

STATE OF MICHIGAN
COURT OF APPEALS

ANN MOORE,

Plaintiff-Appellant,

v

INGHAM COUNTY PROSECUTING
ATTORNEY, INGHAM COUNTY BOARD OF
COMMISSIONERS, and COUNTY OF INGHAM,

Defendants-Appellees.

UNPUBLISHED

May 16, 2000

No. 212994

Ingham Circuit Court

LC No. 97-085142-CK

Before: Fitzgerald, P.J., and Neff and Smolenski, JJ.

PER CURIAM.

Plaintiff appeals as of right the orders granting summary disposition in favor of defendants pursuant to MCR 2.116(C)(10) in this wrongful discharge action. We reverse and remand.

Plaintiff was hired in 1981 by then Ingham County Prosecutor Peter D. Houk as an assistant prosecutor. At that time, defendants and the Ingham County Employees Association (ICEA) had previously negotiated a collective bargaining agreement that governed assistant prosecutors' terms and conditions of employment. The pertinent portions of that collective bargaining agreement stated:

Neither the Constitutional nor the statutory rights, duties and obligations of the County of Ingham and/or the Ingham County Prosecuting Attorney shall in any way whatsoever be abridged unless specifically provided for under the terms of this Agreement.

* * *

F. SENIORITY

* * *

Section 4. Loss of Seniority/Employment. An employee shall lose his/her seniority and job for any of the following reasons:

* * *

b. He/she is discharged for just cause and is not reinstated.

K. GRIEVANCE PROCEDURE FOR DISCIPLINARY ACTION.

Section 1. Intent. All disciplinary grievances are covered exclusively by the provisions of this Article [and] [t]he ICEA recognizes that Assistant Prosecuting Attorneys serve at the pleasure of the Prosecuting Attorney.

Houk averred that he never agreed to just-cause employment for the assistant prosecutors in any of the collective bargaining agreements while he was prosecutor.

In 1986, Donald E. Martin was appointed to replace Houk as the prosecutor. The 1986-1987 collective bargaining agreement was identical in pertinent part to the earlier agreement but deleted the entire grievance procedure for disciplinary actions. The 1992 to 1996 collective bargaining agreement was identical in pertinent part to the 1986-87 agreement. In 1993, plaintiff took an oath of office and signed appointment papers to serve as an assistant prosecutor. In the appointment papers, Martin appointed plaintiff as an assistant prosecutor for a term commencing on January 1, 1993, to December 31, 1996, or any portion thereof, at his pleasure.

On June 2, 1995, the chief assistant prosecutor, with Martin's approval, discharged plaintiff from her job. The ICEA filed a grievance with defendants on behalf of plaintiff alleging that plaintiff was discharged without just cause and that she lost her seniority. Defendants denied the grievance on the ground that the 1992 to 1996 collective bargaining agreement did not provide just-cause employment for assistant prosecutors and did not contain a grievance for disciplinary actions of an assistant prosecutor.¹

On January 1, 1997, plaintiff filed a two-count complaint against defendants alleging wrongful discharge and denial of due process. On January 14, 1998, plaintiff filed a motion to compel discovery because defendants allegedly had not produced relevant documents and responded to certain interrogatories. Plaintiff also sought an order compelling the deposition of Martin. On that same date, defendants filed a motion for summary disposition, arguing that Martin did not waive statutory rights to have the assistant prosecutor serve at his pleasure and that the unambiguous language of the just-cause provision in the 1992 - 1996 collective bargaining agreement dealt only with the issue of loss of seniority.

At the February 25, 1998, hearing on the motions, the trial court instructed the parties to resolve the discovery problem outside the courtroom and if a resolution could not be met, the complaining party could then come back to court to resolve the matter. We are unable to ascertain from the record, however, whether plaintiff or defendants made a good-faith effort to resolve the discovery dispute. Plaintiff presented documentary evidence that the ICEA agreed to remove the

grievance procedure for disciplinary actions with the understanding that assistant prosecutors would “then be free to enforce their contractual rights, including the just-cause provision, in the courts.” However, defendants presented evidence that even though the language that the assistant prosecutors served at the pleasure of the prosecutor was deleted and the just-cause language remained in the new collective bargaining agreement, the just-cause provision only reflected the terms of seniority and the assistant prosecutors were still serving at the pleasure of the prosecutor under MCL 49.35; MSA 5.795.² Following the hearing, the trial court granted defendants’ motion for summary disposition pursuant to MCR 2.116(C)(10) on the ground that there was no genuine issue of material fact that Martin did not waive the statutory right to have the assistant prosecutors serve at his pleasure.

Plaintiff argues that summary disposition was premature because it was granted before Martin was deposed. Plaintiff claims that Martin’s testimony was vital to discovery because it would reveal whether Martin waived the statutory right to have the assistant prosecutors serve at his pleasure.

Generally, summary disposition granted before discovery on a disputed issue is complete is considered premature. *Hasselbach v TG Canton, Inc*, 209 Mich App 475, 481-482; 531 NW2d 715 (1995). However, summary disposition may be proper before discovery is complete where further discovery does not stand a fair chance of uncovering factual support for the position of the party opposing the motion. *Prysack v R L Polk Co*, 193 Mich App 1, 11; 483 NW2d 629 (1992).

In the present case, the parties vehemently disputed whether Martin waived statutory rights to have the assistant prosecutors serve at his pleasure and both parties presented documentary evidence in support of their positions. However, plaintiff was unsuccessful in her attempt to depose Martin despite her motion to compel discovery. Because Martin was the only individual who could waive the statutory right provided in §5, we find that further discovery may have provided a fair chance of uncovering factual support for plaintiff’s claims. Accordingly, we conclude that it was premature for the trial court to grant summary disposition.³

Reversed and remanded. Jurisdiction is not retained.

/s/ E. Thomas Fitzgerald

/s/ Janet T. Neff

/s/ Michael R. Smolenski

¹ Subsequently, the ICEA filed an unfair labor practice charge with the Michigan Employment Relations Committee alleging that defendants violated their collective bargaining obligation under the Public Employee Relations Act, MCL 423.216; MSA 17.455(16), by refusing to process the grievance. The MERC hearing referee determined that defendants did not violate their collective bargaining obligation because the 1992 to 1996 collective bargaining agreement did not contain a grievance procedure for disciplinary actions of an assistant prosecutor.

² MCL 49.35; MSA 5.795 states:

Said prosecuting attorneys and other employees appointed by said prosecuting attorney under this act shall hold office during the pleasure of the prosecuting attorney.

³ Defendants contend in the alternative that res judicata and collateral estoppel barred plaintiff's wrongful discharge claim. Although defendants raised this issue in the record below, the trial court did not rule on this issue and defendants have not filed a cross-appeal. Therefore, we decline to review this issue.