

STATE OF MICHIGAN
COURT OF APPEALS

PAUL ZIMMERMAN, JOHN FLORKOWSKI,
DAVID MICHAEL, RANDY HANVEY, BRYAN
HILL, FREDERICK HARDER, JOHN DIVICO,
CLYDE GROVES, GILBERT KOPACKI, and
CONSTANT J. RUSIS, JR.,

UNPUBLISHED
December 18, 1998

Plaintiffs-Appellants,

v

AMERICAN TELEPHONE AND TELEGRAPH
COMPANY, a/k/a AT&T,

No. 199102
Wayne Circuit Court
LC No. 92-227672-NZ

Defendant-Appellee.

Before: Jansen, P.J., and Kelly and Markey, JJ.

PER CURIAM.

Plaintiffs appeal as of right from an order granting defendant's motion for summary disposition. We reverse and remand for further proceedings.

I

Plaintiffs were employed as communications technicians by defendant in the City of Detroit and were members in the Communications Workers of America (the union). Defendant created a new division within the company and transferred plaintiffs into it. Plaintiffs' seniority was based upon their length of service within the new division, not their length of service with the company as a whole. On April 26, 1991, plaintiffs were terminated from their new positions, following a work force reduction, because they had the lowest seniority. Plaintiffs' union subsequently filed a grievance pursuant to the collective bargaining agreement. The union contended that the alteration of the employees' seniority was in violation of the collective bargaining agreement. On April 5, 1992, the arbitrator agreed with the union, ordered defendant to recall the aggrieved employees and make them whole.

Because there were 320 employees that were affected by the arbitrator's award, the union and defendant negotiated several different remedies to be offered to the employees.¹ However, some of the

remedies, if chosen, required the employee to release defendant from all claims. At the same time that the union's grievance was filed, plaintiffs had filed an age discrimination claim against defendant in the Wayne Circuit Court² and did not wish to forego that suit. After filing suit on the age discrimination claim, defendant did not permit plaintiffs to make an election of the various remedies regarding the arbitration award.

Plaintiffs filed the present action in the Wayne Circuit Court on October 2, 1992, alleging a claim under § 301 of the Labor Management Relations Act (LMRA) to enforce the terms of the arbitration award, and asserting a claim for retaliation under the Civil Rights Act, MCL 37.2101 *et seq.*; MSA 3.548(101) *et seq.* Defendant moved for summary disposition,³ arguing that plaintiffs' § 301 claim was barred due to failure to exhaust their grievance remedies, and that plaintiffs had failed to establish a material factual dispute with regard to the retaliation claim. The trial court granted defendant's motion, but gave no specific reasons for the decision nor did it cite under which court rule the motion was being granted.

II

Plaintiffs first argue that the trial court erred in dismissing their claim under § 301 of the LMRA because they were not required to exhaust any further grievance or internal union remedies before bringing this suit because they are merely seeking to enforce the terms of an arbitration award that they have already successfully pursued.

Defendant filed its motion for summary disposition under MCR 2.116(C)(7) (claim barred because of arbitration agreement). A motion under this subsection may be supported by documentary evidence. MCR 2.116(G)(3). Any pleadings, affidavits, depositions, admissions, and any other documentary evidence submitted to the court must be considered when ruling on a motion brought under subsection (C)(7). MCR 2.116(G)(5). A trial court's decision regarding a motion for summary disposition is reviewed *de novo*. *Dewey v Tabor*, 226 Mich App 189, 192; 572 NW2d 715 (1997).

The trial court's decision to grant summary disposition in favor of defendant on the basis of failing to exhaust grievance or internal union remedies is an error of law because, having already successfully pursued their grievance, plaintiffs are not again required to file a grievance to enforce their arbitration award. In this case, in reviewing the collective bargaining agreement, any dispute over the arbitrator's award was not a matter for arbitration or resort (again) to the grievance procedure. Rather, interpretation of an arbitrator's award, which the parties clearly attempted to resolve in a post-award agreement, does not require re-exhaustion of grievance or arbitration procedures. See, e.g., *Locals 2222, 2320-2327, Internat'l Brotherhood of Electrical Workers, AFL-CIO v New England Telephone & Telegraph Co*, 628 F2d 644, 648 (CA 1, 1980).

For essentially the same reason, plaintiffs were also not required to exhaust internal union remedies. A review of the union constitution reflects that it applies to the "consideration and review of complaints of members regarding actions of the Union or Local, or Union or Local Officers or governing bodies," but not to the employer. Further, there is nothing in the union constitution which applies to arbitration awards. Therefore, the union constitution does not apply to an employee's

attempt to enforce a arbitration award rendered pursuant to a collective bargaining agreement. See *Miller v Gateway Transportation Co, Inc*, 616 F2d 272, 274-275 (CA 7, 1980).

Accordingly, the trial court erred in granting summary disposition in favor of defendant with respect to plaintiffs' § 301 claim under the LMRA. Plaintiffs are not required to re-exhaust their grievance/arbitration or internal union remedies in order to bring this claim.

III

Plaintiffs also argue that the trial court erred in dismissing their claim of retaliation under the Civil Rights Act.

Defendants sought summary disposition with respect to this claim under MCR 2.116(C)(10), arguing that plaintiffs failed to establish a material factual dispute with respect to the causal link between the protected activity and the adverse employment action. A motion under MCR 2.116(C)(10) tests the factual dispute of a claim. The court must consider the pleadings, affidavits, depositions, admissions, and any other documentary evidence submitted to it to determine whether a genuine issue of any material fact exists to warrant a trial. *Spiek v Dep't of Transportation*, 456 Mich 331, 337; 572 NW2d 201 (1998). The trial court's ruling on a motion for summary disposition is reviewed de novo. *Id.*

MCL 37.2701; MSA 3.548(701) provides in relevant part:

Two or more persons shall not conspire to, or a person shall not:

(a) Retaliate or discriminate against a person because the person has opposed a violation of this act, or because the person has made a charge, filed a complaint, testified, assisted, or participated in an investigation, proceeding, or hearing under this act.

To establish a prima facie case of unlawful retaliation under the Civil Rights Act, plaintiffs must show (1) that they were engaged in a protected activity; (2) that this was known by the defendant; (3) that the defendant took an employment action adverse to the plaintiffs; and (4) that there was a causal connection between the protected activity and the adverse employment action. *DeFlaviis v Lord & Taylor, Inc*, 223 Mich App 432, 436; 566 NW2d 661 (1997).

We believe that plaintiffs have set forth sufficient evidence to establish a causal connection between their protected activity (the filing of the age discrimination claim in circuit court) and the adverse employment action (defendant's denial of the arbitration award remedies). Plaintiffs claim that their award package forms were misleading and deceitful, that defendant refused to allow plaintiffs to make an election on the award package because they had filed a civil rights claim, and that they were treated differently because they had filed an age discrimination claim. In response to defendant's motion for summary disposition, plaintiffs presented two forms which show that two employees were permitted to change their elections under the award package. Plaintiffs also presented an affidavit in which plaintiff Randy Hanvey avers that he was not permitted to change his election under the award package.

Plaintiffs have come forth with affidavits showing they were not permitted to change their election under the award package. They have produced documentation showing that others were permitted to change their election. Therefore, the question of whether plaintiffs were not permitted to change their election under the award package because they had filed an age discrimination claim is a question of fact that must be resolved by a trier of fact. Accordingly, the trial court erred in granting summary disposition to defendant on the retaliation claim.

Reversed and remanded for further proceedings. Jurisdiction is not retained.

/s/ Kathleen Jansen

/s/ Michael J. Kelly

¹ Not all of the employees were in the same position at the time of the arbitrator's decision. For example, some employees had found other positions that they did not wish to leave. Therefore, a remedy of reinstatement would not be feasible for such employees. Thus, the arbitrator's award to "recall employees laid off in violation of the collective bargaining agreement and make them whole" had to be broad to encompass the different circumstances of the laid off employees.

² Plaintiffs filed an age discrimination suit in the Wayne Circuit Court in case no. 91-133113-NZ. Plaintiffs alleged that defendant discriminated against them based on age when it created the new division, placed plaintiffs in that division, and based plaintiffs' seniority on their service in the new division only. Plaintiffs specifically alleged that defendant's actions effectively removed their bumping rights and, when defendant closed the center where plaintiffs were employed, they could not bump into any other organization because of their low seniority. The trial court granted defendant's motion for summary disposition, and this Court affirmed finding that plaintiffs failed to establish a prima facie case of age discrimination. *Zimmerman v American Telephone & Telegraph Co*, unpublished opinion per curiam of the Court of Appeals, issued July 1, 1997 (Docket No. 190768). Plaintiff's application for leave to appeal was denied by the Supreme Court. 458 Mich 866 (1998).

³ This is the second appeal before this Court. In the first appeal, the trial court granted summary disposition in favor of defendant, ruling that, with regard to the § 301 claim, plaintiffs were required to show that defendant breached the agreement reached to enforce the arbitration award and that the union had not breached the duty of fair representation as a matter of law. The trial court also ruled that the retaliation claim was preempted by federal law. This Court reversed those rulings, and held that plaintiffs were not required to show that defendant breached the agreement to enforce the arbitration award, that there was a material factual dispute as to whether the union breached its duty of fair representation, and that the retaliation claim was not preempted by federal law. *Zimmerman v American Telephone & Telegraph Co*, unpublished opinion per curiam of the Court of Appeals, issued May 23, 1995 (Docket No. 166276). The Supreme Court subsequently denied defendant's application for leave to appeal. 452 Mich 870 (1996).