

STATE OF MICHIGAN
IN THE COURT OF APPEALS

SHERRY LOAR and DAWN IVES,

Plaintiffs,

Court of Appeals No: 294087

V

MICHIGAN DEPT. OF HUMAN SERVICES
And ISMAEL AHMED, in his official
Capacity as Director of the Michigan Dept.
Of Human Services,

Defendants.

DEFENDANTS' RESPONSE BRIEF OPPOSING PLAINTIFFS'
MOTION TO FILE AMENDED COMPLAINT

Respectfully submitted,

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Dated: October 28, 2009

Introduction

On October 7, 2009, Defendants Michigan Department of Human Services ("DHS") and DHS Director Ishmael Ahmed filed a Motion to Dismiss Pursuant to MCR 2.116(C)(8) and (C)(4). DHS and Mr. Ahmed argued that Plaintiffs' Complaint failed to state a claim because it did not allege either the elements of mandamus or any factual foundation for those elements. In addition, DHS and Mr. Ahmed argued that Plaintiffs failed to add necessary parties who, once added, would strip this Court of jurisdiction. Furthermore, Plaintiffs failed to exhaust their available remedies. Plaintiffs responded by filing a Motion to File Amended Complaint. As argued below, the proposed amended complaint fails to cure the defects in the Complaint and any amendment would be futile. Accordingly, this Court should deny Plaintiff's Motion.

Legal Argument

Under Michigan law, a party may amend a complaint only if the amendment will cure the deficiencies in the complaint or where the amendment will not be futile.¹ An amendment is futile where "it merely restates the allegations already made or adds allegations that fail to state a claim."² It logically follows that an amendment which fails to cure the defects of the original is futile because, like the original, it would also result in dismissal. In the present case, Plaintiffs' proposed amendment would not cure the defects in the Complaint because it does not add the necessary parties and does not address Plaintiffs' failure to exhaust their remedies. Thus, even with the proposed Amended Complaint, summary disposition pursuant to MCR 2.116(C)(4) would remain warranted. In addition, because the proposed amended complaint merely adds

¹ *Miller v Chapman Contracting*, 477 Mich 102, 105-108; 730 NW2d 462 (2007); *Weymers v Khera*, 454 Mich 639, 658; 563 NW2d 647 (1997); *Lane v Kindercare Learning Ctrs, Inc*, 231 Mich App 689, 697; 588 NW2d 715 (1998).

² *Lane*, 231 Mich App at 697-698.

conclusory allegations that fail to state a claim, dismissal pursuant to MCR 2.116(C)(8) also would remain warranted.

A. Plaintiffs' proposed Amended Complaint fails to state a claim on which relief can be granted because it merely states conclusory allegations and fails to lay a sufficient factual foundation.

A complaint that merely makes conclusory allegations must be dismissed³ and a claim must allege a factual basis for each of its elements.⁴ Where a plaintiff fails to allege specific facts in support of each element of a claim, the action must be dismissed.⁵ The proposed Amended Complaint adds the elements of mandamus, at ¶¶ 54-57, but fails to establish a factual basis for those elements. As such, "it merely . . . adds allegations that fail to state a claim."⁶ The proposed Amended Complaint would be futile because it fails to state a claim. Therefore, for the same reasons set forth in Defendants' Motion to Dismiss, Plaintiffs' Motion must be denied.

B. Plaintiffs' proposed Amended Complaint fails to add necessary parties who, once added, divest this Court of jurisdiction.

The proposed Amended Complaint still fails to cure the defect of Plaintiffs' failure to name necessary parties. Plaintiffs' claim does not properly belong in this Court because other parties exist whose roles in this case make them necessary to this action and whose claims must therefore be joined and litigated.⁷ Plaintiffs premise this Court's jurisdiction on MCR

³ *Kloian v Schwartz*, 272 Mich App 232, 242; 725 NW2d 671 (2006); *Demido v Attorney General*, 100 Mich App 254, 257; 299 NW2d 43 (1980).

⁴ *Merillat v Michigan State University*, 207 Mich App 240, 248; 523 NW2d 802 (1994); *Eichhorn v Lamphere School Dist*, 166 Mich App 527, 546; 421 NW2d 230 (1988).

⁵ *Merillat*, 207 Mich App at 248; *Eichhorn*, 166 Mich App at 546; *Demido*, 100 Mich App at 257.

⁶ *Lane*, 231 Mich App at 697-698.

⁷ These parties are the Michigan Home Based Child Care Council (Council), Mott Community College (Mott), the Michigan Employment Relations Commission (MERC), and the Child Care Providers Together Michigan (Union).

7.203(C)(2) and MCR 3.305(A)(1), which grant this Court jurisdiction over an original action for mandamus action against a state officer.⁸ If the action involves a party other than a state officer, however, it "must be brought in the Circuit Court."⁹ Once the necessary parties have been joined, this Court will no longer have jurisdiction pursuant to MCR 3.305(A)(2). Because the proposed amended complaint fails to cure this defect, it would be futile and Plaintiffs' Motion must be denied.

C. Plaintiffs' proposed Amended Complaint fails to show how Plaintiffs satisfied their obligation to exhaust their available remedies.

Nor does the proposed amendment address Plaintiffs' failure to exhaust their remedies under the Public Employee Relations Act (PERA), which gives MERC exclusive jurisdiction over the composition of bargaining units¹⁰ and unfair labor practices.¹¹

Once again, Plaintiffs do not allege they filed any claim with MERC regarding the matters challenged in this lawsuit. The proposed Amended Complaint, like the original Complaint, challenges MERC's 2006 certification of a union representing home-based child care providers. Plaintiffs, however, waited three years to bring this present action. If Plaintiffs, who are members of the Union, claim that the deduction of dues somehow constitutes an unfair labor practice or that the union breached its duty of fair representation, they were required to file their

⁸ Defendants do not concede their claim that this Court lacks jurisdiction based on the present case being an action for declaratory and injunctive, rather than mandamus, relief.

⁹ MCR 3.305(A)(2).

¹⁰ MCL 423.213; *St. Clair Intermediate School Dist v Intermediate Education Ass'n*, 458 Mich 540, 549; 581 NW2d 707 (1998) (MERC has "exclusive jurisdiction" over unfair labor practices with respect to bargaining policy).

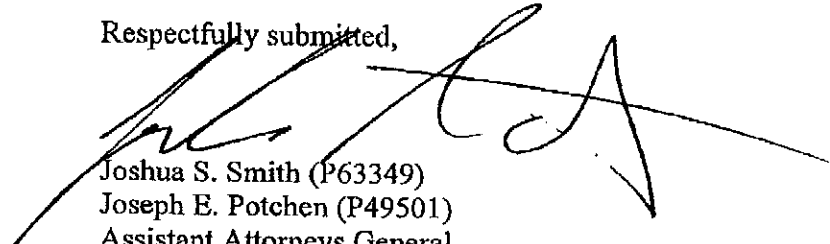
¹¹ MCL 423.216; *Kent County Deputy Sheriff's Assoc v Kent County Sheriff*, 463 Mich. 353, 359; 616 NW2d 677 (2000). *See also Labor Mediation Board v Jackson County Road Commissioners*, 365 Mich 645, 654; 114 NW2d 183 (1962); *Lamphere Schools v Lamphere Federation of Teachers*, 400 Mich 104, 118; 252 NW2d 818 (1977).

claim, before either MERC or in Circuit Court,¹² within six months after discovering the claim.¹³ Plaintiffs failed to exhaust their available remedies, a defect not cured by the proposed amended Complaint. Accordingly, Plaintiffs Motion to File Amended Complaint must be denied as futile.

Conclusion

Plaintiffs' proposed Amended Complaint fails to cure the defects of the Complaint and merely adds conclusory, unsupported allegations that fail to state a claim. It would therefore be futile to allow them to file an amended complaint. The proposed Amended Complaint also fails to avoid the jurisdictional infirmities set forth in Defendants' Motion to Dismiss. Defendants Michigan Department of Human Services and Ishmael Ahmed therefore respectfully request that this Court deny Plaintiffs' Motion to File Amended Complaint and dismiss Plaintiffs' Complaint.

Respectfully submitted,



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¹² *Demings v City of Ecorse*, 423 Mich 49, 63-64; 377 NW2d 275 (1985).

¹³ *Silbert v Lakeview Education Ass'n, Inc*, 187 Mich App 21, 25; 466 NW2d 333 (1991).