

STATE OF MICHIGAN
COURT OF APPEALS

BRIAN YINGER,

Plaintiff-Appellant,

v

POLICE OFFICERS ASSOCIATION OF
DEARBORN and POLICE OFFICERS
ASSOCIATION OF MICHIGAN,

Defendant-Appellee.

UNPUBLISHED

December 7, 1999

No. 207707

Wayne Circuit Court

LC No. 96-642748-CL

Before: Gribbs, P.J., and Murphy and Griffin, JJ.

PER CURIAM.

Plaintiff Brian Yinger appeals as of right from an order granting defendants' motion for summary disposition pursuant to MCR 2.116(C)(10). We affirm.

Plaintiff filed a lawsuit against the instant union defendants, alleging that defendants had breached their duty of fair representation by refusing to file a grievance against the city when the city forced plaintiff to accept non-duty disability retirement status. Specifically, plaintiff alleged that defendants based their refusal on an irrational, perfunctory, and arbitrary reason. On appeal, plaintiff contends that the trial court improperly granted summary disposition in favor of defendants pursuant to MCR 2.116(C)(10). We disagree. This Court reviews the trial court's grant of summary disposition de novo. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). Therefore, we must review the record in the same manner as the trial court to determine whether the movant was entitled to judgment as a matter of law. *Morales v Auto-Owners Ins*, 458 Mich 288, 294; 582 NW2d 776 (1998).

For approximately seventeen years, plaintiff served as a police officer for the City of Dearborn (city) until the city placed plaintiff on non-duty disability retirement on March 30, 1995. The city decided to retire plaintiff because two psychological evaluations indicated that plaintiff was unfit to continue working as a police officer. Plaintiff initially filed an unfair labor practice charge with the Michigan Employment Relations Committee (MERC) in January 1994, alleging that defendants breached their duty of fair representation by failing to file a grievance on his behalf.¹ In November

1994, a hearing officer recommended a dismissal of the charge, and MERC affirmed the hearing officer's finding in January 1995. After exhausting his administrative remedies with MERC, plaintiff filed the present lawsuit in October 1996, alleging that defendants breached their duty of fair representation by refusing to file a grievance on his behalf. In October 1997, defendants moved for summary disposition, which the court granted.

Under Michigan law, a complainant must satisfy a two-pronged test to prevail on a claim of unfair representation. *Knoke v East Lansing School Dist*, 201 Mich App 480, 488; 506 NW2d 878 (1993). First, a complainant must establish a breach of the underlying collective bargaining agreement. *Id.*; *Martin v East Lansing School Dist*, 193 Mich App 166, 181; 483 NW2d 656 (1992). Second, if the complainant can establish that the underlying collective bargaining agreement was breached, then the complainant must establish a breach of the union's duty of fair representation. *Knoke, supra* at 488. If a complainant can establish a breach of the collective bargaining agreement, then the union's conduct is analyzed under the fair representation standard set forth in *Goolsby v Detroit*, 419 Mich 651, 660, 664; 358 NW2d 856 (1984). The three responsibilities that comprise the fair representation standard are "(1) 'to serve the interests of all members without hostility or discrimination toward any', (2) 'to exercise its discretion with complete good faith and honesty', and (3) 'to avoid arbitrary conduct'." *Id.* at 664, quoting *Vaca v Sipes*, 386 US 171, 177; 87 S Ct 903; 17 L Ed 2d 842 (1967). To establish a breach of the duty of fair representation, a plaintiff must demonstrate that the union has failed to comply with any of the three responsibilities. *Id.*

In the present case, plaintiff argues that defendants' refusal to file a grievance on his behalf should be analyzed under the *Goolsby* standard because defendants' reason was irrational, perfunctory, and arbitrary. We disagree for two reasons. First, and most significantly, plaintiff failed to establish that the city breached the underlying collective bargaining agreement.² Plaintiff claims that the city violated the collective bargaining agreement by placing him on non-duty disability retirement, which plaintiff alleges is tantamount to being constructively discharged. Plaintiff's retirement, although involuntary, was premised on competent evidence that indicated that plaintiff was unfit to work as a police officer. Because the city did not breach the collective bargaining agreement, defendants owed no duty of fair representation to plaintiff, and it is unnecessary to analyze defendants' conduct under the *Goolsby* standard. *Knoke, supra* at 488; *Martin, supra* at 181.

Second, even if defendants owed a duty of fair representation to plaintiff, the *Goolsby* holding still does not advance plaintiff's claim. The *Goolsby* Court held that a union's unexplained failure to process an employee's grievance constitutes a violation of the duty of fair representation. *Goolsby, supra* at 682. In the present case, defendants explained that after conducting a thorough investigation into plaintiff's claim, they could not reasonably or logically file a grievance. Defendants were satisfied that the city's decision to retire plaintiff was based on competent psychological evaluations. This Court has noted that "[a] union has considerable discretion to decide which grievances shall be pressed to arbitration and which shall be settled, and must be permitted to assess each grievance with a view to individual merit." *Knoke, supra* at 486. A union's discretion can be attacked only by a showing that the union did not adequately investigate the employee's claim, and that the union acted with "fraud, bad faith, hostility, discrimination, arbitrariness, caprice, gross nonfeasance, collusion, bias, prejudice, wilful,

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. Plaintiff failed to rebut defendants’ proffered reason for refusing to file a grievance by demonstrating that defendants acted with any of the conduct listed in *Knoke*. *Id.*

Although this Court is liberal in finding a genuine question of material fact, *Marlo Beauty Supply, Inc v Farmers Ins Group of Companies*, 227 Mich App 309, 320; 575 NW2d 324 (1998), the nonmovant must establish the existence of a material fact by admissible evidence, *Maiden v Rozwood*, 461 Mich 109, 121; 597 NW2d 817 (1999). Because plaintiff has based his claim on conjecture and mere speculation without any documentary evidence, plaintiff has failed to provide specific facts that would show that there is a genuine issue for trial. *Detroit v GMC*, 233 Mich App 132, 139-140; 592 NW2d 732 (1998). Therefore, the circuit court properly entered summary disposition under MCR 2.116(C)(10).

Affirmed.

/s/ Roman S. Gribbs
/s/ William B. Murphy
/s/ Richard Allen Griffin

¹ In March 1994, plaintiff filed a lawsuit in circuit court against the city, the police chief, and the Dearborn Civil Service Commission, alleging that his due process rights were violated, and that the city breached the provision of the collective bargaining agreement that stated that the city would reinstate plaintiff if an independent physician found him psychologically fit for duty. The trial court entered an order of summary disposition for the city, the chief of police, and the Dearborn Civil Service Commission. Plaintiff only appealed the breach of contract claim, and a previous panel of this Court affirmed the trial court’s grant of summary disposition pursuant to MCR 2.116(C)(7). In an unpublished opinion, the panel noted that the agreement between the city and the union regarding the use of an independent physician was not independent of the collective bargaining agreement, and that plaintiff offered no evidence that the city breached the collective bargaining agreement. Therefore, the panel affirmed the grant of summary disposition. *Yinger v Bromley*, unpublished opinion per curiam of the Court of Appeals, issued December 13, 1996 (Docket No. 184789).

² See *supra* note 1.