

STATE OF MICHIGAN  
COURT OF APPEALS

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BENTON HARBOR SECRETARIAL  
ASSOCIATION, MEA/NEA, DEBORAH  
FRYER, and BARBARA COLEMAN,

UNPUBLISHED  
August 9, 2011

Plaintiffs-Appellants,

v

BENTON HARBOR AREA SCHOOLS BOARD  
OF EDUCATION and BENTON HARBOR  
AREA SCHOOLS,

No. 292057  
Berrien Circuit Court  
LC No. 09-000051-CL

Defendants-Appellees.

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Before: STEPHENS, P.J., AND MARKEY AND WILDER, JJ.

PER CURIAM.

Plaintiffs appeal as of right the trial court's order granting defendants summary disposition. We affirm.

Plaintiffs maintain that although the collective bargaining agreement (CBA) had expired, they could bring and maintain a breach of contract claim against defendants for breach of the terms in the CBA. In addition, plaintiffs maintain that their complaint does not allege a unilateral change or any other type of unfair labor practice claim, which would put their claims within the exclusive jurisdiction of the Michigan Employment Relations Commission (MERC). Hence, plaintiffs argue that the trial court incorrectly concluded that it did not have jurisdiction to decide the case. We disagree.

Defendants were granted summary disposition pursuant to MCR 2.116(C)(4). In *Cork v Applebee's of Michigan, Inc.*, 239 Mich App 311, 315-316; 608 NW2d 62 (2000), we indicated:

We review a grant or denial of a motion to dismiss de novo. When viewing a motion under MCR 2.116(C)(4), this Court must determine whether the pleadings demonstrate that the defendant was entitled to judgment as a matter of law.

The public employment relations act (PERA), MCL 423.201 *et seq.*, governs public sector labor law. *Kent Co Deputy Sheriffs' Ass'n v Kent Co Sheriff*, 238 Mich App 310, 312-313; 605 NW2d 363 (1999). "The PERA charges the MERC with jurisdiction to remedy unfair labor practices. MCL 423.216." *Id.* at 318. Importantly, "[a]t the expiration of a labor contract,

a public employer is charged with the duty to bargain in good faith pursuant to a proposed new contract with regard to” mandatory subjects of bargaining. *Local 1467, Int’l Ass’n of Firefighters v Portage*, 134 Mich App 466, 472; 352 NW2d 284 (1984). The mandatory subjects of bargaining involve those subjects that impose a significant impact on “wages, hours, and other terms and conditions of employment.” MCL 423.215(1); *Local 1467, Int’l Ass’n of Firefighters*, 134 Mich App at 473-474. “Neither party may take unilateral action on a ‘mandatory subject’ of bargaining absent an impasse in negotiations. An employer taking unilateral action on a ‘mandatory subject’ of bargaining prior to impasse in negotiations has committed an unfair labor practice.” *Id.* at 473.

In this case, plaintiffs alleged that the procedure in the CBA for filling vacant positions was not followed because vacant positions were filled with laid-off workers instead of present employees. Plaintiffs alleged that the positions at issue constituted promotions. Plaintiffs characterize defendants’ actions as a breach of contract and assert that the dispute between the parties is over the interpretation of the contract and, therefore properly before the circuit court, as opposed to MERC. Defendants argue that they believed they had an agreement with plaintiffs to utilize the process employed in this case. Plaintiffs repudiate any such agreement. Standards, qualifications, and other criteria for promotions are mandatory subjects of bargaining. *Detroit Police Officers Ass’n v Detroit*, 61 Mich App 487, 497; 233 NW2d 49 (1975). Consequently, the promotion procedures in the CBA, which plaintiffs allege defendants violated, were mandatory subjects of bargaining. *Id.* Plaintiffs have conceded this point. However, plaintiffs point the Court to *Bay City School Dist v Bay City Ed Ass’n, Inc.*, 425 Mich 426; 390 NW2d 159 (1986), for the propositions that the same conduct can constitute a contract violation and a contractual dispute with MERC’s having concurrent jurisdiction with another forum such as an arbitrator or a circuit court. Under such a scenario, MERC would have its focus on whether certain conduct violated Section 9 of PERA while the court or arbitrator would examine the contract in light of principles of contractual interpretation. In *Bay City Schools*, the union approached the school district to bargain about certain student transfers while the collective bargaining agreement was in full force and effect. *Id.* at 431. The district declined to bargain and continued to make transfer decisions that the union thought were contrary to the CBA. *Id.* The unfair labor practice was the failure to bargain concerning a mandatory subject. The Court reasoned that the parties were free to pursue a resolution in multiple fora. *Id.* at 436-437. In the instant case, the contract had expired and there was no impasse. The right that plaintiffs seek to enforce survives the expiration of the contract because of PERA. Plaintiffs vehemently disagree that they made any agreement that the vacancies would be filled as they were. Defendant has not put forth an argument that the expired contract would have allowed it to use the procedure employed in this case. In oral argument, counsel conceded that in a hypothetical circumstance where the union and management disagreed regarding whether an agreement was reached on a particular mandatory subject of bargaining and the employer undertook to act in accordance with that denied agreement, there would be an unfair labor practice under Section 9 of PERA. This situation, regardless of how the complaint characterized it, is most accurately classified as a unilateral action on a mandatory subject of bargaining before impasse and an unfair labor practice. *Local 1467, Int’l Ass’n of Firefighters*, 134 Mich App at 473. Consequently, because plaintiffs’ claim, “if meritorious, clearly constitutes an unfair labor practice by the employer, its resolution falls within the MERC’s exclusive jurisdiction.” *Kent Co Deputy Sheriffs’ Ass’n*, 238 Mich App at 326. Accordingly, defendants were entitled to judgment as a matter of law. *Cork*, 239 Mich App at 315-316.

Affirmed.

/s/ Cynthia Diane Stephens

/s/ Jane E. Markey