

FILED: May 16, 2012

IN THE COURT OF APPEALS OF THE STATE OF OREGON

PAMALA KROHN,
an individual,
Plaintiff-Appellant,

v.

HOOD RIVER SCHOOL DISTRICT,
Defendant-Respondent.

Hood River County Circuit Court
100096CC

A146995

Donald W. Hull, Judge.

Submitted on October 27, 2011.

David A. Schuck, Stephanie J. Brown, and Schuck Law, LLC filed the briefs for appellant.

Richard Cohn-Lee and The Hungerford Law Firm filed the brief for respondent.

Before Schuman, Presiding Judge, and Wollheim, Judge, and Nakamoto, Judge.

WOLLHEIM, J.

Reversed and remanded.

1 WOLLHEIM, J.

2 The trial court granted defendant Hood River School District's motion to
3 dismiss plaintiff's statutory wage claims under ORCP 21 A(1), based on lack of subject
4 matter jurisdiction on the ground that the claims are subject to or preempted by the Labor
5 Management Relations Act (LMRA) or a collective bargaining agreement. We conclude
6 that the claims are not preempted and therefore reverse and remand.

7 Plaintiff, who works for defendant as a custodian, is a classified employee
8 represented by the Oregon School Employees Association (OSEA). Defendant and
9 OSEA entered into a collective bargaining agreement (CBA) that covered the relevant
10 period, September 1, 2007 to June 30, 2010. The CBA provided:

11 "The intent of this Agreement is to set forth and record herein the
12 basic and full Agreement between the parties on those matters pertaining to
13 wages, hours and conditions of employment for classified personnel in the
14 bargaining use."

15 In the CBA, defendant recognizes the OSEA as having exclusive authority to represent
16 classified employees like plaintiff in matters of hours and wages and makes clear that
17 classified employees such as plaintiff are bound by the terms of the CBA:

18 "The District recognizes the Association as the sole and exclusive
19 representative with respect to wages, hours and conditions of employment
20 for all employees included in the bargaining unit[.]"

21 The CBA defines the salaries and rates of pay for classified employees. The CBA
22 authorizes defendant to deduct certain sums from classified employees' wages if
23 requested by the employee.

24 The CBA provides that "[t]he grievance procedure is the exclusive remedy

1 provided by this Agreement to resolve a grievance." The CBA defines a grievance as "a
2 dispute about the meaning or interpretation of a particular clause of this Agreement, or
3 about an alleged violation of the Agreement." Additionally, the CBA provides that it
4 does not deny any employee her rights under state or federal laws and constitutions.

5 Plaintiff filed a complaint in circuit court against defendant alleging two
6 statutory wage claims: For her first claim, plaintiff alleged that defendant had deducted
7 wages from plaintiff's paychecks in an amount not less than \$7,344 in violation of ORS
8 652.610.¹ For her second claim, plaintiff alleged that defendant had failed to pay plaintiff
9 minimum wage for all hours worked, in violation of ORS 653.025.² For the alleged
10 violations, plaintiff sought actual damages, statutory penalties, interest, and attorney fees.

11 Defendant filed a motion to dismiss the complaint under ORCP 21 A(1),
12 asserting that the trial court lacked subject matter jurisdiction because plaintiff had failed
13 to exhaust her remedies under the CBA between defendant and OSEA. Defendant
14 asserted that the CBA governs any claim that plaintiff might have against defendant,
15 because the CBA defines plaintiff's rights relating to salary, wages, and the rate of her
16 pay, sets forth a grievance procedure, and provides that the grievance procedure is the
17 exclusive remedy to resolve a grievance relating to wages.³ Therefore, defendant argued

¹ ORS 652.610(3) provides that, subject to particular exceptions, "[a]n employer may not withhold, deduct or divert any portion of an employee's wages[.]"

² ORS 653.025(1) provides that, "for each hour of work time that the employee is gainfully employed, no employer shall employ or agree to employ any employee at wages at a rate lower than [the listed minimum wage for the calendar year]."

³ On a motion to dismiss for lack of subject matter jurisdiction under ORCP 21

1 that the claims should be dismissed for lack of jurisdiction. The trial court agreed and
2 dismissed.

3 We review the trial court's dismissal of the action on jurisdictional grounds
4 for legal error. *Parker v. City of Albany*, 208 Or App 296, 298, 144 P3d 976 (2006). In
5 support of the trial court's ruling, defendant continues to contend, citing *Smoldt v.*
6 *Henkels & McCoy, Inc.*, 334 Or 507, 512, 53 P3d 443 (2002), and *State ex rel Nilsen v.*
7 *Berry*, 248 Or 391, 398-99, 434 P2d 471 (1967), that a worker must exhaust remedies
8 under a collective bargaining agreement before bringing a statutory claim and, in the
9 absence of exhaustion, the trial court lacked subject matter jurisdiction.

10 Plaintiff asserts that there was no need to exhaust remedies under the CBA
11 in this case because plaintiff's concerns are not addressed in the CBA. We agree with
12 plaintiff that the trial court erred in dismissing plaintiff's claims as barred by the CBA,
13 because plaintiff's claims are neither addressed in nor precluded by the CBA.

14 Both parties assume that, if plaintiff's claims depend on an interpretation of
15 an ambiguous provision of the CBA, then state court subject matter jurisdiction is

A(1), if

"the facts constituting such [a] defense[] do not appear on the face of the pleading and matters outside the pleading, including affidavits, declarations and other evidence, are presented to the court, all parties shall be given a reasonable opportunity to present affidavits, declarations and other evidence, and the court may determine the existence or nonexistence of the facts supporting such defense or may defer such determination until further discovery or until trial on the merits."

Consequently, a court may consider evidence beyond the allegations in the pleadings--including the CBA--to determine whether it has subject matter jurisdiction of a case.

1 preempted under section 301 of the LMRA, 29 USC § 185(a).⁴ See *Caterpillar, Inc. v.*
2 *Williams*, 482 US 386, 394, 107 S Ct 2425, 96 L Ed 2d 318 (1987) (construing LMRA to
3 preempt state law claims that arise directly from rights granted in a CBA or that are
4 "substantially dependent" on an interpretation of a CBA). That assumption is incorrect;
5 the LMRA has no application in the context of a claim by a public employee because a
6 state public employer is expressly excluded from the definition of employer in the
7 LMRA.⁵ *Ayres v. Int'l. Bhd. Of Elec. Workers*, 666 F2d 441, 444 (9th Cir 1982) ("We
8 hold that section 301(a) of the Act, 29 U.S.C. § 185(a), does not grant this court
9 jurisdiction over the claims of an individual employed by a political subdivision of a
10 state."). The school district is included in the definition of a public employer. ORS
11 243.650(20). We thus consider whether there is some basis under the CBA itself or state
12 law for concluding that plaintiff is precluded from bringing her claims in state court,
13 addressing first the terms of the CBA itself. See *Smoldt*, 334 Or at 510.

14 Plaintiff asserts that her claims are statutory claims, not governed or
15 precluded by the CBA. In defendant's view, plaintiff's claims depend on the meaning or
16 an interpretation of the CBA and are, therefore, subject to the grievance procedure

⁴ Section 301 provides:

"Suits for violation of contracts between an employer and a labor organization representing employees in an industry affecting commerce as defined in this chapter, and between any such labor organizations, may be brought in any district court of the United States having jurisdiction of the parties, without respect to the amount in controversy or without regard to the citizenship of the parties."

⁵ 29 USC section 152(2) provides, in part, "that the term employer * * * shall not include * * * any State or political subdivision thereof[.]"

1 therein. This is so, defendant contends, because the paychecks that plaintiff asserts
2 violated the statutory wage laws were issued pursuant to financial and accounting
3 practices of the school district that follow the "common sense principle reflected in the
4 CBA" that an employee should only be paid wages for hours that she actually worked.

5 We agree with plaintiff that her claims are not governed by the CBA. First,
6 we have no difficulty concluding that plaintiff's claims are not alleged breaches of the
7 CBA that are to be raised as grievances under the CBA. As noted, the CBA defines a
8 grievance as a claim that alleges a violation of the agreement or seeks an interpretation of
9 it. Plaintiff's claims alleged simply that defendant wrongfully withheld money from
10 plaintiff's paycheck that were due, in violation of ORS 653.610, and that plaintiff was not
11 paid minimum wage for hours worked, as required by ORS 652.025. Plaintiff did not
12 allege a violation of the CBA or incorporate or cite the CBA as the basis for her claims.

13 We conclude, further, that plaintiff's claims do not require an interpretation
14 of the CBA. The provisions of the CBA that defendant asserts require "interpretation"
15 are merely general provisions that might be consulted in the course of the claim, but that
16 do not require interpretation to determine plaintiff's claim.⁶ *See Livadas v. Bradshaw*,
17 512 US 107, 124, 114 S Ct 2068, 129 L Ed 2d 93 (1994) (for purposes of the LMRA,

⁶ The provisions of the CBA that defendant cites include provisions stating that (1) the agreement is the parties' full agreement as to "those matters pertaining to wages, hours and conditions of employment"; (2) the union is the sole and exclusive representative of all employees with respect to wages, hours, and conditions of employment; (3) the district "retains all its customary, usual and exclusive rights"; (4) the district is allowed to follow the district's financial, budgetary, and accounting procedures; and (5) "salaries and wages * * * will be paid in accordance with District determined payroll procedures[.]"

1 mere reference to the provisions of a CBA does not amount to an "interpretation"). For
2 that reason, as well, plaintiff's claims are not governed by the CBA.

3 As an alternative ground for affirmance, defendant points out that the
4 statute on which plaintiff bases her claim for the wrongful withholding of wages, ORS
5 652.610(3), provides an exception for deductions authorized by a collective bargaining
6 agreement. ORS 652.610(3)(d) provides that an employer may not withhold or deduct
7 any portion of an employee's wages unless the withholding or deduction is authorized by
8 a CBA. Defendant cites several provisions of the CBA that defendant contends
9 authorized the withholding of plaintiff's wages and show that plaintiff's claim depends on
10 the meaning of the CBA. However, once again, the provisions that defendant cites are
11 simply general provisions bearing on the relationship of the parties to the CBA.
12 Defendant does not cite a single provision that either specifically authorized the
13 withholding of plaintiff's wages in this case or presented an ambiguity as to whether
14 defendant was authorized to withhold plaintiff's wages. Thus, contrary to defendant's
15 contention, plaintiff's wage deduction claim is not barred by ORS 652.610(3)(d).

16 Defendant does not offer any other argument that state law precludes
17 plaintiff's claims. Having concluded that plaintiff's claims are neither preempted by the
18 LMRA nor governed or precluded by the CBA, we hold that the trial court erred in
19 dismissing plaintiff's claims.

20 Reversed and remanded.