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**STATE OF MINNESOTA
IN COURT OF APPEALS
A17-0530**

Michael Bliss,
Respondent,

vs.

Itasca County,
Appellant.

**Filed November 6, 2017
Affirmed
Cleary, Chief Judge**

Itasca County District Court
File No. 31-CV-16-3257

Matthew H. Morgan, Lucas J. Kaster, Nichols Kaster, PLLP, Minneapolis, Minnesota (for respondent)

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Considered and decided by Larkin, Presiding Judge; Cleary, Chief Judge; and Worke, Judge.

UNPUBLISHED OPINION

CLEARY, Chief Judge

In this appeal from an order denying a motion for judgment on the pleadings, appellant Itasca County contends that the district court lacked subject-matter jurisdiction

to hear respondent Michael Bliss's whistleblower claim because he failed to exhaust his administrative remedies. Because Bliss is not required to exhaust his administrative remedies, we affirm.

FACTS

Bliss is employed by the county in the sheriff's department as an investigative supervisor. In November 2014, Bliss conversed with the subordinate of another supervisor; Bliss alleges the conversation was unlawfully monitored by two colleagues. A few days after the conversation, Bliss filed a written complaint against the colleagues.

Over a year after filing his complaint, Bliss was terminated for alleged misconduct. Bliss grieved his termination pursuant to the collective-bargaining agreement (CBA) between his union and the county; following arbitration, he was reinstated with full back pay and benefits but for a 30-day suspension. Bliss alleges that he suffered further retaliation after reinstatement and, in November 2016, Bliss filed a civil action in district court alleging that the termination and post-reinstatement retaliation violated the Minnesota whistleblower act, Minn. Stat. § 181.932 (2016).

The county moved for judgment on the pleadings on the ground that the district court lacked subject-matter jurisdiction over the claim because Bliss failed to exhaust his administrative remedies under the CBA. The district court denied the county's motion.

DECISION

The county argues that the district court lacked subject-matter jurisdiction because Bliss failed to exhaust his administrative remedies. Bliss argues that he is not required to

exhaust his administrative remedies because his whistleblower claim does not derive from, or require interpretation of, the CBA. We agree.

“Subject-matter jurisdiction is the court’s authority to hear the type of dispute at issue and to grant the type of relief sought.” *Seehus v. Bor-Son Constr., Inc.*, 783 N.W.2d 144, 147 (Minn. 2010). The existence of subject-matter jurisdiction “is a question of law that [appellate courts] review de novo.” *Nelson v. Schlener*, 859 N.W.2d 288, 291 (Minn. 2015). “Defects in subject-matter jurisdiction may be raised at any time, and cannot be waived by the parties.” *Seehus*, 783 N.W.2d at 147. “Additionally, subject-matter jurisdiction cannot be conferred by consent of the parties.” *Id.* (quotation omitted).

“Generally, an employee must exhaust all administrative remedies provided under a collective bargaining agreement before bringing an action derived from the contract in district court.” *Edina Educ. Ass’n v. Bd. of Educ.*, 562 N.W.2d 306, 310 (Minn. 1997). However, there is no exhaustion requirement if a state law claim does not derive from or require interpretation of any terms of a CBA. *See McDaniel v. United Hardware Distrib. Co.*, 469 N.W.2d 84, 88 (Minn. 1991) (where determination of the retaliatory discharge claim “does not require interpretation of a collective bargaining agreement, . . . Minnesota law does not require the employee to exhaust contractual remedies before bringing the civil suit”).

Determining whether a statutory claim derives from a CBA requires comparing the elements of the claim to the CBA provisions. *See, e.g., Lingle v. Norge Div. of Magic Chef, Inc.*, 486 U.S. 399, 407, 108 S. Ct. 1877, 1882 (1988) (examining a statutory retaliatory-

discharge claim in the context of workers' compensation); *Brevik v. Kite Painting, Inc.*, 416 N.W.2d 714, 718-19 (Minn. 1987) (examining a statutory retaliatory-discharge claim in the context of the Minnesota Occupational Safety and Health Act).

The U.S. District Court for the District of Minnesota has applied these rules to claims under the Minnesota whistleblower act. In *Rosen v. Transx Ltd.*, that court held that “[a] state law claim is not necessarily inextricably intertwined [with a CBA] even though it involves analysis of the same set of facts as a claim arising under the agreement.” 816 F. Supp. 1364, 1369 (D. Minn. 1993) (quotations omitted). The court then adopted the reasoning in *Lingle* in concluding that “[a]nalysis of the factors needed to establish a claim for retaliatory discharge under Minnesota’s whistleblower statute only requires analysis of factual questions and requires no analysis of any provisions or terms” of a CBA. *Id.* at 1370-71. The court later reiterated in an unpublished opinion that “[w]here a plaintiff seeks to enforce statutory, rather than contractual rights, arbitration provides a concurrent, but not exclusive, dispute resolution procedure.” *Wheale v. Cloquet Cmty. Mem. Hosp.*, No. Civ. 02-3554 RHK/RLE, 2003 WL 21667172, at *2 (D. Minn. July 15, 2003) (quotations omitted).

The United States Supreme Court in *Lingle* also emphasized that an employer’s motive in terminating an employee and its nonretaliatory reason for discharge are both factual inquiries. 486 U.S. at 400, 108 S. Ct. at 1883. The Court concluded that “the state-law analysis might well involve attention to the same factual considerations as the contractual determination of whether [an employee] was fired for just cause. But we

disagree . . . that such parallelism renders the state-law analysis dependent upon the contractual analysis.” *Id.*

Bliss’s whistleblower claim does not challenge the county’s authority to direct its workforce as outlined in the CBA. Rather, it challenges the motive underlying the county’s decision to discharge Bliss. Such a factual analysis does not require interpreting any terms of the CBA and accordingly does not preclude subject-matter jurisdiction. Bliss may maintain his whistleblower claim that asserts independent, statutory rights even though it involves attention to the same factual considerations as a contractual analysis under the CBA.

Schuyler v. Metro. Transit Comm’n, 374 N.W.2d 453 (Minn. App. 1985) is distinguishable. There, the employee was discharged on grounds of absenteeism and brought suit against his employer alleging that he was wrongfully discharged for seeking workers’ compensation benefits. 374 N.W.2d at 454. The court examined whether the employee was required to have exhausted his administrative remedies prior to filing his workers’ compensation action. *Id.* The court implicitly acknowledged that the employee would not be required to exhaust his administrative remedies if he was asserting an independent cause of action that did not derive from the CBA. *Id.* at 456. The court ultimately concluded that while the workers’ compensation claim appeared independent, the employee was essentially claiming that his employer violated the CBA by discharging him without merit. *Id.* Because resolution of the employee’s claim required interpretation of the CBA, the court held that he was required to exhaust his administrative remedies. *Id.*

Two years later, the supreme court held that an employee's statutory retaliatory-discharge claim did not derive from the CBA. *Brevik*, 416 N.W.2d 714. The court explained that the employee's statutory claim was not essentially a claim for wrongful discharge under the CBA:

A trial court faced with a retaliatory discharge claim . . . must determine if the plaintiff employee was, in fact, terminated for exercising [statutory] rights or, instead, was terminated for any other non-discriminatory, legitimate reason. There is no need for the trial court to determine if the non-discriminatory reason put forth by the employer would otherwise justify discharge under the collective bargaining agreement. The inquiry is limited to deciding whether or not plaintiff was terminated for exercising [statutory] rights.

Id. at 718-19. As in *Brevik*, a trial court analyzing Bliss's whistleblower claim would be required to determine if the county discharged him for exercising his statutory rights and would not need to determine if the county's nonretaliatory reason would otherwise justify termination under the CBA. In contrast to *Schuyler*, Bliss's claim rests not on wrongful discharge but on unlawful discharge.

The lack of a "just cause" provision in the CBA in *Brevik* (and the existence of one in *Schuyler*) is inapposite. While *Brevik* mentions that the CBA lacked a "just cause" provision, the court does not explain how the existence of such a provision would change the decision. Moreover, *Lingle* suggests that such a provision is a non-issue. There, the Court expressly rejected the lower court's conclusion that the state-law claim derived from the CBA because the trial court would be deciding "precisely the same issue as would an arbitrator: whether there was 'just cause' to discharge the worker." *Lingle*, 486 U.S. at

408, 108 S. Ct. at 1882-83. Here, regardless of how an arbitrator would interpret the “just cause” provision of Bliss’s CBA, the county may not infringe on Bliss’s statutory rights under the whistleblower act. Bliss’s statutory claim does not depend on interpreting any provision of the CBA.

Finally, Bliss did not specifically agree to arbitrate his whistleblower claim. Generally, statutory claims can be “appropriately resolved through arbitration,” and courts have routinely enforced such agreements. *Green Tree Fin. Corp.-Ala. v. Randolph*, 531 U.S. 79, 89, 121 S. Ct. 513, 521 (2000); *see also Johnson v. Piper Jaffray, Inc.*, 530 N.W.2d 790, 795 (Minn. 1995). But the Court in *Lingle* noted: “[N]otwithstanding the strong policies encouraging arbitration, different considerations apply where the employee’s claim is based on rights arising out of a statute designed to provide minimum substantive guarantees to individual workers.” 486 U.S. at 412, 108 S. Ct. at 1884. In *Piper Jaffray*, the Minnesota Supreme Court held that the employee was bound by her arbitration agreement because it encompassed the specific dispute she attempted to litigate. 530 N.W.2d at 795-98. By submitting to the authority of an arbitrator on that specific claim, the arbitrator properly had jurisdiction over the employee’s statutory claim. *Id.* at 801. In contrast to *Piper Jaffray*, the CBA here limits arbitration to disputes regarding “the violation or application of specific provisions” of the agreement and does not outline any specific grounds for termination beyond just cause.

Because Bliss asserts an independent, statutory claim that does not derive from or require interpretation of the CBA, he was not required to exhaust his administrative

remedies prior to filing his whistleblower action in district court. The district court had subject-matter jurisdiction over his claim and properly denied the county's motion for judgment on the pleadings.

Affirmed.