STATE OF MICHIGAN

COURT OF APPEALS

BRIAN YINGER

Plaintiff-Appellant,

v

JOSEPH C. BROMLEY, NEIL TRAINOR, MARJORIE A. POWELL, RONALD F. DEZIEL, and the CITY OF DEARBORN,

Defendants-Appellees.

UNPUBLISHED
December 13, 1996

No. 184789
LC No. 94-409844 CK

Before: Fitzgerald, P.J., and Cavanagh and N.J. Lambros,* JJ.

PER CURIAM.

Plaintiff appeals as of right the trial court order granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(7)[1] in this labor dispute. We affirm.

When reviewing a motion for summary disposition granted pursuant to MCR 2.116(C)(7), this Court must accept as true the plaintiff's well-pleaded allegations and construe them in a light most favorable to the plaintiff. The motion should not be granted unless no factual development could provide a basis for recovery. This Court reviews a summary disposition determination de novo as a question of law. *Florence v Dep't of Social Services*, 215 Mich App 211, 213-214; 544 NW2d 723 (1996).

Plaintiff argues that the trial court erred when it determined that the agreement to return plaintiff to duty after an independent doctor found him fit for duty could only be enforced through the grievance/arbitration procedures provided in the collective bargaining agreement between the City of Dearborn and the Police Officers Association of Michigan, and could not be enforced by the court. We disagree.

In Article I of the collective bargaining agreement, the parties agreed that issues related to "pay, wages, hours, and conditions of employment" were covered by the collective bargaining agreement.

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* Circuit judge, sitting on the Court of Appeals by assignment.

Although the term "conditions of employment" is not defined in the collective bargaining agreement, it is reasonable to assume that the term encompasses fitness for duty. In addition, the collective bargaining agreement contains a paragraph setting forth the management rights of the city. The agreement to reinstate plaintiff if an independent doctor found him fit for duty was made pursuant to the management rights given to the City of Dearborn by the collective bargaining agreement. Plaintiff has presented no evidence that indicates that the agreement at issue was independent of the collective bargaining agreement.

It is well-settled that a civil service employee must exhaust his administrative remedies before filing suit in circuit court. *Mollett v Taylor*, 197 Mich App 328, 337; 494 NW2d 832 (1992). This Court has recognized exceptions to this general rule only where a plaintiff is seeking remedies not created under the labor contract or where an employee's efforts to proceed with contractual remedies would be futile. *Sankar v Detroit Bd of Education*, 160 Mich App 470, 474; 409 NW2d 213 (1987). Neither exception applies in the instant case.

Furthermore, plaintiff cannot pursue his claim against defendants unless he is successful in his claim of breach of the duty of fair representation. See *Knoke v East Jackson Public School District*, 201 Mich App 480, 485; 506 NW2d 878 (1993). In the present case, plaintiff's union determined that defendants did not breach the collective bargaining agreement. The Michigan Employment Relations Commission dismissed plaintiff's claim against the union for breach of the duty of fair representation and found no evidence that defendants breached the collective bargaining agreement. Therefore, plaintiff is not entitled to bring a breach of contract action against defendants in circuit court. Accordingly, the trial court properly granted defendants' motion for summary disposition.

Affirmed.

/s/ E. Thomas Fitzgerald
/s/ Mark J. Cavanagh
/s/ Nicholas J. Lambros

[1] Defendants brought their motion for summary disposition pursuant to MCR 2.116(C)(8) and (10). Although the trial court did not specify the subrule under which it granted defendants' motion, MCR 2.116(C)(7) is the proper subrule for deciding whether to grant a motion for summary disposition for failure to exhaust grievance and arbitration procedures. *Mollett v Taylor*, 197 Mich App 328, 332; 494 NW2d 832 (1992). Therefore, we assume that summary disposition was granted pursuant to MCR 2.116(C)(7).