STATE OF MICHIGAN

COURT OF APPEALS

WASHTENAW COUNTY, Respondent-Appellee, v MICHAEL SCHILS, Charging Party-Appellant.	UNPUBLISHED January 4, 2007 Nos. 263938; 267650 MERC LC Nos. 03-000288; 04-000013; 04-000260

Before: Borrello, P.J., and Neff and Cooper, JJ.

PER CURIAM.

In these consolidated cases, Michael Schils appeals two decisions and orders of the Michigan Employment Relations Commission (MERC), dismissing unfair labor practice charges that Schils filed against his former employer, Washtenaw County. We affirm.

On March 18, 2003, Schils filed unfair labor practices charges with MERC against his employer and his bargaining unit, American Federation of State, County and Municipal Employees Council 25 (AFSCME), claiming that he was wrongfully discharged in 2001. There is little evidence in the record regarding his discharge except that the County discharged him on January 7, 2000, and reinstated him after an August 8, 2001, arbitration award. One month later, he was discharged again for failing a drug test. After a second arbitration award, the County reinstated him subject to a "last chance agreement." When Schils refused to sign the agreement, an arbitrator, in a third award issued September 10, 2002, made findings that Schils had voluntarily terminated his employment by failing to sign the agreement. Those original charges, C03 C-061 and CU03 C-017, were dismissed by MERC in an order dated August 6, 2004, citing a failure by Schils to file the charges within the six-month limitations period of the Public Employment Relations Act (PERA), MCL 423.216(a). While the original charges were pending, Schils filed the charges that are now at issue in Docket No. 263938. Following dismissal of the original charges, Schils filed a motion to reopen the record on August 16, 2004, which MERC denied, causing Schils to subsequently file the charges in Docket No. 267650.

In Docket No. 267650, Schils appeals the dismissal of his unfair labor practice charges set forth in C04 J-260. In those charges, he accused the County of dominating the AFSCME, a violation of MCL 423.210, and of fraudulent concealment of his cause of action. Schils alleged, based on the same facts he presented in his motion to reopen the record, that his supervisor implemented new policies requiring a commercial drivers license (CDL) and the drug testing of drivers based on "false information" that they were federally required. Schils supported his

argument with a letter from the Federal Motor Vehicle Safety Administration of the U.S. Department of Transportation dated November 21, 2003, which stated that there was no federal requirement that a driver of a passenger van designed to transport nine to fifteen passengers was required to have a CDL. Schils claimed that because of this "fraudulent concealment" by his supervisor, MCL 600.5855 applied to extend the statute of limitations for the unfair labor practices to two years.

Administrative Law Judge (ALJ) Stern issued a recommendation and decision dismissing Schils's claims on January 4, 2005. She noted that the MERC stated there was no basis to reopen the record after it considered Schils's new evidence because the MERC already ruled on Schils's argument that the county fraudulently concealed his cause of action, and the ALJ could not change its conclusion. The MERC affirmed the ALJ's recommendation in its decision and order on December 21, 2005, and dismissed the unfair labor practice charges for failure to state a claim upon which relief could be granted.

On appeal, Schils makes several arguments regarding the charges in C04 J-260, but the essential complaint is that the MERC did not fully consider his new charges of "domination" and fraudulent concealment and incorrectly dismissed the charges as if they had been decided with the original charges. According to Schils, the MERC's dismissal of the new charges was improper because the prior charges were not adjudicated on the merits since they were dismissed as time-barred.

A finding of fact by the MERC is conclusive if it is "supported by competent, material, and substantial evidence on the record considered as a whole." *Grandville Exec Assoc v Grandville*, 453 Mich 428, 436; 553 NW2d 917 (1996). Legal determinations by the MERC "may not be disturbed unless they violate a constitutional or statutory provision or they are based on a substantial and material error of law." *Id*.; MCL 24.306(1). Thus, we review a decision of the MERC with due deference. *West Ottawa Ed Ass'n v West Ottawa Pub Schools Bd of Ed*, 126 Mich App 306, 313; 337 NW2d 533 (1983).

Schils first argues that ALJ Stern erred because her decision contained no findings of fact as required by MCL 423.216(b). The MERC must state its findings of fact when it issues an order dismissing an unfair labor practices complaint. *Id.* Nevertheless, MERC has the authority to summarily dispose of an unfair labor practice complaint on the ground that the charge fails to state a claim consistent with PERA, and it may do so without an evidentiary hearing on the facts as long as the parties have the opportunity to present oral arguments on issues of law and policy. *Smith v Lansing School Dist*, 428 Mich 248, 250-251; 406 NW2d 825 (1987). Any decision by the MERC must be supported by "substantial evidence." *MERC v Detroit Symphony Orchestra*, 393 Mich 116, 124; 223 NW2d 283 (1974). Substantial evidence is "the amount of evidence that a reasonable mind would accept as sufficient to support a conclusion. While it consists of more than a scintilla of evidence, it may be substantially less than a preponderance." *St Clair Co Ed Ass'n v St Clair Co ISD*, 245 Mich App 498, 512; 630 NW2d 909 (2001), quoting *In re Payne*, 444 Mich 679, 692; 514 NW2d 121 (1994).

In ruling on the "new" charge in C04 J-260, ALJ Stern stated that the board had already decided the new charges were without merit and that she could not reverse that decision. ALJ Stern was correct in her finding that the MERC had already concluded that it could not reopen the record because the new arguments failed to raise any issue under PERA, and the additional

evidence presented would not change the result of the dismissal of the original charges. Despite Schils's contention that his allegation of "employer domination" was a new claim, his charge asserted no different behavior or actions by the County. Rather, he admitted that the same facts on which he based his motion to reopen the record also formed the basis for the accusation of employer domination. Accordingly, it was not a substantial and material error for the ALJ to dismiss the charges.

For fraudulent concealment to extend the statute of limitations, Schils must show that defendant engaged in some arrangement or contrivance of an affirmative character designed to prevent subsequent discovery of the cause of action. *Prentis Family Foundation, Inc v Barbara Ann Karmanos Cancer Institute*, 266 Mich App 39, 48; 698 NW2d 900 (2005). As the Michigan Supreme Court explained long ago:

> The fraudulent concealment which will postpone the operation of the statute must be the concealment of the fact that plaintiff has a cause of action. If there is a known cause of action there can be no fraudulent concealment. It is not necessary that a party should know the details of the evidence by which to establish his cause of action. It is enough that he knows that a cause of action exists in his favor, and when he has this knowledge, it is his own fault if he does not avail himself of those means which the law provides for prosecuting or preserving his claim. [*Weast v Duffie*, 272 Mich 534, 539; 262 NW 401 (1935).]

In this case, Schils was aware he had a cause of action, and filed his claims, even though he did not have all the details of the evidence to establish his claim. There is no evidence that the employer or anyone acting on behalf of the employer did anything to prohibit Schils from either finding or accumulating evidence to substantiate his claims. From the record it is clear that the existence of his *claim* was not fraudulently concealed. Thus, the two-year statute of limitations does not apply, but rather his claims are time-barred by the six-month limitations period. MCL 423.216(a).

Schils next argues that it was improper for the ALJ to raise the affirmative defense of res judicata sua sponte when dismissing the charges at issue in Docket No. 267650. Res judicata bars a subsequent action when (1) the prior action was decided on the merits; (2) the decree in the prior action was a final decision; (3) the matter contested in the second case was or could have been resolved in the first action; and (4) both actions involved the same parties or their privies. *Baraga Co v State Tax Comm*, 466 Mich 264, 269; 645 NW2d 13 (2002). Res judicata may arise from a quasi-judicial administrative decision if the determination is adjudicatory in nature, a method of appeal is provided, and it was intended by the legislature that the determination be final absent an appeal. *Wayne Co v Detroit*, 233 Mich App 275, 277; 590 NW2d 619 (1998).

In this case, the August 6, 2004, order of the MERC was a final decision, the issue whether the county "dominated" the union could have been resolved in the prior charges before MERC, and the same parties were involved in the prior and current charges. However, there was no adjudication on the merits because a summary disposition based on procedural grounds, like the expiration of the limitations period in this case, is not a determination on the merits. *Verbrugghe v Select Specialty Hospital-Macomb Co, Inc*, 270 Mich App 383, 393-396; 715 NW2d 72 (2006). Thus, res judicata cannot operate to bar the action in C04 J-260.

Regardless of the reason the MERC dismissed the charges, the MERC's regulations state that an ALJ may, on its own motion, order the dismissal of a charge, at any time before or during the hearing, on the basis that "[t]he charge is barred because of the expiration of the applicable period of limitations, or . . . the charging party has failed to state a claim upon which relief can be granted." 2006 AC, R 423.165(2)(c) and (d). Therefore, it was not error for ALJ Stern to dismiss the charges in this case. The statute of limitations bars the claim as a matter of law. As previously discussed, the charges at issue in Docket No. 267650 assert no new behavior or actions by the employer.

Schils also incorrectly contends that the County's failure to answer his charge waived any affirmative defenses. However, the MERC regulations clearly state that a "failure to file an answer shall not constitute an admission of any fact alleged in the charge, nor shall it constitute a waiver of the right to assert any defense." 2006 AC, R 423.155.

In Docket No. 267650, Schils argues that MERC has failed to effectuate the policy of the PERA because it is colluding with the Union and the County to violate employees' privacy by enforcing employee drug testing without a legal basis for it. Schils did not raise this argument below, and he fails to cite the record to support his allegations or to cite any legal authorities to support his position. An appellant may not announce a position and leave it to this Court to discover and rationalize that position, nor may he give the issue cursory treatment with little citation to authority. *Houghton v Keller*, 256 Mich App 336, 339-340; 662 NW2d 854 (2003). We deem this argument abandoned, and even if we were to consider such an argument we find it without merit.

In Docket No. 263938, Schils appeals the dismissal of two unfair labor practice charges that he filed against the County, C03 L-288 and C04 A-013. In both cases Schils alleged that the County retaliated against him for his earlier unfair labor charges and attempted to discredit and to intimidate him and other employees from exercising their rights under PERA. In C03 L-288, Schils specifically alleged that on June 26, 2003, a supervisor prohibited him from observing and photographing legally required employment postings at his former workplace, police forcibly removed him from the premises, and another staff member read a notice of trespass to him, which publicly humiliated him in front of former co-workers. In C04 A-013, Schils alleged that on July 23, 2003, the sheriff escorted him out of a County Board of Commissioner's meeting, searched him, placed him in a squad car, gave him a trespass notice, and told him to leave the premises. The trespass notice prohibited Schils from entering Washtenaw County government property for one year. Schils claimed those actions violated MCL 423.10(1)(a) and (d), which state that it is unlawful for a public employer or officer or agent "(a) to interfere with, restrain or coerce public employees in the exercise of their rights guaranteed in section 9;[1] . . . and (d) to discriminate against a public employee because he has given testimony or instituted proceedings under this act."

[1] Section 9 allows public employees to organize and form unions. MCL 423.209.

Washtenaw County filed motions to dismiss both charges, alleging that Schils lacked standing because he was not a public employee at the time of the County's acts, and thus, he failed to state a claim. After a hearing to show cause why the charges should not be dismissed, the ALJ issued a decision and order, which granted summary disposition because Schils, as a former employee, had no protection under PERA and no standing to file a charge.

Schils filed his exceptions to the decision, stating that although the act did not protect employees who voluntarily separated from their employment; it protected employees who were improperly terminated in retaliation for exercising rights under PERA. He stated that but for the fact that the County had terminated him on September 7, 2001, for exercising his PERA-protected rights, he would still be an employee. Schils is correct in his assertion that not being a current public employee does not mandate that an individual is not protected under PERA. The MERC noted in *City of Highland Park*, 7 MPER (LRP) P25,078 (1994), that "PERA does not bar a complaint by an individual protesting his discharge as illegal under PERA, simply because he is no longer an employee." However, an employee who resigns a position, even if he has done so under "changed conditions," is not covered by PERA unless the former employee can prove constructive discharge, specifically, that the employee has been put in an intolerable or untenable position. *Detroit v Assoc of Municipal Inspectors*, 18 MPER 58 (2005). In Schils' case, an arbitrator found that he voluntarily left his position. That decision was never properly appealed. Consequently, Schils was no longer an employee for purposes of PERA, regardless of any definition of "employee" that can be applied. It was therefore proper that the MERC ruled that Schils could not claim protection under PERA two years after he had voluntarily left his employment.

Finally, Schils argues that the MERC's failure to follow federal precedent that allows a charging party to file additional unfair labor practices charges while the original proceeding is pending was arbitrary. He is correct that a charging party may file additional unfair labor practice charges "of the same class of violations" which are related to the original charges and grow out of those charges while the proceeding is pending before the board. *NLRB v Fant Milling Co*, 360 US 301, 307; 79 S Ct 1179; 3 L Ed 2d 1243 (1959). Although we may appropriately look to federal precedent for guidance in construing the provisions of PERA, *Mich Employment Relations Comm v Reeths-Puffer School Dist*, 391 Mich 253, 260; 215 NW2d 672 (1974), in this case, because Schils voluntarily left his position, he was not an employee and he was therefore not covered by PERA. Thus, federal precedent is irrelevant and we need not address the substance of his charges to determine if they were related to the original charges.

Affirmed.

/s/ Stephen L. Borrello
/s/ Janet T. Neff
/s/ Jessica R. Cooper