STATE OF MICHIGAN

COURT OF APPEALS

DAVID BACHMAN and ROBERT L. JOHNSON,

Plaintiffs-Appellees,

v

CITY OF JACKSON,

Defendant-Appellant,

and

JACKSON CITY ACT 345 RETIREMENT BOARD, a/k/a JACKSON CITY RETIREMENT BOARD,

Defendant.

UNPUBLISHED
December 16, 2003

No. 242087
Jackson Circuit Court
LC No. 00-004855-CK

Before: Sawyer, P.J., and Griffin and Smolenski, JJ.

PER CURIAM.

This case concerns whether plaintiffs, both former Jackson city police officers, are eligible for retirement health care benefits under a collective bargaining agreement. Defendant City of Jackson appeals as of right from two orders: (1) the April 11, 2002 order granting plaintiff Robert L. Johnson's motion for summary disposition and (2) the May 30, 2002 order granting plaintiff David Bachman's motion for summary disposition. We affirm in part, reverse in part, and remand.

The trial court granted plaintiffs' summary disposition pursuant to MCR 2.116(C)(10), which tests the factual support of a claim. In reviewing a motion for summary disposition brought under MCR 2.116(C)(10), the court must consider the affidavits, pleadings, depositions, admissions, and documentary evidence filed in the action or submitted by the parties in the light most favorable to the party opposing the motion. Summary disposition may be granted if the evidence demonstrates that there is no genuine issue with respect to any material fact, and the moving party is entitled to judgment as a matter of law. *Ormsby v Capital Welding, Inc*, 255 Mich App 165, 172; 660 NW2d 730 (2003). We review de novo a trial court's decision on a motion for summary disposition. *Id*.

The main issue is whether plaintiffs are entitled to retirement health care benefits even though they were no longer city employees on the 25-year anniversary of their start dates. At the time plaintiffs left their employment, the applicable terms of the collective bargaining agreement read:

> Section 11.3: Non-Duty Disability and Service Retirees: The Employer shall provide and pay the cost of a medical, hospital and surgical hospitalization plan, designated Blue Cross Blue Shield MVF-I or a comparable coverage with another carrier, for all employees covered by this Agreement who retire after July 1, 1979 on a non-duty disability or service retirement.

Additionally, in April 1993, a letter of agreement was added as an appendix to the above retirement benefit section, enabling retired employees to opt-out of the health care benefits in favor of a "cash in lieu of" payment. Defendant claims these provisions only apply to "service retirees," not to "deferred retirees" such as plaintiffs, those officers who have left city employment after ten years of employment, but before their 25-year anniversary of employment. Therefore, we begin our analysis by determining whether plaintiffs are "service retirees" as contemplated by the collective bargaining agreement.

Defendant adopted provisions of the Firefighters and Police Officers Retirement Act, MCL 38.551 *et seq.*, for its collective bargaining agreements. Specifically, defendant used MCL 38.556 to govern the retirement section, which provides:

> (1) Age and service retirement benefits payable under this act are as follows:
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> (a) A member who is 55 years of age or older and who has 25 or more years of service as a police officer or firefighter in the employ of the municipality affected by this act may retire from service on written application to the retirement board stating a date, not less than 30 days or more than 90 days after the execution and filing of the application, on which the member desires to be retired.
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> (d) A member who has 10 or more years of service shall have vested retirement benefits that are not subject to forfeiture on account of disciplinary action, charges, or complaints. *If the member leaves employment before the date the member would first become eligible to retire as provided in subdivision (a) for any reason except the member's retirement or death, the member is entitled to a pension that shall begin the first day of the calendar month immediately after the month in which the member's written application for the pension is filed with the Retirement Board that is on or after the date the member would have been eligible to retire had the member continued in employment.* The retirement board shall grant the member the benefits to which the member is entitled under this act, unless the member resumes service. If the member resumes service, the member's pension shall be further deferred with service years of credit until the member actually retires. [Emphasis added.]

Under the above statutory language, employees who leave employment of a police department with at least 10 years of service are eligible to receive retirement benefits as a service retiree on the date they would have had 25 years of service had they continued in employment. It is undisputed that both plaintiffs fall within this definition. In fact, plaintiffs Bachman and Johnson began receiving their pension benefits on June 5, 1999, and February 12, 1997, respectively.

Despite clearly adopting the language of MCL 38.556 as applicable to its collective bargaining agreements, defendant insists that when it referred to "service retirement" in section 11.3 it only meant people who had worked 25 *consecutive* years with defendant. But, regardless of defendant's intent, a contract's unambiguous terms must be interpreted and enforced according to its plain and ordinary meaning. *Alibri v Detroit/Wayne Co Stadium Auth*, 254 Mich App 545, 558; 658 NW2d 167 (2002). And where the terms of the contract are clear, extrinsic evidence may not be considered. *UAW-GM Human Resource Ctr v KSL Recreation Corp*, 228 Mich App 486, 491; 597 NW2d 411 (1998). The language in the agreement made no distinction between "service retirees" and "deferred retirees," and we may not create an ambiguity where none exists.[1] *Id*. Therefore, we conclude that plaintiffs were "service retirees" within the meaning of the collective bargaining agreement.

Having determined that plaintiffs are "service retirees," section 11.3 of the collective bargaining agreement clearly provides that "service retirees" are entitled to health benefits. Plaintiff Bachman ended his service with defendant in June 1999. Because section 11.3 was not amended to distinguish "service retirees" from "deferred retirees" until July 1999, Bachman is entitled to the health benefits he requested. For the same reason, Bachman is also entitled to receive cash in lieu of these health benefits as provided in the April 1993 addendum to the collective bargaining agreement.

But defendant contends that Bachman's claim is barred because he failed to exhaust his administrative remedies. Neither party disputes that Michigan case law requires an employee to exhaust his administrative remedies when he or she is *actively* employed under a collective bargaining agreement. [Emphasis added.] See *Martin v Metro Life Ins Co*, 140 Mich App 441; 364 NW2d 348 (1985). The reasoning behind this rule is that the rights a plaintiff may have to collect benefits are created solely by virtue of membership in the union and by virtue of the collective-bargaining agreement entered into between the bargaining agent and employer. See *id.* at 450-451. Therefore, the question is whether this rule applies to retirees who are no longer active members of the union or collective bargaining agreement.

The collective bargaining agreement states:

> An employee, who believes he has a grievance, must submit his complaint orally to his immediate non-unit supervisor within (5) calendar days . . . .

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[1] We are aware that the 1999-2003 collective bargaining agreement explicitly distinguished between "service retirees" and "deferred retirees." However, that language was not in effect at the time of plaintiffs' employment and is not controlling in this case.

Because defendant no longer employed Bachman when he became eligible for retiree health care benefits, he can be considered subject to the grievance procedure contained in the labor agreement if retirees are subject to collective bargaining. But this Court and the United States Supreme Court have held that they are not.

In *Allied Chemical & Alkali Workers of America, Local Union No. 1 v Pittsburgh Plate Glass Co*, 404 US 157, 172; 92 S Ct 383; 30 L Ed 2d 341 (1971), the Supreme Court held that retirees are not "employees" within the meaning of the collective bargaining obligations of the National Labor Relations Act because they have ceased to work for another for hire. The Court also held that retiree benefits are not mandatory subjects of collective bargaining because retirees are not employees and retiree benefits do not vitally affect current employees. *Id.* at 181-182.

In *West Ottawa Ed Ass'n v West Ottawa Bd of Ed*, 126 Mich App 306, 311-312; 337 NW2d 533 (1983), the plaintiffs sued the defendant school board alleging that it had engaged in unfair labor practices by giving consulting jobs to retired teachers without first bargaining with the plaintiffs. Relying on *Allied Chemical, supra*, this Court held that retirees are not "employees" within the meaning of collective bargaining requirements because only *active* workers are subject to collective bargaining agreements. *Id.* at 328-330. The Court recognized that the consultant plan could be a mandatory subject of bargaining if it "vitally affect[ed] the terms and conditions of employment of the active bargaining unit employees." *Id.* at 330. This Court concluded that because retired teachers were no longer members of the collective bargaining unit, and the consultant plan was not a mandatory subject of collective bargaining because the plan did not alter the retirement benefits of the active teachers, nor did it take away teaching positions from them, the defendant school board had no duty to bargain with active members of the plaintiffs' bargaining unit. *Id.*

Based on *Allied Chemical, supra*, and *WOEA, supra*, we find that plaintiff Bachman was not subject to the collective bargaining procedures because, as a retiree, he was not an active member of the collective bargaining agreement. But, also according to *Allied Chemical, supra*, and *WOEA, supra*, this is not the end to our inquiry. Whether Bachman was required to exhaust his administrative remedies is dependent on whether his claim for retirement health benefits is considered a mandatory subject of bargaining. *WOEA, supra* at 330, citing *Allied Chemical, supra* at 179.

MCL 38.556e, of the Firefighters and Police Officers Retirement Act, provides:

> Notwithstanding any other provisions of this act, any matter relating to the retirement system provided by this act, including, but not limited to, postretirement increases, *applicable to current employees* represented by a collective bargaining agent is a mandatory subject of bargaining under the public employment relations act . . . . [Emphasis added.]

In July 1999, the collective bargaining agreement was amended to distinguish between "service retirees," who qualify for retiree health benefits, and "deferred retirees," who are not eligible for retirement health benefits, defining the current collective bargaining unit employees' eligibility for retiree health benefits. Thus, we find that Bachman's claim for retirement health care benefits is not a mandatory subject of bargaining because it does not vitally affect the terms and conditions of employment of the *current* collective bargaining unit employees, and, therefore,

Bachman was not required to exhaust his administrative remedies.[2] Accordingly, we hold that Bachman is entitled to receive retirement health care benefits or cash in lieu of those benefits as provided in the 1995-1999 collective bargaining agreement.

Turning to plaintiff Johnson, although he was prohibited from engaging in collective bargaining because of his position as the Jackson police chief, the Jackson City Commission, in January 1990, adopted Resolution 90-13, which added the police chief to those entitled to the benefits of the 1989-1992 collective bargaining agreement. However, defendant argues that Johnson cannot use this provision to support entitlement to receive the benefits of a *different* collective bargaining agreement that was in place when he left, i.e., the city council never executed a similar incorporation resolution for the 1992-1995 collective bargaining agreement. Johnson left defendant's employ in January 1995. Thus, defendant asserts that Johnson is not eligible for retirement health benefits or cash in lieu of these benefits.

Resolution 90-13 stated, in part:

> 1. The City shall provide and pay for the Chief of Police and Police Captain the cost of a Blue Cross-Blue Shield Medical, Surgical and Hospitalization Plan, the provisions of which are identical to those provided with[in] Article 11, section 11.1, 11.2 and 11.3 of the Labor Agreement between the City and the Command Officers Association of Michigan, Jackson Division.

This resolution does not specify that it is applicable to only the bargaining agreement in affect at the time. Notably, a similar resolution passed by the city council in March 1988, that entitled the police chief and captain to additional fringe benefits, did specify that it was referring to certain benefits in sections 11.1 and 11.2 of the collective bargain agreement that was executed in November 1987. Thus, the 1990 resolution added the benefits in section 11.3 of the collective bargain agreement and deleted the reference to the collective bargain agreement's execution date, which had limited the prior resolution's amendments to that specific collective bargain agreement. Therefore, at first blush, it appears that even though a subsequent collective bargain agreement was executed covering 1992-1995, the terms of the 1990 resolution remained in effect.

However, the 1988 resolution that was amended stated, in part:

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[2] In defense of its position, defendant cites *Theodore v Wayne-Westland Comm Schools*, unpublished opinion per curiam of the Court of Appeal, issued January 12, 2001 (Docket No. 208151). We first note that this case is not binding precedent. MCR 7.215(C)(1). Secondly, *Theodore* is not inconsistent with *Allied Chemical*, *supra*, *WOEA*, *supra*, or our decision in this case because of a critical factual distinction. In *Theodore*, this Court held that the early retirement incentive plan at issue was a mandatory subject of collective bargaining because it altered the retirement benefits that active teachers would receive. Here, the issue of plaintiff Bachman's entitlement to retirement health benefits does not affect the retirement benefits of active employees. Therefore, we are not persuaded by defendant's reliance on *Theodore*.

> NOW THEREFORE, BE IT RESOLVED that with regard to the Chief of Police and the Police Captain of the City of Jackson, the following additions or amendments be, and are hereby made to the resolution adopted by this Commission on July 10, 1984 and amendments through October 1, 1987 with regard to fringe benefits for certain of its administrative and Supervisory employees:
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> 1. The City shall provide and pay for the Chief of Police and Police Captain the cost of a Blue Cross-Blue Shield medical, surgical and hospitalization plan, the provisions of which are to be identical to those provided within Article 11, section 11.1 & 11.2 of the labor contract entered into between the City and the Labor Council of Michigan Fraternal Order of Police, Jackson Command Division, November 20, 1987.

Reading the 1988 and 1990 resolutions together, it is apparent that the latter was not replacing the former, only amending it. All of the benefits provided in the 1988 resolution referred to the labor contract entered into in November 1987, presumably referring to the July 1988-June 1992 labor contract, while all of the benefits provided in the 1990 resolution had no such reference. In the 1990 resolution, only the first paragraph covered the same subject matter with the remainder providing for additional benefits. Thus, when considered together, the paragraphs providing benefits in the 1988 resolution retained the date reference, while the additions in the 1990 resolution had no such reference. This seems to indicate that the council did not intend for the 1990 resolution to cover future labor agreements, an interpretation that is consistent with the temporary character of a resolution, *Duggan v Clare Co Bd of Comm'rs*, 203 Mich App 573, 576; 513 NW2d 192 (1994), and with defendant's position. We note that defendant asserts that the city council must take specific action in order for any terms of a command officers' collective bargaining agreement to apply to the police chief, but fails to cite to any authority.

If defendant's position were true, based on the record evidence presented to this Court, then a police chief or police captain who retired between July 1, 1992, and January 20, 1997, was not entitled to any of the fringe benefits listed in the 1988 or 1990 resolution.[3] Defendant could hardly have intended such a situation. In fact, in an affidavit provided by defendant, Kent Mauer, Jackson police captain from 1990-1994, stated that a resolution pertaining to benefits was passed in 1994. Mauer did not indicate what benefits were included, only stating that the "cash in lieu" of health benefits provision was not included.

Therefore, we find that a genuine issue of material fact exists as to whether the city council, by deleting the labor contract reference date in the 1990 resolution, intended to tie

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[3] On January 21, 1997, the city counsel amended its personnel policy to reflect that the police chief, police captain, and the fire chief were entitled to the fringe benefits outlined in their respective collective bargain agreements. The counsel did not specify the fringe benefit sections, nor did it reference a particular collective bargaining agreement by date, thus eliminating the need for the counsel to pass a resolution each time benefits were added to or deleted from a collective bargain agreement or a new collective bargaining agreement was executed.

entitlement to the fringe benefits to the current labor contract at the time, eliminating the necessity to pass a new resolution each time a new labor contract was executed between defendant and the Command Officers Association of Michigan, or whether a subsequent resolution covering the 1992-1995 collective bargaining agreement granted the police chief retiree health benefits. The determination of this issue will control whether plaintiff Johnson is entitled to retiree health benefits. For the same reasons, we find that a genuine issue of material fact exists regarding whether Johnson is entitled to "cash in lieu" of the retiree health benefits provided in the April 1993 addendum to the collective bargaining agreement. We reiterate our finding that Johnson is considered a "service retiree" for purposes of entitlement to retiree health benefits under section 11.3 of the collective bargaining agreement.

Johnson also avers that he is entitled to these benefits based on a theory of promissory estoppel. Johnson asserts that he was promised these benefits on multiple occasions by agents of defendant, beginning in 1986 when he took the position of police chief. Defendant does not contest, nor concede, that these promises were made. Rather defendant offers competing affidavits. After reviewing the evidence in the light most favorable to the non-moving party, we find that genuine issues of material fact exist regarding plaintiff Johnson's promissory estoppel theory that the trier of fact must resolve.

Accordingly, we hold that the trial court properly denied defendant's motions for summary disposition with regard to both plaintiffs and properly granted summary disposition in favor of plaintiff Bachman. We further hold that the trial court improperly granted summary disposition in favor of plaintiff Johnson as genuine issues of material fact exist as to his entitlement to retiree health benefits.

Affirmed in part, reversed in part, and remanded with regard to plaintiff Johnson's claims only. We do not retain jurisdiction.

/s/ David H. Sawyer
/s/ Richard Allen Griffin
/s/ Michael R. Smolenski