

**IN THE COURT OF APPEALS OF IOWA**

No. 2-849 / 12-0440  
Filed December 12, 2012

**LYDIA HARTUNIAN,**  
Plaintiff-Appellant,

**vs.**

**KIRKWOOD COMMUNITY  
COLLEGE,**  
Defendant-Appellee.

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Appeal from the Iowa District Court for Linn County, Robert E. Sosalla,  
Judge.

Lydia Hartunian appeals the district court's ruling granting summary  
judgment to her employer, Kirkwood Community College. **AFFIRMED.**

David E. Brown and Laura E. Bergus of Hayek, Brown, Moreland & Smith,  
L.L.P., Iowa City, for appellant.

Brian L. Gruhn and David J. Winkelmann of Gruhn Law Firm, Cedar  
Rapids, for appellee.

Heard by Doyle, P.J., and Mullins and Bower, JJ.

**MULLINS, J.**

Lydia Hartunian, a professor at Kirkwood Community College (Kirkwood), appeals the district court's ruling granting summary judgment in favor of Kirkwood. Hartunian asserts the district court erred in concluding (1) she was required to follow the collective bargaining agreement's grievance procedure, (2) the futility exception to the exhaustion requirement was not applicable, and (3) Kirkwood did not waive the exhaustion requirement in this case. For the reasons stated below, we affirm.

**I. BACKGROUND FACTS AND PROCEEDINGS.**

Hartunian is a tenured humanities professor at Kirkwood's Cedar Rapids campus. However, she was interested in transferring to the Iowa City campus because she resided in Iowa City. In February 2011, Kirkwood advertised an internal transfer opening for a Philosophy and Religion professor on Iowa City's campus.

Hartunian and another Kirkwood faculty member, David Bullwinkle, applied for the internal transfer position. In an email from Dale Simon, Associate Vice President of the Iowa City campus, both Hartunian and Bullwinkle were informed they would not be qualified for the position because they did not have the requisite number of credit hours of graduate work in religion. Simon explained the position would be opened externally for outside applicants to apply. He further explained that if the hiring committee was unable to find someone who met both the philosophy and religion requirements, or someone who would be a good fit for Kirkwood, it would "probably look at individuals who would meet the

requirements for Philosophy and Humanities. Therefore, we would invite you to apply.”

The external position announcement said a master’s degree or higher in philosophy and religion was preferred, additional background in another humanities discipline was desired, and successful teaching experience was essential. Bullwinkle submitted an application in response to the external posting. Hartunian did not. When the hiring committee did not find a fit for the philosophy and religion position, they looked at applicants who met the philosophy and humanities requirements. The job advertisement was not revised to reflect a change in the job title or its requirements. Bullwinkle was interviewed and hired for the position.

When Hartunian became aware of the hiring decision, she sought an explanation from Simon and Bill Lamb, Vice President of Academic Affairs, in a series of emails. When she did not receive the response she sought, she employed the services of an attorney, who sent Simon and Lamb a letter on May 25, 2011, asking that the offer to Bullwinkle be withdrawn and that the college make no hiring decision until it advertised the philosophy and humanities position to permit Hartunian and others to apply. Counsel for Kirkwood responded to the letter on June 17, 2011, asserting Hartunian was advised that the college would look to fill a philosophy and humanities position if the philosophy and religion position was not filled. Counsel for the college asserted both Hartunian and Bullwinkle were invited to apply externally, which Bullwinkle did and Hartunian

did not. The letter concluded by asserting Bullwinkle qualified for the position and the position had been offered to him.

Hartunian filed a petition for a declaratory judgment and an application for a temporary injunction on July 1, 2011. Hartunian asserted Kirkwood “violated its policies, practices, and procedures” by failing to advertise the philosophy and humanities position, and by failing to notify her that it had decided to offer the position.<sup>1</sup> She asked the court to determine that Kirkwood “was required to advertise [the philosophy and humanities] position and/or to allow [Hartunian] a reasonable opportunity to apply for same before making any hiring decision in regard to that position.” In addition, Hartunian asked the court to determine the decision to hire Bullwinkle was premature, to order the decision be rescinded, and to order no hiring decision be made until proper advertising and notice procedures are followed by Kirkwood.

Kirkwood filed a motion for summary judgment on September 27, 2011, asserting Hartunian’s action should be dismissed because the court lacked the jurisdiction to hear the case due to Hartunian’s failure to exhaust the remedies under the collective bargaining agreement between Kirkwood and the faculty union. On January 31, 2012, the district court granted Kirkwood’s motion for summary judgment finding “the disagreement turns on Kirkwood’s obligations to post internal job openings,” which “clearly falls within the articles of the [collective bargaining a]greement.” Because Hartunian admitted she did not follow the

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<sup>1</sup> At oral argument, counsel for Hartunian described her claim as an implied contract claim. Because we determine summary judgment was proper in this case due to Hartunian’s failure to exhaust her remedies under the collective bargaining agreement, we need not address the viability of her implied contract claim.

formal grievance procedures under the agreement, the court found it had no jurisdiction to hear the matter.

The court also found that the series of emails and letters between Hartunian, her attorney, and Kirkwood did not substantially comply with the grievance procedures because Hartunian followed virtually none of the requirements, and “most troubling,” Hartunian did not send her complaint to the appropriate people—namely first to her immediate supervisor. The court found the futility exception to exhausting administrative remedies did not apply. Finally, the district court rejected Hartunian’s claim that Kirkwood waived the exhaustion requirement by failing to respond to her attorney’s letter within the time required by the grievance procedures. The court found that because Hartunian never properly initiated the grievance procedures, Kirkwood could not have waived the exhaustion requirement by failing to respond to a grievance it never received. Hartunian appeals.

## **II. SCOPE AND STANDARD OF REVIEW.**

We review the district court’s decision to grant summary judgment for correction of errors at law. *Mueller v. Wellmark, Inc.*, 818 N.W.2d 244, 253 (Iowa 2012). Summary judgment is appropriate when “there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law.” *Id.*; see also Iowa R. Civ. P. 1.981(3). We view the evidence submitted in the light most favorable to the nonmoving party. *Mueller*, 818 N.W.2d at 253.

### III. COLLECTIVE BARGAINING AGREEMENT.

Hartunian first claims the district court erred in determining she was required to first exhaust the collective bargaining agreement's grievance procedures before filing her action in district court. She alleges that because her claim does not involve the "interpretation or application" of the agreement, she does not have to exhaust the grievance procedures<sup>2</sup> contained in that agreement. Because we find Hartunian's claim does arise out of the collective bargaining agreement, we agree with the district court that it had no jurisdiction

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<sup>2</sup> The grievance procedures in the collective bargaining agreement at issue in this case provide, in part:

A grievance is a claim that there has been a violation, misrepresentation, or misapplication of a specific Article or Articles of this Agreement. A grievance may be filed by one or more members of the unit who claim they have been aggrieved, or by the Association with the immediate supervisor of any of the employees filing such a grievance.

. . . .

A. Level One

The grievant will present a signed, written grievance on an approved form to the immediate supervisor or designee within thirty (30) working days from the date the grievant became aware of the alleged contract violation. . . . Within fifteen (15) working days after the presentation of the grievance, the immediate supervisor shall give his/her answer to the unit member in writing.

B. Level Two

In the event a grievance has not been satisfactorily resolved at Level One, the grievant may, within five (5) working days of the receipt of the immediate supervisor's answer, submit to the appropriate Dean, a signed written statement of the grievance. . . .

C. Level Three

If the grievance is not resolved satisfactorily at Level Two, the grievant may, within five (5) working days of the receipt of the Dean's answer, submit to the President of the college a signed written statement of the grievance. . . .

D. Level Four

If the grievance is not resolved at Level Three, the grievant or his/her representative may, within ten (10) working days, notify the President that the grievance be submitted to binding arbitration.

over her claim due to her failure to exhaust her contractual remedies contained within the collective bargaining agreement.<sup>3</sup>

If an employee makes a claim that a collective bargaining agreement has been breached by an employer, that employee “must at least try to exhaust the exclusive grievance and arbitration procedures in the collective bargaining agreement before bringing suit.” *Norton v. Adair County*, 441 N.W.2d 347, 352-53 (Iowa 1989). “Since the employee’s claim is based upon breach of the collective bargaining agreement, he is bound by terms of that agreement which govern the manner in which contractual rights may be enforced.” *Vaca v. Sipes*, 386 U.S. 171, 184 (1967). However, if the claim made by the employee is not covered by the collective bargaining agreement, then there is no requirement to exhaust the contractual remedies. See *Barske v. Rockwell Int’l Corp.*, 514 N.W.2d 917, 921 (Iowa 1994) (“Employees covered by labor contracts may assert legal rights independent of the labor contract as long as they do not rely on the [collective bargaining agreement].”). Thus, our question in this case is whether Hartunian’s claim is covered by the collective bargaining agreement. If it

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<sup>3</sup> Hartunian also alleges there is no statutory requirement that she exhaust the grievance procedures in the collective bargaining agreement. She argues for the first time on appeal that Iowa Code section 20.18 (2011) does not apply to her as that statute has been construed in *Kucera v. Baldazo*, 745 N.W.2d 481, 487 (Iowa 2008). At oral argument Hartunian asserted she did preserve this issue by mentioning the inapplicability of section 20.18 in her resistance memorandum in the district court. We have reviewed the memorandum and find that while she did contend section 20.18 was inapplicable, the basis asserted in the district court for its inapplicability was that her claim did not arise out of the collective bargaining agreement. Nowhere in the district court record did Hartunian assert the argument she now makes on appeal that *Kucera* narrows section 20.18’s application to only collective bargaining agreements under Iowa Code chapters 8A and 400. We find this issue not preserved as it was not raised in or decided by the district court. *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002) (“It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal.”).

is, Hartunian must follow the grievance procedures. If it is not, Hartunian is free to pursue her action in district court without regard to the grievance procedures of the collective bargaining agreement.

The collective bargaining agreement at issue in this case does address the “transfer” of members. A transfer is defined in the agreement as “the movement of a unit member from one supervisory area to another supervisory area in which the unit member is certified to perform a new assignment or work in a new primary teaching location.” The agreement requires Kirkwood to post faculty vacancies internally first—“The Board *shall* post vacancies covered by this agreement throughout the college.” (Emphasis added.) The agreement also states, “Any full-time unit member may apply for transfer to any open position for which s/he is qualified.”

Hartunian exercised her right as a unit member to apply for a transfer when the position was posted as a philosophy and religion instructor. She was advised she did not qualify for the position due to a lack of graduate credit hours in religion. When no internal candidate qualified for the position, the position was changed to an external open position, which is advertised to the world. Hartunian asserts her claims do not implicate the collective bargaining agreement, and thus, she does not have to exhaust the grievance procedure because the position was an external open hire, and the agreement does not cover external open hires.

Hartunian’s petition in the district court asserted Kirkwood violated its policies, practices, and procedures by failing to advertise the philosophy and



humanities position and by failing to notify Hartunian that it intended to offer this position. Hartunian claims this failure to advertise denied her the opportunity to apply for the position. Hartunian does not assert in the petition that Kirkwood violated a provision of the collective bargaining agreement.

In Hartunian's deposition she stated that it is her position Kirkwood should have re-advertised the position internally when it decided to change the position from philosophy and religion to philosophy and humanities. She also stated that Kirkwood would not only need to advertise the position internally after it made the change, but it would also need to change the external posting as well, depending on the outcome of the internal search.

During the deposition Hartunian also went to great lengths to clarify she was not contending Kirkwood violated a term of the collective bargaining agreement but was asserting that it violated its human resource practices, policies, and procedures. She based her allegations on human resource forms she contends Kirkwood filled out incorrectly. She alleged Kirkwood failed to fill out the human resource forms with the correct job title for the position being hired. She claimed Kirkwood erred in failing to properly describe the job duties and failed to properly define the minimum qualifications. She also pointed out the fact that those in charge of the hiring failed to keep the human resource department aware of the fact that the position was not being filled as advertised so the human resource department could advise the applicants of the change, as suggested by the hiring guideline form.

The district court found that all of the policies Hartunian claims were violated were “more detailed provisions promulgated by Kirkwood in the course of fulfilling their obligations to employees with rights under the Agreement.” The court concluded that “Hartunian cannot logically argue that Kirkwood failed to properly re-cast the position internally as a transfer opportunity, ask that this Court order them to do so now, and simultaneously complain that the articles of the Agreement addressing job postings for internal transfers does not govern her complaint.” Ultimately, the court found “the disagreement turns on Kirkwood’s obligations to post internal job openings,” and therefore, it found the agreement was implicated and Hartunian was obligated to exhaust her remedies under the grievance procedures.

We find the district court was correct in concluding Hartunian was obligated to exhaust the grievance procedures in the collective bargaining agreement. While Hartunian attempts to frame her claim as outside the bounds of the collective bargaining agreement, Hartunian’s deposition clearly establishes the remedy she seeks is for the court to order the college to re-advertise the new position internally as a transfer position pursuant to the collective bargaining agreement. Hartunian cannot seek a remedy provided in the collective bargaining agreement and then at the same time, assert her claim does not arise out of the same agreement. Hartunian’s claim is governed by the collective bargaining agreement, and as such she was required to exhaust the grievance procedures provided in the agreement before filing her claim in district court.

#### IV. FUTILITY EXCEPTION.

Hartunian next argues she was excused from having to exhaust the grievance procedures because the pursuit of the grievance procedures in this case would have been futile. She claims based on the responses she received to her emails and to the letter sent by her attorney, “the decision-makers at Kirkwood told [her] they would not provide the relief she requested.”

While there is an exception to the exhaustion requirement when the remedy available under the contract is inadequate or the pursuit of the remedy would have been fruitless, this “futility exception is concerned with the adequacy of the remedy, not the perceived predisposition of the decision maker.” *Keokuk County v. H.B.*, 593 N.W.2d 118, 125 (Iowa 1999). Thus, it is not an excuse that the decision makers would have denied the remedy requested if the grievance procedures had been followed. “A claim of bias is insufficient to avoid the exhaustion requirement.” *N. River Ins. Co. v. Iowa Div. of Ins.*, 501 N.W.2d 542, 546 (Iowa 1993).

The district court found the futility exception has only been recognized by the courts where the employee is making a claim directly against the union or where the union is accused of breaching its duty of fair representation. Therefore, the court concluded the exception did not apply to Hartunian’s claim. The district court also found that just because Hartunian did not get the answer she wanted in response to her emails and her attorney’s letter, this did not mean she was free to proceed to judicial review without following the grievance procedures.

We agree with the district court that the futility exception in this case does not excuse Hartunian's failure to follow the grievance procedures. Hartunian does not argue that her remedy under the collective bargaining agreement was inadequate. Instead she asserts that the grievance procedure would have been futile because she had already been informed by "the decision-makers" at Kirkwood that they would not provide the relief she requested and were dismissive of her claim. The futility exception is not concerned with the perceived predisposition of the decision maker or bias. *N. River Ins.*, 501 N.W.2d at 546. Hartunian has failed to prove the futility exception applies to excuse her failure to exhaust the grievance procedures.

**V. WAIVER.**

Finally, Hartunian claims Kirkwood waived the exhaustion requirement by failing to respond to her grievance within fifteen days as required by the collective bargaining agreement.

The district court found because Hartunian did not properly invoke the grievance process under the agreement, Kirkwood did not waive the exhaustion requirement by failing to respond to the inquiries Hartunian made within the timeline proscribed by the agreement. The court concluded it could not find "Kirkwood failed to respond to a grievance they never received."

We agree with the district court's decision on this issue. In order to find Kirkwood waived the exhaustion requirement, we would first have to find Hartunian's emails and/or her attorney's letter to Simon and Lamb initiated the grievance procedures. This we cannot do. The procedure under the collective

bargaining agreement required Hartunian to first submit her grievance to her immediate supervisor, not to the Associate Vice President of the Iowa City campus, Simon, or the Vice President of Academic Affairs, Lamb. Hartunian's communications did not substantially comply with the grievance requirements, and as such Hartunian did not initiate the grievance procedure. Because the grievance procedure was not initiated, Kirkwood could not have waived the exhaustion requirement. See *Iowa Comprehensive Petroleum Underground Storage Tank Fund Bd. v. Federated Mut. Ins. Co.*, 596 N.W.2d 546, 552 (Iowa 1999) ("The essential elements of waiver are the existence of a right, knowledge, actual or constructive, and an intention to relinquish such right.").

#### **VI. CONCLUSION.**

We find Hartunian's claim is governed by the collective bargaining agreement, and as such she was required to exhaust the grievance procedures provided in the agreement before filing her claim in district court. Her failure to exhaust her contractual remedies was not excused by the futility exception or as a result of a waiver by Kirkwood. We therefore affirm the district court's ruling granting summary judgment in favor of Kirkwood.

**AFFIRMED.**