STATE OF MICHIGAN

COURT OF APPEALS

MICHIGAN AFSCME COUNCIL 25 and LORETTA BATES,

Plaintiffs-Appellants,

v

LIVINGSTON COUNTY ROAD COMMISSION and MICHAEL R. KLUCK,

Defendants-Appellees.

UNPUBLISHED
November 13, 2007

No. 274665
Livingston Circuit Court
LC No. 06-022295-CK

Before: Talbot, P.J., and Fitzgerald and Kelly, JJ.

PER CURIAM.

Plaintiffs, Michigan AFSCME Council 25 and Loretta Bates, appeal as of right the grant of summary disposition in favor of defendants, Livingston County Road Commission and Michael R. Kluck. We affirm.

On April 25, 2005, the Livingston County Road Commission (hereinafter "Road Commission") conducted an investigation involving two employees at their garage in Brighton, Michigan. The investigation pertained to derogatory remarks printed next to a newspaper photograph of a Road Commission supervisor posted in the garage. As part of the investigation, the Road Commission interviewed the two employees assigned to that location, Jerry Hoskins and Russell Carpenter. Present for the interviews were Steve Wasylk, Director of Operations for the Road Commission, Michael R. Kluck, the Road Commission's attorney, and Loretta Bates as a union representative for Michigan AFSCME Council 25 (hereinafter "Union").

Following denial of responsibility by Carpenter and Hoskins, the Road Commission obtained writing samples from the two employees. Based on comparisons by a forensic document analyst, it was determined that Carpenter wrote the remarks and his employment was terminated for gross insubordination and dishonesty on May 9, 2005.

Carpenter subsequently filed an application for unemployment benefits with the Michigan Employment Security Commission ("MESC"). At the benefits hearing Bates, testifying pursuant to a subpoena, acknowledged that she advised Carpenter to deny any allegations in order to permit the Union sufficient time to "put things together." Specifically, in response to questioning at the MESC hearing, Bates testified:

Q. Ms. Bates, at the investigatory interview- -if I understood your testimony correctly, you told Mr. Carpenter to lie, is that correct?

A. Yeah- -yeah, more or less.

Following the conclusion of Carpenter's MESC hearing, the Road Commission initiated a separate, independent investigation into the conduct of Bates. Based on Bates' admission that she counseled Carpenter to lie, the Road Commission terminated her employment for dishonesty on January 26, 2006. On that same day, the Union filed a grievance alleging Bates' wrongful termination, which was denied on February 6, 2006.

Significantly, the Union and Road Commission were parties to a collective bargaining agreement, which was in effect from October 1, 2001 to September 30, 2004. While the parties attempted to negotiate a successor agreement, the contract was extended on a day-to-day basis through December 28, 2004. Because the parties had reached an impasse in negotiations, the contract was deemed to have expired after December 28, 2004.

On July 25, 2006, the Union filed a civil complaint against the Road Commission and Kluck alleging (1) breach of contract, (2) violation of MCL 421.11(b)(1) asserting the wrongful or prohibited use of certain disclosures or information obtained in the MESC hearing, and (3) civil conspiracy between the Road Commission and their attorney in the violation of the cited statute. The Road Commission and Kluck filed motions for summary disposition pursuant to MCR 2.116(C)(4) and (C)(8), alleging lack of subject matter jurisdiction and failure to state a claim for which relief could be granted. Shortly before the scheduled hearing, the Union filed a motion to amend the complaint to add Bates as a party and to include a proposed new count for "violation of public policy." The Road Commission and Kluck filed a motion to strike the amended complaint and the matter proceeded to hearing on October 31, 2006.

Addressing Kluck's motion for summary disposition, the trial court noted that "Defendant Kluck is not a party to the collective bargaining agreement" entitling him to summary disposition on the breach of contract count. In reference to the second count, alleging violation of MCL 421.11(b)(1), the trial court granted summary disposition in favor Kluck because it did "not find that that particular statute covers the situation here where Ms. Bates was neither the employee nor the employer." The trial court determined that the civil conspiracy count must also fail because Kluck was acting as an agent of the Road Commission and, therefore, "you don't really have the two persons necessary to create such a conspiracy."

Considering the Road Commission's motion for summary disposition, the trial court dismissed plaintiffs' complaint in its entirety, stating in relevant part:

> [T]his Court does find that this particular claim lies within the jurisdiction of the Michigan Employment Relations Commission, MERC, . . . because the allegation as set forth . . . as to the breach of contract, really an allegation of an unfair labor practice under PERA, and . . . is an issue for MERC to decide and not this Court.

The trial court dismissed the conspiracy charge based on its determination that a civil conspiracy could not exist due to the absence of the number of persons necessary to establish a conspiracy.

The count pertaining to violation of MCL 421.11(b)(1) was dismissed against the Road Commission based on the trial court's finding that plaintiffs had failed to state a cause of action. Addressing the violation of public policy claim the trial court granted summary disposition, ruling:

> [W]hether you deal with it as a motion to strike or otherwise, it lacks merit for the reasons I've stated on the record previously. I would also point out without dealing with it in any great detail, I also agree with [the] argument that under a (C)(8), even if this Court has jurisdiction, I would find no cause of action as to any of the counts as to any of the parties. So therefore, I do grant summary disposition and I do dismiss this lawsuit then.

This Court reviews de novo motions brought under MCR 2.116(C)(4). *Cork v Applebee's of Michigan, Inc*, 239 Mich App 311, 315; 608 NW2d 62 (2000). "When viewing a motion under MCR 2.116(C)(4), this Court must determine whether the pleadings demonstrate that the defendant was entitled to judgment as a matter of law, or whether the affidavits and other proofs show that there was no genuine issue of material fact." *Id.* "A motion for summary disposition under MCR 2.116(C)(8) tests the legal sufficiency of a claim by the pleadings alone." *Smith v Stolberg*, 231 Mich App 256, 258; 586 NW2d 103 (1998). "All factual allegations supporting the claim, and any reasonable inference or conclusions that can be drawn from the facts, are accepted as true." *Id.* Summary disposition is appropriate only if the plaintiff's claim "is so clearly unenforceable as a matter of law that no factual development could establish the claim and justify recovery." *Id.*

Plaintiffs contend the trial court erred in determining that the MERC had exclusive jurisdiction over plaintiffs' claims. Plaintiffs assert the "just cause" provision of the collective bargaining agreement remained in effect at the time of Bates' termination. As a result, plaintiffs argue that the filing of a breach of contract action in circuit court to enforce the "just cause" provision of the contract was valid and appropriate. Further, plaintiffs assert on appeal that an "implied-in-fact" contract existed permitting their pursuit of a remedy in circuit court.

Defendants respond by arguing that plaintiffs are wrongfully attempting to assert a contract right, which can no longer exist due to expiration of the collective bargaining agreement. Defendants specifically note that Bates was terminated more than 12 months after the expiration of the contract and well after the parties had purportedly reached an impasse in negotiations. In addition, defendants assert that plaintiffs are wrongfully attempting to transform a labor dispute into a breach of contract claim. According to defendants, regardless of the label applied by plaintiffs to their claim, the true nature of the complaint is that of a pure labor dispute and, thus, within the exclusive province of the MERC to resolve.

The parties do not dispute that the Road Commission is a governmental employer and as such is governed by the Michigan Public Employment Relations Act ("PERA"), MCL 423.201 *et seq*. In addition, the parties concur that the Union is a labor union, certified by the MERC, and includes among its members Bates, who was functioning as an officer of the Union and in her capacity as a union representative when the events complained of in this litigation occurred.

Consistent with the mandates of PERA, when a labor contract expires, a public employer has a continuing duty to bargain in good faith to obtain a new contract with regard to "wages,

hours, and other terms and conditions of employment." MCL 423.215. Such conditions of employment are deemed "mandatory subjects" of bargaining, which "survive the contract by operation of law during the bargaining process." *Local 1467, Int'l Assoc of Firefighters, AFL-CIO v City of Portage*, 134 Mich App 466, 472; 352 NW2d 284 (1984). It is well recognized that neither party to an agreement may take unilateral action on a mandatory bargaining subject unless an impasse has been reached in contract negotiations. *Central Michigan Univ Faculty Ass'n v Central Michigan Univ*, 404 Mich 268, 277; 273 NW2d 21 (1978). If an employer violates the prohibition against unilateral action on a mandatory bargaining subject before an impasse occurs, an unfair labor practice has been committed. MCL 423.210(1)(e); MCL 423.216(a).

The crux of plaintiffs' assertion is that defendants improperly took unilateral action following expiration of the collective bargaining agreement and changed Bates' conditions of employment by failing to maintain the "just cause" requirement for termination. Plaintiffs' imply that termination of Bates' employment constituted a violation of Bates' statutory right, as a member of the Union, to engage in a protected activity, in violation of MCL 423.209, which 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.

Either claim places jurisdiction squarely within the purview of the MERC.

> It is consistently acknowledged that:
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> PERA is the exclusive remedy for any unfair labor practice charge, and the MERC has exclusive jurisdiction to adjudicate such charges. A plaintiff cannot obtain another remedy by framing the unfair labor practice as a different species of common-law or statutory claim invoking the jurisdiction of a different tribunal. If the allegations forming the plaintiff's cause of action implicate an unfair labor practice question, the claim is barred by the MERC's exclusive jurisdiction. [*Kent Co Deputy Sheriffs' Assoc v Kent Co Sheriff*, 238 Mich App 310, 325; 605 NW2d 363 (2000), aff'd in part and remanded in part on other grounds 463 Mich 353 (2000).]

Ultimately, the issue to be resolved is whether defendants improperly altered Bates' working conditions by denying her "just cause" protection and terminating her employment because of her conduct as a union representative. As such, the actual underpinnings of this complaint can only be construed as an unfair labor dispute, which must be brought before the MERC as the forum having exclusive jurisdiction. Therefore, the trial court's dismissal of plaintiffs' breach of contract claim based on a lack of subject matter jurisdiction was proper.

In addition, plaintiffs' contend their petition to the circuit court was proper because defendants violated an "implied-in-fact" contract. We acknowledge that courts do recognize the existence of an implied contract "where parties assume obligations by their conduct." *Williams v*

Litton Sys, Inc, 433 Mich 755, 758; 449 NW2d 669 (1989). A contract implied in fact is deemed to arise "when services are performed by one who at the time expects compensation from another who expects at the time to pay therefore." *In re McKim Est*, 238 Mich App 453, 458; 606 NW2d 30 (1999) (citation omitted).

Plaintiffs' contention regarding an implied-in-fact contract cannot survive based on plaintiffs' failure to plead a claim for breach of implied contract in either their original or amended complaints. The complaint referred only to the provisions of the collective bargaining agreement in the assertion of a contract breach. In addition, the past conduct of the parties, regarding continued adherence to provisions contained in the expired collective bargaining agreement, is insufficient to create an implied-in-fact contract.

The elements necessary to establish an implied contract include: (1) parties competent to contract, (2) a proper subject matter, (3) consideration, (4) mutuality of agreement, and (5) mutuality of obligation. *Mallory v Detroit*, 181 Mich App 121, 127; 449 NW2d 115 (1989). In particular, the requirement of mutual assent, defined as a "meeting of the minds" on all material facts, *Kamalnath v Mercy Hosp*, 194 Mich App 543, 548-549; 487 NW2d 499 (1992), must be demonstrated to establish the elements of an implied contract. *Pawlak v Redox Corp*, 182 Mich App 758, 765; 453 NW2d 304 (1999) (citation omitted). Plaintiffs failed to assert or put forth any evidence in support of their belief that the parties had attained an agreement regarding the imposition of a just cause termination requirement. Contrary to plaintiffs' assertion that an implied-in-fact contract was formed, in reality an impasse had been reached in the negotiations to achieve a new collective bargaining agreement. This impasse belies plaintiffs' assertion that a "meeting of the minds" necessary to establish an implied-in-fact contract requiring "just cause" for employment termination could have occurred.

The trial court's dismissal of plaintiffs' claim for breach of contract against Kluck was also proper. In order to establish a claim for breach of contract, a plaintiff must establish both the elements of the contract and its breach. See *Pawlak, supra* at 765. Kluck served as the attorney for the Road Commission. As an individual and agent of the Road Commission, Kluck lacked the legal capacity to be a party to the collective bargaining agreement or any alleged employment contract. In the absence of contractual privity, the liability of an attorney to a third party "is limited to cases involving fraud, collusion, or malicious prosecution," which have not been alleged by plaintiffs in reference to the breach of contract claim. *Schunk v Zeff & Zeff, PC*, 109 Mich App 163, 179; 311 NW2d 322 (1981).

Plaintiffs next argue that defendants violated the prohibitions of MCL 421.11(b)(1) by using information obtained during Carpenter's MESC hearing to subsequently terminate Bates. Defendants further contend that the improper use of this information constituted a violation of public policy and a civil conspiracy between the Road Commission and Kluck.

MCL 421.11 governs administration of the Michigan Employment Security Act, MCL 421.1 *et seq*. MCL 421.11(b)(1) states, in relevant part:

> Information obtained from any employing unit or individual pursuant to the administration of this act, and determinations as to the benefit rights of any individual shall be held confidential and shall not be disclosed or open to public inspection other than to public employees in the performance of their official

> duties under this act in any manner revealing the individual's or the employing unit's identity.

MCL 421.11(b)(1)(*iii*) further indicates that "the information and determinations shall not be used in any action or proceeding before any court or administrative tribunal unless the commission is a party to or a complainant in the action or proceeding." Plaintiffs additionally cite to the language of MCL 421.11(b)(1)(*iv*), which provides:

> Any report or statement, written or verbal, made by any person to the commission, any member of the commission, or to any person engaged in administering this act is a privileged communication, and a person, firm, or corporation shall not be held liable for slander or libel on account of a report or statement. The records and reports in the custody of the commission shall be available for examination by the employer or employee affected.

Plaintiffs contend that these statutory provisions preclude defendants' use of Bates' statements at the MESC hearing to terminate her employment.

At the outset, we note that many of the cases cited by plaintiffs in support of their position are federal court rulings, which do not specifically involve or address the MERC or PERA. "While federal precedent may often be useful as guidance in this Court's interpretation of laws with federal analogues, such precedent cannot be allowed to rewrite Michigan law. The persuasiveness of federal precedent can only be considered after the statutory differences between Michigan and federal law have been fully assessed, and, of course, even when this has been done and language in state statutes is compared to similar language in federal statutes, federal precedent remains only as persuasive as the quality of its analysis." *Garg v Macomb Cty Community Mental Health Services*, 472 Mich 263, 283; 696 NW2d 646 (2005).

"When construing statutory provisions, the task of this Court is to discover and give effect to the intent of the Legislature. Legislative intent is to be derived from the actual language of the statute, and when the language is clear and unambiguous, no further interpretation is necessary." *Storey v Meijer, Inc*, 431 Mich 368, 376; 429 NW2d 169 (1988) (citations omitted). Rather than provide the broad rights of confidentiality and privilege asserted by plaintiffs, the statute is restricted in scope and only prohibits "*the use of MESC information and determinations* in subsequent civil proceedings unless the MESC is a party or complainant in the action." *Id.* (emphasis added). This is consistent with the purpose of MCL 421.11(b)(1), which has been construed "less as a personal privilege than a systemic policy" intended to "support expeditious and nonadversarial unemployment proceedings." *Paschke v Retool Industries,* 445 Mich 502, 516, 518 n 15; 519 NW2d 441 (1994). As a result, the statutory provisions are inextricably linked to claimant or employer rights and have been interpreted only to preclude "representations made before the MESC" from being "used to estop claims in other forums." *Id.* at 447.

Contrary to plaintiffs' contention regarding the existence of an absolute privilege, case law does not address testimony by a witness at these proceedings other than to prohibit statements, such as those made by Bates to the Commission, from being used to establish liability for "slander or libel." MCL 421.11(b)(1)(*iv*). Defendants used the testimony of Bates as a witness. They did not misuse information or determinations by the MESC regarding a claimant's benefit rights. Consistent with the proscriptions imposed by MCL 421.11(b)(1)(*iii*),

the information was not used in a subsequent court or administrative proceeding. Finally, MCL 421.11(b)(1)(*iv*) specifically contradicts plaintiffs' assertion of confidentiality of information obtained within the hearings by mandating the accessibility of the Commission's "records and reports . . . for examination by the employer or employee affected."

Plaintiffs further plead the existence of a civil conspiracy involving the Road Commission and its attorney. "A civil conspiracy is a combination of two or more persons, by some concerted action, to accomplish a criminal or unlawful purpose, or to accomplish a lawful purpose by criminal or unlawful means." *Admiral Ins Co v Columbia Cas Ins Co*, 194 Mich App 300, 313; 486 NW2d 351 (1992). It is well recognized that "[a]n allegation of conspiracy, standing alone is not actionable." *Magid v Oak Park Racquet Club Assoc, Ltd*, 84 Mich App 522, 529; 269 NW2d 661 (1978). A plaintiff "must allege a civil wrong resulting in damage caused by the defendants." *Id.* Based on our determination that plaintiffs cannot sustain their breach of contract action and that MCL 421.11 was not violated, plaintiffs are unable to demonstrate a civil conspiracy as a conspiracy cannot exist absent the showing of an illegal act.

In addition, with reference to Kluck, there can be no conspiracy if he was acting as an agent of the Road Commission within the scope of their agency agreement. In *Blair v Checker Cab Co*, 219 Mich App 667; 558 NW2d 439 (1996), this Court ruled that "an agent or employee cannot be considered a separate entity from his principal or corporate employer, respectively, as 'long as the agent or employee acts only within the scope of his agency [or] employment.'" *Id.* at 674 (citation omitted). "An attorney often acts as his client's agent, and his authority may be governed by what he is expressly authorized to do as well as by his implied authority." *Uniprop, Inc v Morganroth*, 260 Mich App 442, 447; 678 NW2d 638 (2004). Because plaintiffs have failed to demonstrate that Kluck was acting in any capacity other than as an agent of the Road Commission, the trial court properly dismissed this claim.

Finally, we find that plaintiffs' assertion of a public policy violation is indistinguishable from their claim regarding violation of MCL 421.11(b)(1). Plaintiffs' allegation merely restates that defendants "through their concerted actions have violated Michigan public policy that protects individuals who testify before the MESC." They fail to specify any distinction from their assertion that Bates' testimony before the MESC was "confidential and/or privileged" when claiming violation of MCL 421.11(b)(1). As such, the allegation constitutes merely the same claim under a separate guise and was properly dismissed by the trial court for the reason that defendants' actions were not a violation of MCL 421.11(b)(1). Plaintiffs further assert Kluck's alleged admission that "an employer should not terminate an employee for testimony given at the MESC" precludes summary disposition on their public policy violation claim. As noted by the trial court, this admission could not "confer . . . subject matter jurisdiction where it does not exist." Finally, because the trial court granted summary disposition in accordance with MCR 2.116(C)(8), which is based solely on the pleadings, dismissal of plaintiffs' claims was appropriate.

Affirmed.

/s/ Michael J. Talbot
/s/ E. Thomas Fitzgerald
/s/ Kirsten Frank Kelly