STATE OF MICHIGAN

COURT OF APPEALS

NEWAYGO COUNTY INTERMEDIATE SCHOOL DISTRICT,

Plaintiff-Appellee,

v

NEWAYGO COUNTY INTERMEDIATE SCHOOL DISTRICT SERVICE STAFF ASSOCIATION,

Defendant-Appellant.

UNPUBLISHED
November 2, 1999

No. 212060
Newaygo Circuit Court
LC No. 97-017638 CL

Before: Bandstra, C.J., and Markman and Meter, JJ.

PER CURIAM.

Defendant, a bargaining representative for plaintiff's employees, appeals by right from an order granting plaintiff summary disposition under MCR 2.116(C)(10). Defendant sought to compel the arbitration of a grievance against plaintiff by one of plaintiff's custodial employees, Lance Vandever. Plaintiff then sought a declaratory judgment that it need not arbitrate the grievance because the alleged injury – the termination of Vandever's employment – arose after the expiration of a collective bargaining agreement ("CBA") that allowed defendant to compel arbitration. The circuit court agreed that plaintiff need not submit to arbitration because the alleged injury arose after the CBA expired. We affirm.

Defendant argues that the arbitrator, not the circuit court, should have decided whether the basis for Vandever's grievance arose after the expiration of the CBA such that compelled arbitration was inappropriate. Whether the circuit court had the authority to make this decision is a question of law. We review questions of law de novo. *Faircloth v Family Independence Agency*, 232 Mich App 391, 406; 591 NW2d 314 (1998). In *City of Huntington Woods v Ajax Paving Industries, Inc (After Remand)*, 196 Mich App 71, 74; 492 NW2d 463 (1992), this Court stated that "[t]he existence of an arbitration contract and the enforceability of its terms are judicial questions that cannot be decided by the arbitrator." Because the issue here was *whether a contract providing for arbitration existed* at the time the basis for Vandever's grievance arose, the circuit court properly decided the issue of arbitrability in the instant case. *Id.* at 74.

Defendant cites *Brown v Holton Public Schools*, 397 Mich 71; 243 NW2d 255 (1976), and *Amtower v William C Roney & Co (On Remand)*, 232 Mich App 226; 590 NW2d 580 (1998), for the proposition that the arbitrator, not the court, should determine whether grievances have been timely filed for purposes of arbitration. These cases are distinguishable from the instant case, however, because they deal with the internal procedural requirements contained in existing arbitration contracts. *Brown, supra* at 72-74; *Amtower, supra* at 231-233. In other words, these cases dictate that the arbitrator, not the court, must decide whether a grievance was timely filed under a limitations period set forth in a valid arbitration agreement. Here, the issue was not whether Vandever violated a limitations period contained in the CBA's arbitration clause; instead, the issue was whether *the arbitration agreement even existed* at the time Vandever's basis for a grievance arose. Accordingly, under *Huntington Woods, supra* at 74, the court was the proper forum for the resolution of the issue. See also *Ottawa County v Jaklinski*, 423 Mich 1, 25-26 (Williams, C.J.), 29 (Brickley, J.); 377 NW2d 668 (1985) (Court, not arbitrator, decided whether an alleged wrongful discharge occurring after the expiration of an arbitration agreement was subject to mandatory arbitration).

Defendant additionally argues that because Vandever received notice during the CBA's existence that plaintiff intended to terminate his employment, the basis for Vandever's grievance arose during the CBA's existence and the trial court therefore erred in failing to compel arbitration. We first note that because defendant did not raise this issue in its statement of questions presented on appeal, we are to treat it as unpreserved. *Phinney v Perlmutter*, 222 Mich App 513, 564; 564 NW2d 532 (1997); MCR 7.212(C)(5). Indeed, defendant admits that "[t]he sole question before this . . . Court is . . . whether the lower court erred by deciding that it, rather than an arbitrator, should decide if [defendant's] grievance was timely filed . . . ." We may nevertheless review this unpreserved issue, however, because it involves a question of law, and the facts necessary for its resolution have been presented. *Poch v Anderson*, 229 Mich App 40, 52; 580 NW2d 456 (1998).

We disagree that the basis for Vandever's grievance arose during the existence of the CBA. The Supreme Court indicated in *Moll v Abbott Laboratories*, 444 Mich 1, 15-16; 506 NW2d 816 (1993), that (1) a cause of action for personal injury accrues when a plaintiff can allege, in a complaint, each element of the asserted claim, and (2) injury is one of the essential elements in a personal injury action. Although *Moll* dealt with the limitation period in an action for personal injuries, we see no reason to depart from this principle in the context of the instant case, because (1) a valid action for employment discrimination also requires the existence of an injury, and (2) the instant case can be analogized to a case involving a statute of limitations issue, since the central issue here, as in a statute of limitations case, is the date the cause of action accrued. Here, Vandever's injury occurred not when he received notice regarding his layoff, but rather when the layoff actually occurred, after the expiration of the CBA. Indeed, Vandever had the right to work, and thus receive the benefits of work, until his termination date. Accordingly, Vandever did not have an actionable grievance until after the CBA expired, and the trial court therefore did not err in ruling that his claim was not subject to mandatory arbitration. See *Ottawa, supra* at 19-26 (Williams, C.J.), 29 (Brickley, J.). See also *Sumner v Goodyear Tire & Rubber Co*, 427 Mich 505, 533; 398 NW2d 368 (1986) (a cause of action does not accrue until an injury has occurred), *Northville Public Schools v Civil Rights Comm*, 118 Mich App 573, 579; 325 NW2d 497 (1982) ("a mere threat to discriminate or an announcement of an

intention to discriminate" does not constitute an act of discrimination), and *Salisbury v McLouth Steel*, 93 Mich App 248, 250; 287 NW2d 195 (1979) (a cause of action for wrongful discharge accrues on the date of discharge).

We note that the United States Supreme Court has held, in construing a statute of limitations contained in a federal statute, that an action for wrongful discharge accrues when an employee receives notice that his employment will be terminated. *Sumner, supra* at 533, citing *Chardon v Fernandez*, 454 US 6, 8; 102 S Ct 28; 70 L Ed 2d 6 (1981). The Michigan Supreme Court has suggested, in dicta, that this holding might conflict with "the principle, well-established in Michigan law, that a cause of action does not accrue until an injury has occurred." *Sumner, supra* at 533. See also *Jacobson v Parda Federal Credit Union*, 457 Mich 318, 327, n 20; 577 NW2d 881 (1998). We find no such conflict, however, in the context of the instant case, since (1) the federal case law cited in *Sumner* arose out of the interpretation of specific federal statutes, and (2) none of these federal statutes governed the specific issue in the instant case, i.e., whether arbitration of a wrongful discharge claim can be compelled if a notice of termination is received during the existence of a CBA requiring arbitration. Accordingly, we remain convinced that Vandever did not have an actionable claim until after the expiration of the CBA and that compelled arbitration was therefore inappropriate.[1] See *Moll, supra* at 15-16, and *Ottawa, supra* at 19-26 (Williams, C.J.), 29 (Brickley, J.).

Defendant raises the additional, unpreserved arguments that the trial court, in ruling on whether Vandever's claim was subject to mandatory arbitration, (1) improperly considered the underlying merits of the claim, and (2) improperly based its decision, in part, on the fact that Vandever had a pending claim before the Michigan Department of Civil Rights. We need not consider these arguments, since even if the trial court erred in these respects, it ultimately reached the correct result. See *Yerkovich v AAA*, 231 Mich App 54, 68; 585 NW2d 318 (1998).

Affirmed.

/s/ Richard A. Bandstra
/s/ Patrick M. Meter

Markman, J. did not participate

[1] We note that even if we assume, for purposes of argument only, that the instant case could be governed by federal arbitration law or federal labor relations law – in which case binding federal precedent would apply, see *Koester v Novi*, 213 Mich App 653, 668; 540 NW2d 765 (1995), reversed in part on other grounds 458 Mich 1 (1998) (federal precedent binds this Court on issues of federal law) – there apparently is no federal law in these areas holding that arbitration of a wrongful discharge claim can be compelled if a notice of termination, but not the actual termination, occurs during

the existence of a CBA requiring arbitration. Indeed, defendant itself cites no binding federal authority in these areas. Accordingly, such an assumption would not require reversal in this case.