IN THE COURT OF APPEALS OF THE
STATE OF OREGON

Cynde Ann BLACK,
Plaintiff-Appellant,

v.

COOS COUNTY,
an Oregon municipal corporation,
Defendant-Respondent.

Joanne BECK,
Plaintiff-Appellant,

v.

COOS COUNTY,
an Oregon municipal corporation,
Defendant-Respondent.

Carmen Ann RAKOSI,
Plaintiff-Appellant,

v.

COOS COUNTY,
an Oregon municipal corporation,
Defendant-Respondent.

Desiree Dawn McLAUGHLIN-GARCIA,
aka Desiree Dawn Garcia,
aka Desiree Dawn McLaughlin,
Plaintiff-Appellant,

v.

COOS COUNTY,
an Oregon municipal corporation,
Defendant-Respondent.

Theresa Lynn THAXTON,
Plaintiff-Appellant,

v.

COOS COUNTY,
an Oregon municipal corporation,
Defendant-Respondent.

Coos County Circuit Court
15CV0660, 15CV0661,
15CV0663, 15CV0662, 15CV0664;
A161377 (Control), A161378,
A161379, A161380, A161381

Martin E. Stone, Judge.

Argued and submitted June 2, 2017.

Michael R. Stebbins argued the cause for appellants. With him on the briefs was Stebbins & Coffey.

Alicia M. Wilson argued the cause for respondent. With her on the brief were Tracy M. McGovern and Frohnmayer, Deatherage, Jamieson, Moore, Armosino & McGovern, P.C.

Before DeVore, Presiding Judge, and Garrett, Judge, and Edmonds, Senior Judge.

DEVORE, P. J.

Reversed and remanded.

DeVORE, P. J.

Plaintiffs appeal from a judgment dismissing their tort and contract claims for lack of subject matter jurisdiction. Plaintiffs brought claims for negligent misrepresentation and unjust enrichment against Coos County, their employer, for damages they alleged that they suffered when the county mistakenly identified them as within the "police and fire" classification of the Public Employees Retirement System (PERS). In a consolidated proceeding, the trial court dismissed plaintiffs' complaints because the court considered the claims to involve a "reduction of monetary benefits" that was subject to the exclusive jurisdiction of the Employment Relations Board (ERB) under the Public Employee Collective Bargaining Act (PECBA), ORS 243.650 to 243.782. We conclude that, because the claims did not raise a question to be decided by ERB, the claims remain within the court's jurisdiction. We reverse and remand.

Because the trial court dismissed on the pleadings alone, we assume the facts as plaintiffs allege in their complaints. *See* *Vuylsteke v. Broan*, 172 Or App 74, 79, 17 P3d 74 (2001) (involving personal jurisdiction). Plaintiffs are or were emergency dispatchers or telecommunication specialists in the county sheriff's office. From the time of their initial employment, the county had identified plaintiffs as within the category of "police and fire" employees for purposes of the state program involving retirement of public employees. That PERS classification would have entitled plaintiffs to earlier retirement and more favorable benefits. It also allowed them to add personal "police and fire unit" contributions. Sometime later, the sheriff asked PERS about placing all of the office employees in the police and fire classification. In response, PERS wrote, in September 2000, that not all sheriff's employees could be classified within the police and fire category; only those whose duties are the regular duties of police or corrections officers could qualify for that classification; and to misidentify employees as police or corrections officers would violate Oregon law. Despite that information, the county continued to represent to plaintiffs that they were within the PERS "police and fire" category. Plaintiffs continued to make individual "police and

fire unit" contributions. Nearly 13 years later, in June 2013, the county notified plaintiffs that they were misidentified and were not actually "police and fire" employees within the state retirement system.

In their claims for negligent misrepresentation, plaintiffs alleged that the county was negligent in identifying plaintiffs as "police and fire" employees and in failing to disclose to them the September 2000 letter about their correct classification. Plaintiffs alleged that, in reliance on their mistaken identification as "police and fire" employees, they each "made other plans and economic decisions resulting in economic damages in individual amounts ranging from $50,000 to $250,000." In their claims for unjust enrichment, plaintiffs alleged that the county was unjustly enriched when the county received refunds from PERS, representing the "police and fire unit" contributions that plaintiffs and the county had made. In their complaints, plaintiffs did not seek relief as against PERS or the county so as to change their classification within PERS or to be deemed "police and fire" employees. Plaintiffs did not allege any breach of any collective bargaining agreement. They did not allege any unfair labor practice, nor cite any provision of PECBA.

The county filed a motion to dismiss the complaints under ORCP 21 A for a variety of reasons.[1] Among them, the county asserted that plaintiffs' claims involved a labor dispute within the meaning of PECBA and that, as a consequence, they are claims over which ERB should have exclusive jurisdiction. In its letter opinion, the court agreed. The court characterized the complaints as "claims for *monetary benefits* alleged to be payable from defendant." (Emphasis added.) The court reasoned that a claim for monetary

[1] Because the trial court did not rule on the alternative grounds that defendant raised below, we decline to exercise our discretion to consider defendant's alternative bases for affirmance. The record would be better developed if the trial court had reached those issues in the first instance. Even if the trial court had accepted alternative arguments, it is possible that the court would have allowed plaintiffs an opportunity to replead. *See* *Cannon v. Dept. of Justice*, 261 Or App 680, 691 n 6, 322 P3d 601 (2014) (similarly declining to address alternative bases for affirmance for the first time on appeal where trial court could have dismissed or allowed further pleading if it had ruled on an alternative basis); *Outdoor Media Dimensions Inc. v. State of Oregon*, 331 Or 634, 659-60, 20 P3d 180 (2001) (discussing requirements for affirmance on alternative grounds).

benefits was within the definition of a "labor dispute" involving "employment relations" under PECBA. ORS 243.650 (7)(a), (12). The trial court noted that ERB had exclusive jurisdiction to consider unfair labor practices for breach of a collective bargaining agreement under ORS 243.672(1)(g) or for any other violation of PECBA under ORS 243.672 (1)(f). The court concluded that, "[b]ecause the alleged conduct in these five cases relates to reduction of monetary benefits, it is ERB that has jurisdiction of the labor dispute and only ERB can determine whether an unfair labor practice has been committed." At the county's urging, the court rejected plaintiffs' attempt to style their claims as matters of negligent misrepresentation or unjust enrichment, citing a Supreme Court case that had rejected an attempt to plead a tort that was based on an alleged unfair labor practice, *Ahern v. OPEU*, 329 Or 428, 988 P2d 364 (1999). The trial court granted defendant's motion to dismiss for want of subject matter jurisdiction.

We review for legal error when deciding whether a court has subject matter jurisdiction over a claim. *Merten v. Portland General Electric Co.*, 234 Or App 407, 413, 228 P3d 623, *rev den*, 348 Or 669 (2010). To decide whether these claims are within the exclusive jurisdiction of ERB, we consider the terms of Oregon's statutes governing the collective bargaining of public employees and employers, ORS 243.650 to 243.782. When interpreting those statutes, our task is to discern the intent of the legislature. Our starting point is the text and context of a statute, because the "best evidence of the legislature's intent" is the text itself. *PGE v. Bureau of Labor and Industries*, 317 Or 606, 610, 859 P2d 1143 (1993); *State v. Gaines*, 346 Or 160, 171, 206 P3d 1042 (2009).

An important indication of the scope of PECBA begins with the statute's policy statement. In material part, ORS 243.656 provides:

> "The Legislative Assembly finds and declares that:
>
> "*****
>
> "(2) Recognition by public employers of the right of public employees to organize and full acceptance of the principle and procedure of collective negotiation between

> public employers and public employee organizations can alleviate various forms of strife and unrest. ***
>
> "*****
>
> "(5) It is the purpose of ORS 243.650 to 243.782 to obligate public employers, public employees and their representatives to enter into collective negotiations with willingness to resolve grievances and disputes relating to employment relations and to enter into written and signed contracts evidencing agreements resulting from such negotiations. It is also the purpose of ORS 243.650 to 243.782 to promote the improvement of employer-employee relations within the various public employers by providing a uniform basis for recognizing the right of public employees to join organizations of their own choice, and to be represented by such organizations in their employment relations with public employers."

That declaration of purpose makes plain that PECBA is addressed to individual and collective rights related to collective bargaining in the public sector.

To that end, ERB is authorized to investigate, hear, and resolve claims of unfair labor practices, whether committed by public employers, individuals, or labor organizations. ORS 243.676.[2] The acts that, if committed by public employers, would constitute unfair labor practices (ULPs) are listed in ORS.243.672(1), where, in relevant part, the statute provides:

> "It is an unfair labor practice for a public employer or its designated representative to do any of the following:
>
> "(a) Interfere with, restrain or coerce employees in or because of the exercise of rights guaranteed in ORS 243.662 [rights of public employees to join labor organizations].
>
> "(b) Dominate, interfere with or assist in the formation, existence or administration of any employee organization.
>
> "(c) Discriminate in regard to hiring, tenure or any terms or condition of employment for the purpose of

[2] ORS 243.676 provides that, "[w]henever a written complaint is filed alleging that any person has engaged in or is engaging in any unfair labor practice listed in ORS 243.672(1) and (2) and 243.752," ERB shall "[i]vestigate the complaint ***, [s]et the matter for hearing ***, [s]tate its findings of fact ***, [t]ake such affirmative action *** as necessary ***."

> encouraging or discouraging membership in an employee organization. * * *
>
> "(d) Discharge or otherwise discriminate against an employee because the employee has signed or filed an affidavit, petition or complaint or has given information or testimony under ORS 243.650 to 243.782.
>
> "(e) Refuse to bargain collectively in good faith with the exclusive representative.
>
> "(f) Refuse or fail to comply with any provision of ORS 243.650 to 243.782.
>
> "(g) Violate the provisions of any written contract with respect to employment relations including an agreement to arbitrate or to accept the terms of an arbitration award, where previously the parties have agreed to accept arbitration awards as final and binding upon them.
>
> "(h) Refuse to reduce an agreement, reached as a result of collective bargaining, to writing and sign the resulting contract.
>
> "(i) Violate ORS 243.670 (2) [employer assistance or interference in union organizing]."

PECBA also concerns other circumstances in which ERB has authority over a matter, but none of those circumstances are urged to be relevant in this case.[3] Taken together, "PECBA is a comprehensive regulatory scheme for resolving public sector labor disputes." *Ahern*, 329 Or at 434. As such, ERB has "exclusive jurisdiction to determine whether an unfair labor practice has been committed." *Id.* at 434-35.

As pleaded, plaintiffs' claim for negligent misrepresentation is a common-law tort ordinarily within the jurisdiction of a circuit court. *See, e.g.*, *Conway v. Pacific University*, 324 Or 231, 924 P2d 818 (1996) (dismissing

[3] *See* ORS 243.670(5)(a) (authorizing ERB to adopt rules to prohibit public employers from deterring union organizing); ORS 243.682 (authorizing ERB to determine the appropriate bargaining unit); ORS 243.686 (allowing ERB to place labor organizations meeting certain specifications on the ballot); ORS 243.692 (indicating that ERB must rule about the effect of certain contracts on elections); ORS 243.712 (authorizing ERB to render assistance to resolve labor disputes by appointing a mediator and a factfinder, if the parties request such assistance); ORS 243.742 and ORS 243.746 (indicating ERB's role in receiving petitions for binding arbitration and selecting arbitrators); ORS 243.766 (discussing other duties of ERB).

claim based on circumstances involving arm's-length negotiations); *Onita Pacific Corp. v. Trustees of Bronson*, 315 Or 149, 843 P2d 890 (1992) (dismissing claim for lack of a special relationship). Likewise, plaintiffs' claim for unjust enrichment is an implied or quasi-contractual claim at common law ordinarily within the jurisdiction of a circuit court. *See, e.g.*, *Wilson v. Gutierrez*, 261 Or App 410, 414-15, 323 P3d 974 (2014) (reciting elements of a quasi-contractual claim of unjust enrichment).

To suggest that these claims are claims for unfair labor practices—within ERB's jurisdiction—the county has cited two particular provisions. On appeal, the county argues that plaintiffs' claims implicate ORS 243.672(1)(f), which provides that it is an unfair labor practice for an employer to "[r]efuse or fail to comply with any provisions of ORS 243.650 to 243.782."[4] The county contends that ORS 243.672(1)(f) is a "catch-all" provision, but the county does not explain how the county's conduct, as alleged in the claims, would potentially violate some other, cross-referenced provision of PECBA. The county did not develop that argument below or on appeal. In our review of the cross-referenced terms of ORS 243.650 to 243.782, we find none that are implicated by plaintiffs' claims.[5]

In the trial court, the county also relied on ORS 243.672(1)(g), as did the trial court itself in its letter opinion. That provision, however, describes a ULP in which an employer violates "the provisions of any written contract with respect to employment relations" or refuses to arbitrate or to accept an arbitration award. *See, e.g.*, *Arlington Ed.*

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[4] On appeal, the county referred in passing to ORS 243.672(2)(c), but that provision concerns prohibited conduct of an employee or union, not an employer. That provision is inapt.

[5] In its own decisions involving violations of ORS 243.672(1)(f), ERB has been concerned about issues of bargaining, mediation, and other related matters. *See AFSCME Local 189 v. City of Portland*, 25 PECBR 14, *adh'd to on recons*, 25 PECBR 80 (2012) (city's failure to bargain over impacts of its decision to eliminate a work unit before implementing the decision violated ORS 243.672(1)(f)); *Blue Mountain Faculty Association v. Blue Mountain Community College*, 21 PECBR 673 (2007) (a premature request for mediation would violate ORS 243.672(1)(f)); *Teamsters Local 670 v. City of Vale*, 20 PECBR 337, *adh'd to as modified on recons*, 20 PECBR 388 (2003) (city's refusal to bargain to completion the impacts of closing police department, prior to closure violated ORS 243.672(1)(f)).

Assn. v. Arlington Sch. Dist. No. 3, 196 Or App 586, 103 P3d 1138 (2004) (collective bargaining agreement construed to require arbitration). Plaintiffs' claims do not allege a breach of any term of a collective bargaining agreement. As a result, the county's reliance on ORS 243.672(1)(g) is misplaced.

The county's primary argument does not rely on reference to a ULP or a violation of another provision of PECBA.[6] Instead, the county relies on PECBA's initial definitions divorced from other operations of the statute. The county stresses the definition of a "labor dispute" and the nested term "employment relations." Among its definitions, ORS 243.650(12) provides:

> "'Labor dispute' means any controversy concerning *employment relations* or concerning the association or representation of persons in negotiating, fixing, maintaining, changing, or seeking to arrange terms or conditions of employment relations, regardless of whether the disputants stand in the proximate relation of employer and employee."

(Emphasis added.) In turn, ORS 243.650(7)(a) provides:

> "'Employment relations' includes, but is not limited to, matters concerning direct or indirect *monetary benefits*, hours, vacations, sick leave, grievance procedures and other conditions of employment."

(Emphasis added.) Based on those definitions, the county contends, and the trial court concluded, that, because plaintiffs' claims seek damages, they are claims about "monetary benefits," and, because they are claims about "monetary benefits," they are claims that are "labor disputes," within the exclusive jurisdiction of ERB. Those conclusions, however, misconstrue plaintiffs' claims and PECBA itself.

As noted, plaintiffs' claims did not contest the correction of their long-mistaken classification within PERS as "police and fire" employees. Plaintiffs did not sue PERS, nor sue to be restored to the "police and fire" classification. Rather, they sought damages resulting from their reliance on the allegedly negligent misrepresentation; and, in their unjust enrichment claim, they sought allegedly unrealized refunds of past "police and fire unit" contributions. Plaintiffs

[6] *See* 288 Or App at 30 n 2, 31 n 3.

did not seek employment benefits promised by PERS or by the county. They sought damages based on common-law claims.

The more serious flaw in defendant's rationale is its reconstruction of Oregon's public labor law. In terms of text and context, the county reads the term "labor dispute" to mean anything to do with "employment relations" without reading the term within the context of matters of bargaining about the terms and conditions of employment. When defendant equates the term "labor dispute" with simply "employment relations," defendant divorces the term "labor dispute" from the legislature's policy statement that PECBA addresses matters of individual, group, and employer rights involving *collective bargaining*. Plaintiffs' claims, however, have nothing to do with collective bargaining or any individual, collective, or employer rights governed by PECBA.

The county insists, nonetheless, that this case should be governed by a decision in which a tort claim did implicate ERB's exclusive jurisdiction to determine matters subject to PECBA. In *Ahern*, 329 Or 428, a public employee union went on strike against Jefferson County. Union members conducted informational picketing outside a grocery owned by the plaintiff, who was a county commissioner. The plaintiff filed a claim in circuit court against the union for intentional interference with economic relations. An element of that tort required him to prove that the union had acted through an improper means or for an improper motive. *Id.* at 431 (citing *McGanty v. Staudenraus*, 321 Or 532, 535, 901 P2d 841 (1995)). For that element, the plaintiff alleged expressly that the union had violated PECBA's provision against picketing the business of a member of a governing body, ORS 243.672(2)(g). Despite that allegation, the plaintiff argued that, because his claim was a tort, it was not subject to ERB's jurisdiction. The trial court found an unlawful labor practice and enjoined the picketing. The Oregon Supreme Court concluded that, notwithstanding its tort label, the gravamen of plaintiff's complaint was that the union had committed a ULP. *Id.* at 436. As such, the matter was within the exclusive jurisdiction of ERB. The court vacated the injunction and remanded the matter to

the circuit court—presumably to await ERB's decision on any alleged ULP.[7] *Id.*

Ahern is distinguishable. Plaintiffs here do not allege that the county committed any violation of PECBA; their complaints do not indirectly allege any ULP; and nothing alleged in the common-law claims depends, as a predicate, upon any determination of the sort to be made by ERB.

A better precedent may be found in *Shockey v. City of Portland*, 313 Or 414, 837 P2d 505 (1992), *cert den*, 507 US 1017 (1993). The city discharged the plaintiff for his refusal to comply with a policy requiring him to shave his beard. In relevant part, he brought a common-law claim of wrongful discharge. A jury returned a verdict in his favor, but the trial court granted a directed verdict for the city. On the plaintiff's appeal, the city asserted that the circuit court lacked subject matter jurisdiction over the common-law claim because PECBA should have been his exclusive remedy. *Id.* at 418. The court understood the city to contend that the plaintiff's claim was a potential ULP claim (*i.e.*, "just cause" as a breach of a collective bargaining agreement). Even so, the court observed, "[t]he purpose and policy underlying PECBA is that public employers and public employees resolve their disputes through resort to collective bargaining when there is a collective bargaining agreement." *Id.* at 420. The court concluded that a policy of promoting collective bargaining was not offended by allowing a common-law remedy for the harm the plaintiff suffered. That aspect of the judgment dismissing the common-law claim was reversed. *Cf. Trout v. Umatilla Co. School Dist.*, 77 Or App 95, 712 P2d 814 (1985), *rev den*, 300 Or 704 (1986) (holding that the plaintiffs' claim that was based on collective bargaining agreement was subject to ERB jurisdiction but nonetheless deciding in court the plaintiffs' tort claims on the merits).

As relevant here, *Shockey* supports an unchanged principle that a common-law claim, which presents no ULP issue nor any other issue under PECBA, is not within the

[7] In the meantime, Jefferson County had filed a ULP complaint with ERB concerning the matter. *Ahern*, 329 Or at 431 n 3.

exclusive jurisdiction of ERB. In our case, plaintiffs' claims raised no issues relating to individual or collective rights of collective bargaining within the scope of PECBA's general policy terms. Plaintiffs' claims raised no issues that ERB could review as ULPs or an employer's violation of PECBA. Plaintiffs' claims did not seek "monetary benefits" within the meaning of PECBA. Instead, plaintiffs' claims sought damages under the common law for negligent misrepresentation and unjust enrichment. For those reasons, the trial court erred in dismissing plaintiffs' complaints.

Reversed and remanded.