.]

According to our Supreme Court, "the conduct prohibited by the duty of fair representation includes (a) impulsive, irrational or unreasoned conduct, (b) inept conduct undertaken with little care or with indifference to the interests of those affected, (c) the failure to exercise discretion, and (d) extreme recklessness or gross negligence." *Goolsby v Detroit*, 419 Mich 651, 682; 358 NW2d 856 (1984).

The collective bargaining agreement at issue in this case contains the following provisions regarding vacancies and staff reduction:

> Article 10: Vacancies, Transfers and Promotions
>
> A. A vacancy shall be defined, for purposes of this Agreement, as a position previously held by a bargaining unit member, an administrative secretarial position, a newly created position, or changing a part-time position to a full-time position within the bargaining unit. No vacancy shall be filled until it has been posted for at least ten (10) working days.
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> B. Whenever a vacancy occurs or is anticipated, the Office of Personnel shall immediately notify, in writing, the [defendant]. Notice of such vacancy shall be sent to all [defendant's] members and shall be mailed to each laid-off bargaining unit member.
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> C. Members of the bargaining unit shall be granted full consideration in the filling of any vacancies. Vacancies shall be filled on the basis of experience, competency, qualifications and seniority of the individual.
>
> D. No employee shall suffer a reduction of pay because of an involuntary transfer.

* * *

Article 12: Staff Reduction

A. In the event a staff reduction is necessary, the individuals being laid off shall be notified at least ten (10) working days prior to the staff reduction.

B. If a reduction in staff is necessary, in determining which Association members are to be retained, a bargaining unit member whose position will be eliminated or reduced shall have the right to bump an equivalent position occupied by any of the three (3) least senior equivalent position employees, provided he/she is qualified. Employees shall be limited to bumping within his/her classification. For purposes of this agreement, employees shall be placed in one of the four (4) following classifications: library aide/court reporter aide, computers, food service or secretarial/clerical. No employee shall be moved between classifications unless mutually agreed upon by the parties in writing.

C. When filling vacancies which occur after a reduction in staff, qualified bargaining unit members, who have been released less than two (2) years, shall be re-hired in accordance with their system seniority providing they are qualified.

D. The College agrees that qualifications established will not be made in an arbitrary or capricious manner.

Plaintiff learned that the College was eliminating her positions on May 29, 2002. At that time, plaintiff's rights under article 12, section B vested; thus, plaintiff had "the right to bump an equivalent position occupied by any of the three (3) least senior equivalent position employees, provided [she was] qualified." Instead, however, plaintiff opted for layoff status, which gave her recall rights under article 12, section C. The language of section C is quite clear: "When filling vacancies which occur after a reduction in staff, qualified bargaining unit members, who have been released less than two (2) years, shall be re-hired in accordance with their system seniority providing they are qualified." It was undisputed that plaintiff was a qualified bargaining unit member; she was released within two years of the posting of the position in question; and she was the most senior qualified bargaining unit member applying for the position.

There was ample testimony regarding the past practice of part-time employees being unable to bump full-time employees. Plaintiff asserts that defendant must meet a higher standard by offering "substantially stronger evidence" to demonstrate that the past practice modified the clear and unambiguous contract term. *Port Huron*, *supra* at 327-328. However, section C is silent regarding distinctions among full-time and part-time employees subject to recall; the College and defendant had a tacit understanding of this purported past practice. See *Amalgamated Transit Union*, *supra* at 454-455. If both plaintiff and Kangas were exercising their rights under section B, then the past practice would control in this case. However, this case implicates plaintiff's recall rights under section C and purportedly to Kangas's rights under section B. Clearly, article 12 does not address such a situation. As a result, "[w]here the

agreement is silent or ambiguous, proof of mutual acceptance [of a past practice] may arise 'by inference from the circumstances.'" *Port Huron, supra* at 328 (citation omitted).

The testimony was dubious as to whether the past practice applied in such a case. Reasonable minds could differ as to whether the past practice related to bumping rights or recall rights. Defendant asserted that Kangas's case was analogous to plaintiff's case; however, defendant has misstated Kangas's deposition testimony. Defendant erroneously contends Kangas indicated that when she was laid off as a part-time employee, a less senior, full-time employee was appointed to the full-time payroll position she had applied for. Yet, Kangas's deposition provides only that she was on layoff status when she applied for the full-time payroll position in October or November 1992, and she worked in a temporary part-time position at the College from November 1992 until June 1993, whereafter she was again laid off. At the summary disposition hearing, it was unknown whether Kangas was laid off from a full-time or part-time position when she applied for the subsequent full-time payroll position.[1] Moreover, it was unknown whether Kangas was actually a part-time employee on layoff status when she applied for the position or whether she was merely unqualified for the position.

Additionally, defendant's admissions undermine an application of this past practice in this case because the current union president and dean of instruction explained that plaintiff could have bumped Kangas at this time.[2] Finally, while plaintiff worked as a three-quarter-time employee for approximately eight years, her most recent position was a temporary full-time position. Reasonable minds could differ over the applicability of the purported past practice to plaintiff's situation, as well as over plaintiff's employment status. After viewing the record in the light most favorable to plaintiff, genuine issues of material fact existed, because reasonable minds could differ as to whether there was an applicable past practice and whether the College breached the collective bargaining agreement. See *West, supra* at 183.

Next, plaintiff presented evidence of an employment-related conflict between herself and defendant's leadership. The Uniserv directors[3] indicated that plaintiff's case had merit, and it should have been advanced to arbitration. Conversely, defendant argues that there was no evidence connecting the alleged hostility towards plaintiff in the 1990s and defendant's decision not to advance plaintiff's grievance to arbitration. Contrary to defendant's contention, however, the composition of defendant's leadership has not changed throughout the years. Thus, the

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[1] Only a partial transcript of Kangas's deposition was included in the lower court file. Defendant bears the burden of furnishing the reviewing court with a record to verify the factual basis of any argument upon which reversal was predicated. *People v Elston*, 462 Mich 751, 762; 614 NW2d 595 (2000).

[2] Kangas filled a full-time position in the dean of instruction's Office when plaintiff was notified of her layoff.

[3] The Uniserv director acts as a business agent for the Union, often offering technical advice on contractual issues. One Uniserv director testified that his job was to be an advocate on the members' behalf; to deal with individual employment issues; to consult with union leaders and members; and to make recommendations based on his consultation.

connection between plaintiff's allegations from the 1990s and the July 16, 2003 denial of her arbitration request is clear.

Defendant provided testimony that its members voted against advancing plaintiff's grievance to arbitration based on the existence of a past practice. However, defendant's argument that it made a good faith decision not to advance plaintiff's grievance to arbitration is self-serving at best. Defendant's reliance on a dubious past practice would also raise a jury question as to its motives for rejecting plaintiff's request. This is underscored by the Uniserv directors' recommendations to advance plaintiff's grievance to arbitration. Further, defendant did not refute plaintiff's implicit allegation that the College and the union sought to get rid of her; the former Uniserv director supported this position by testifying that he "truly believe[d] that the administration at Gogebic Community College had it in for [plaintiff]." After viewing the record in the light most favorable to plaintiff, a genuine issue of material fact existed, because reasonable minds could differ as to whether defendant acted with "fraud, bad faith, hostility, discrimination, arbitrariness, caprice, gross nonfeasance, collusion, bias, prejudice, willful, wanton, wrongful and malicious refusal, personal spite, ill will, bad feelings, improper motives, misconduct, overreaching, unreasonable action, or gross abuse of its discretion in processing or refusing or failing to process [plaintiff's] grievance." See *Knoke*, *supra* at 487.

We conclude that the trial court did not err in denying defendant's motion for summary disposition. After viewing the record in the light most favorable to plaintiff, genuine issues of material fact existed, because reasonable minds could differ as to whether the College breached the collective bargaining agreement and whether defendant breached its duty of fair representation. See *West*, *supra* at 183.

## III. DIRECTED VERDICT

Next, defendant asserts that it was entitled to a directed verdict. Again, we disagree.

### A. Standard of Review

The trial court's decision on a motion for a directed verdict is reviewed de novo. *Derbabian v S & C Snowplowing, Inc*, 249 Mich App 695, 701; 644 NW2d 779 (2002). This Court evaluates a motion for a directed verdict "in the light most favorable to the nonmoving party, making all reasonable inferences in favor of the nonmoving party." *Meagher*, *supra* at 708. "Directed verdicts are appropriate only when no factual question exists upon which reasonable minds may differ." *Id.* This Court must recognize "'the unique opportunity of the jury and the trial judge to observe witnesses and the fact-finder's responsibility to determine the credibility and weight of the testimony'"; thus, it may not substitute its own judgment if reasonable jurors could honestly have reached different conclusions. *Foreman v Foreman*, 266 Mich App 132, 136; 701 NW2d 167 (2005), quoting *Wiley v Henry Ford Cottage Hosp*, 257 Mich App 488, 491; 668 NW2d 402 (2003).

### B. Analysis

First, plaintiff presented evidence at trial that the College breached the collective bargaining agreement. Plaintiff testified about her recall rights under the collective bargaining agreement. She indicated that she opted for layoff status, with the understanding that she would

be recalled if any position opened during a two-year period, for which she was qualified. Plaintiff testified that her benefits, vacation, and seniority accrued while she filled the temporary, full-time position. After that assignment concluded, plaintiff then returned to layoff status, waiting for another position to open. The former Uniserv director's letter was admitted at trial, stating in part that "[a]s a union, we would be obligated to file and pursue a grievance on behalf of [plaintiff] should the college fail to meet the requirements of Article 12, Section C." He also testified that the only way plaintiff could be refused that position was if the College found her unqualified based on an objective criterion. Plaintiff testified about her qualifications for the position, and she noted that the College did not interview her for the position. The former Uniserv director testified that he was familiar with only one specific instance of a past practice, but he learned of that incident after retirement from his position as Uniserv director. The current Uniserv director testified that "there was a practice with the college in regards to full-time rights versus part-time rights." However, he never asked the Union to provide a detailed history of the past practice.

We conclude that plaintiff presented evidence that raised a jury question as to whether the College breached the agreement. Various testimony, and the former Uniserv director's letter, supported plaintiff's position that the collective bargaining agreement was breached. Further, plaintiff's last position at the College was the temporary, full-time position, where her benefits, vacation, and seniority accrued. Yet, defendant relies on a single instance as constituting a past practice. Certainly, this also implicates a jury question as to whether a past practice truly existed. As such, reasonable jurors could reach different conclusions as to whether the College breached the collective bargaining agreement. See *Foreman*, *supra* at 136.

Second, plaintiff testified about her history of conflict with the Union, which began when she became the bookstore manager and continued when another College employee, Linda Montanati, bumped her from that position. Plaintiff also testified about defendant's purported strategy to use bumping as a negotiation strategy. When plaintiff bumped into a part-time position instead of bumping the next most senior employee, she effectively thwarted defendant's plan. The former Uniserv director testified that he advised defendant that if plaintiff was not recalled for the secretary to the dean of instruction position, the union must file a grievance on her behalf. The current Uniserv director pursued plaintiff's claim to the College.

Defendant fails to see the connection between plaintiff's allegations from the 1990s and the decision to reject her request for arbitration. Plaintiff presented ample evidence regarding the ill will that existed with defendant's officers beginning in the 1990s. Defendant's officers remained constant (although in different capacities as union officers) throughout the years. Additionally, there was testimony that the Uniserv directors agreed that plaintiff was entitled to the position in question, which calls into question why defendant rejected its own experts' recommendations. Thus, plaintiff presented evidence where jurors could reasonably reach different conclusions as to whether defendant acted with "fraud, bad faith, hostility, discrimination, arbitrariness, caprice, gross nonfeasance, collusion, bias, prejudice, willful, wanton, wrongful and malicious refusal, personal spite, ill will, bad feelings, improper motives, misconduct, overreaching, unreasonable action, or gross abuse of its discretion in processing or refusing or failing to process [plaintiff's] grievance." See *Knoke*, *supra* at 487.

After considering the evidence in the light most favorable to plaintiff, we conclude that the trial court did not err in denying defendant's motion for a directed verdict, because

reasonable minds could differ on whether the College breached the collective bargaining agreement and whether defendant breached its duty of fair representation. See *Meagher*, *supra* at 708.

## IV. JNOV

Finally, defendant contends that plaintiff failed to establish a breach of the duty of fair representation, and therefore, the trial court erred in denying defendant's motion for JNOV. We disagree.

### A. Standard of Review

This Court reviews de novo a trial court's denial of a motion for JNOV. *Garg v Macomb Co Community Mental Health Services*, 472 Mich 263, 272; 696 NW2d 646, amended by 473 Mich 1205(2005). This Court "'"review[s] the evidence and all legitimate inferences in the light most favorable to the nonmoving party."'" *Craig v Oakwood Hosp*, 471 Mich 67, 77; 684 NW2d 296 (2004) (citations omitted). A JNOV is appropriate only if the evidence failed to establish a claim as a matter of law. *Id*. This Court has previously held that "[o]nly when reasonable minds could not differ in the conclusion advocated by the movant may the jury's verdict be ignored." *Jernigan v Gen Motors Corp*, 180 Mich App 575, 585; 447 NW2d 822 (1989).

### B. Analysis

First, as discussed above, plaintiff presented evidence that the College breached the collective bargaining agreement. Defendant argued that evidence of the past practice supported a position that the College did not breach the collective bargaining agreement. All of defendant's witnesses testified about this past practice; however, some could not recall any specific examples of its occurrence. The previous and current Union presidents both cited Kangas's incident as the only example of such a past practice. Additionally, Patricia King's testimony implicated that example, because she received the full-time payroll position over Kangas, despite having less seniority. However, King noted that Kangas was a full-time employee on layoff when they applied for the full-time payroll position. Kangas testified that she was laid off in September 1992, and she was in a full-time position before she was laid off. Kangas then applied for the full-time payroll position, while she was laid off from another full-time position. She subsequently received a part-time position instead (in her deposition, she stated that she applied for the payroll position and then she worked in the temporary part-time position). The College hired King instead of Kangas, even though King had less seniority, but both were full-time employees. It can be reasonably inferred that Kangas was exercising her recall rights at this time.

The trial testimony clearly undermined defendant's argument that there was a past practice, where part-time employees could not bump full-time employees. Throughout the proceedings, defendant cited Kangas's failure to bump King for the payroll position as the example of the past practice. Yet, Kangas and King, the two individuals involved in that incident, testified that Kangas was a full-time employee on layoff status at the time in question. The trial court even concluded that the past practice was not supported by "experiential foundation." Further, question was raised as to whether Kangas even possessed the requisite

qualifications for the full-time payroll position. Based on all of the testimony and the reasonable inferences derived therefrom, reasonable jurors could disagree as to whether there was a past practice and whether the College breached the collective bargaining agreement. *Jernigan, supra* at 585.

Next, plaintiff testified about her history of conflict with the Union. Union officers denied that they undermined plaintiff's authority in the bookstore or advocated a job-sharing plan when plaintiff was bookstore manager. They also denied being upset by plaintiff's decision to bump into the three-quarter time bookstore position, thereby rejecting plaintiff's allegations that defendant planned on using the bumping process as a negotiation strategy. Several of defendant's witnesses expressed surprise over plaintiff's decision to bump into the three-quarter-time position in the bookstore. All of defendant's witnesses testified that their votes not to advance plaintiff's grievance to arbitration were not based on animosity towards plaintiff. Defendant argued that its members rejected plaintiff's proposed arbitration based on the existence of a past practice.

Defendant's claim that the "valid, long-standing understanding" or past practice was the basis for rejecting plaintiff's request for arbitration was dubious, and its argument that it did not act with hostility, in bad faith, or arbitrarily was entirely self-serving. Further, Montanati's testimony tended to support a reasonable inference that plaintiff was bumped out of her bookstore position as part of a negotiating ploy. Montanati testified that she initially bumped the least senior employee, but then changed her mind after the contract was not ratified. She testified that it was her choice to bump plaintiff, because she wanted to cause a disruption in the flow of the workforce. Based on all of the testimony and the reasonable inferences derived therefrom, reasonable jurors could disagree as to whether defendant breached its duty of fair representation. *Jernigan, supra* at 585.

We conclude that the trial court did not err in denying defendant's motion for JNOV. Plaintiff presented evidence from which the fact-finder could reasonably conclude that the College breached the collective bargaining agreement and defendant breached its duty of fair representation. Thus, reasonable jurors could have reached different conclusions, so the jury verdict must stand. See *Barrett v Kirtland Community College*, 245 Mich App 306, 312; 628 NW2d 63 (2001).

Affirmed.

/s/ Bill Schuette
/s/ Alton T. Davis