STATE OF MICHIGAN

COURT OF APPEALS

MICHIGAN STATE UNIVERSITY, Respondent-Appellee,	UNPUBLISHED April 14, 2009
v	No. 281588 MERC
JOHN MORALEZ, Charging Party-Appellant.	LC No. 06-000305

Before: Murphy, P.J., and Fitzgerald and Markey, JJ.

PER CURIAM.

Charging party appeals the decision of the Michigan Employment Relations Commission (MERC) based on the decision and recommended order of the hearing referee dismissing his charge as barred by the statute of limitations and for failure to state a claim under the Public Employment Relations Act (PERA), MCL 432.210 *et seq*. We affirm.

Charging party was laid off from his position as a TV producer in 2003 at respondent university due to budgetary constraints. He applied for two positions with the university in 2004, but he was not hired for either. Charging party's collective bargaining agreement (CBA) apparently contains a provision that requires respondent to consider charging party after a layoff for any position for which he is "minimally qualified." He claims that respondent violated the CBA because it never intended to consider him for those positions and, instead, hired an external candidate. Charging party contacted his union and a grievance was filed on his behalf in February 25, 2005, alleging "Improper Lay-Off," "Failure to Recall," and "Violation of Article 16 and Article 1 of the Collective Bargaining Agreement." A step 3 grievance hearing was held on April 7, 2005 and the grievance was denied. Charging party filed a charge against the union on October 26, 2005, alleging unfair labor practices claiming that his union failed to represent him regarding his lay-off. This charge was dismissed on May 25, 2007.

On December 21, 2006, charging party filed an unfair labor practices charge with MERC, claiming that respondent violated PERA §§ 10(1) and 10(1)(E). The complaint did not specify any facts to support the allegation. He was ordered to show cause why the charge should not be dismissed for failure to state a claim upon which relief can be granted. According to the PERA, "no complaint shall issue upon any unfair labor practice occurring more than 6 months prior to the filing of the Charge . . . ." MCL 423.216(a). He did not respond to the order. On January 11, 2007, he filed a motion for summary disposition with MERC, asserting there were no genuine issues of material fact as to his unfair labor practice charge.

According to charging party, he recently discovered documents that he claims respondent and his union fraudulently concealed from him at the April 7, 2005 hearing. He claims these documents show that respondent engaged in unfair labor practices, but makes no legal argument to support these allegations. He also claims that because of the fraudulent concealment, the statute of limitations on the unfair labor practices charge should be tolled, but he does not indicate when he discovered these documents and does not specify when the time limit should begin to accrue

On January 19, 2007, the hearing referee issued his decision and recommended order dismissing charging party's complaint, stating that he failed to meet the pleading requirements of 2002 AC, R 423.151(2). On that same day, charging party filed amendments to his original charges. The referee rejected the amendments because they were proposed after his decision had been issued, because the statute of limitations had run, and because charging party lacks standing to bring a claim under PERA § 10(1)(e), which regulates relationships between employers and labor organizations. On January 26, 2007, charging party filed another proposed amended charge that was also rejected due to futility and expiration of the statute of limitations. On February 2, 2007, charging party filed exceptions to the referee's recommended order. Thereafter, charging party filed a second motion for summary disposition on February 2, 2007. MERC concluded that charging party failed to identify any newly discovered fact that is relevant or material and that his allegations of fraud were conclusory. Regardless of whether the documents charging party presented were newly-discovered, MERC stated they would not have caused it to reach a different result in the previous charge against the union. MERC also decided that the charges in the instant case do not set forth an allegation of a PERA violation by respondent and did not lead MERC to decide that the charge was timely filed.

Charging party argues on appeal that MERC improperly made factual findings, failed to follow the administrative code, denied him his right to oral argument, and failed to toll the statute of limitations. "We will set aside a legal ruling by MERC if it runs afoul of the law or is otherwise tainted by a serious legal error." *Michigan Ed Assoc v Christian Bros Institute*, 267 Mich App 660, 663; 706 NW2d 423 (2005). We afford less deference to MERC legal rulings because our review of legal questions remains de novo. *Id*. MERC's legal conclusions may only be disturbed if they violate a constitutional or statutory provision or if they are based on a substantial and material error of law. *City of Lansing v Carl Schlegel, Inc*, 257 Mich App 627, 630; 669 NW2d 315 (2003).

Charging party's argument that there was no genuine issue of material fact fails to recognize MERC's decision was based on the expiration of the 6-month statute of limitations and on his failure to state a claim upon which relief could be granted. MCL 423.216(a); 2002 AC, R 423.165(2)(d). He also attempts to argue that his allegations are unopposed and that he is therefore entitled to judgment as a matter of law. It is true that respondent neither filed an answer to his charge nor a response to his motion for summary disposition. But respondent was not required to do so:

> Each respondent may file with the commission a signed original . . . answer to the complaint and attached charge within 10 days after receipt . . . . Failure to file an answer shall not constitute an admission of any fact alleged in the charge, nor shall it constitute a waiver of the right to assert any defense. [2002 AC, R 423.155(1).]

Nothing in the rule requires respondent to file an answer, and the rule requires that failing to do so shall not be taken to constitute any admission. The rules for summary disposition also do not allow for any negative inference when an opposing party does not respond. Additionally, the rule regarding summary disposition in MERC proceedings does not require that an opposing party file a written response to MERC. 2002 AC, R 423.165. Despite the lack of response, respondent did not concede charging party's allegations.

Charging party next claims that the hearing referee and MERC made factual findings and raised defenses on behalf of respondent. This is a mischaracterization. The referee and MERC need not rely on any party to raise the statute of limitations as a bar to recovery. According to the PERA, "no complaint shall issue upon any unfair labor practice occurring more than 6 months prior to the filing of the Charge . . . ." MCL 423.216(a). Although he claims in his charge that respondent engaged in unlawful acts beginning in August 2006, charging party was laid off in 2003 and had applied for other positions in 2004. He filed his charge in December 2006, more than 3 years after his employment ended and the six-month statute of limitations had clearly expired. The limitations period under PERA commences when the person knows or reasonably should know of the claimed offense that caused his injury and has good reason to believe that the act was improper. *City of Huntington Woods v Wines*, 122 Mich App 650, 652; 332 NW2d 557 (1983). Here, charging party's suspicions of respondent's alleged repudiation of the CBA, failure to hire him for another position, and fabrication of reasons to lay him off and not to rehire him date back to 2004. By then he had applied for other positions with respondent and received emails in November of that year, which he interprets to mean that he was improperly denied those jobs.

Charging party claims that the statute of limitations should be tolled, analogizing MCL 600.5855 to these administrative proceedings, because respondent had fraudulently concealed newly discovered documents from charging party during his step 3 grievance hearing. MCL 600.5855 states, "[I]f a person who is or may be liable for any claim fraudulently conceals the existence of the claim of the identity of any person who is liable for the claim," the statute of limitations is tolled. Charging party makes no legal argument as to why this statute might apply here. Regardless, he neither describes when he discovered the "concealed" documents, nor does he make any legal argument as to whether they were intentionally kept from him and whether that constituted fraudulent concealment. There are no facts in the record that can lead to these conclusions. MERC properly decided not to toll the statute of limitations.

Charging party next asserts that his proposed amended charges were improperly denied; however, the amendments neither provided any additional factual support or legal arguments for his claims nor an explanation as to the untimeliness of the charge. They were properly rejected.

Charging party appears to also argue that respondent was denied its right under 2002 AC, R 423.153 to file objections to the proposed amendments. The rule states in relevant part:

> (2) Where an amendment is made in writing, each respondent may file with the commission a signed original and 4 copies of an objection to the amended charge within 10 days after receipt thereof, and at the same time shall serve a copy of the objection on each party.

> (3) If objection to the amended charge is not filed or stated orally on the record, then the commission or administrative law judge designated by the commission may permit the amendment upon such terms as are just and consistent with due process. [2002 AC, R 423.153(2), (3).]

The referee apparently did not provide respondent ten days to respond. But this is irrelevant to charging party's cause and harmless error because the amendments were rejected.

Charging party also argues that he was improperly denied opportunity for oral argument. According to the administrative code, a party moving for summary disposition may make a request for oral argument at the end of the motion. 2002 AC, R 423.161(4). The record indicates that charging party failed to make such a request at the end of his motion, so under the operative rule, the referee and MERC were within their rights to rule without oral argument.

We affirm. Respondent-Appellee being the prevailing party, may tax costs pursuant to MCR 7.219.

/s/ William B. Murphy
/s/ E. Thomas Fitzgerald
/s/ Jane E. Markey