STATE OF MICHIGAN

COURT OF APPEALS

GAYLE DOVE,

Plaintiff-Appellant,

v

OAKLAND LIVINGSTON HUMAN SERVICE AGENCY,

Defendant-Appellee.

UNPUBLISHED
March 18, 2008

No. 276833
Oakland Circuit Court
LC No. 2006-074423-CD

Before: O'Connell, P.J., and Borrello and Gleicher, JJ.

PER CURIAM.

Plaintiff appeals as of right the circuit court's order granting summary disposition to defendant on the ground that the parties had agreed to arbitrate. For the reasons set forth in this opinion, we affirm. This case is being decided without oral argument in accordance with MCR 7.214(E).

Plaintiff began working for defendant as a nonunion Head Start teacher in 1998. She was terminated, and then reinstated, in 2004. Plaintiff thereafter received a series of reprimands, then an unpaid suspension, in response to which she filed a charge of discrimination with the Equal Employment Opportunity Commission. Plaintiff was finally terminated in 2005, upon which she initiated the internal grievance process to address the matter. Then, in 2006, alleging discrimination and retaliation, plaintiff brought suit in the circuit court under the Civil Rights Act, MCL 37.2101 *et seq*.

Defendant moved for summary disposition on the ground that the parties had agreed to resolve any work-related disputes through arbitration. The trial court agreed and granted the motion.

Plaintiff argues that no valid agreement bound her to arbitration, and, alternatively, that defendant failed to perform as contractually required and thus excused plaintiff's attendant obligations.

"The grant or denial of summary disposition as well as the existence and enforceability of an arbitration agreement are questions of law for a court to determine de novo." *Michelson v Voison*, 254 Mich App 691, 693-694; 658 NW2d 188 (2003). When reviewing a decision on a

motion for summary disposition predicated on the existence of an agreement to arbitrate, we accepts the plaintiff's well-pleaded allegations as true and construes them in favor of the nonmoving party. *Id.* at 694, citing MCR 2.116(C)(7).

Plaintiff signed a statement acknowledging receipt of a personnel practices manual from defendant. The latter sets forth the following provisions (underscoring in the original):

> The following grievance and arbitration procedure shall be utilized by all supervisors and nonunion full-time regular, temporary and part-time employees of the agency. Additionally, the procedure is only available to those employees terminated for any reason, and such procedure shall be a terminated employee's exclusive remedy.
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> * * *
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> 5. Arbitration
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> a. Selection
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> An employee not satisfied with the Executive Director's written findings may within five (5) days of their receipt request in writing that the agency apply to the American Arbitration Association for a list of names of potential arbitrators. . . .
>
> * * *
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> c. Effect and Scope of the Arbitration and its Award
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> The arbitrator's award shall be final and binding on both parties and enforceable in any court of competent jurisdiction.
>
> * * *
>
> The claims that may be submitted for the arbitrator's decision include not only noncompliance by the agency with its practices, procedures and rules, but also any violation of any employment related federal and/or state law.

Plaintiff does not dispute the applicability of this language, but insists that the word "may," as used above, indicates that recourse to arbitration was merely permissive, not a required alternative to litigation.

We review de novo issues of contract interpretation. See *Sands Appliance Services, Inc v Wilson*, 463 Mich 231, 238; 615 NW2d 241 (2000). The primary goal in contract interpretation is to ascertain and effectuate the intent of the parties. *Old Kent Bank v Sobczak*, 243 Mich App 57, 63; 620 NW2d 663 (2000). To determine the parties' intent, we will read the contract as a whole and attempt to apply its plain language. *Id.* Where the contractual language is not ambiguous, its construction is a question of law for the court. See *id.* at 63-64.

In this case, the statement of scope unequivocally declares that the internal grievance procedure, including arbitration, constitutes a nonunion employee's exclusive remedy for termination. The mandatory nature of that provision is indicated by use of the word "shall." See *Liggett v City of Pontiac*, 260 Mich App 127, 138; 676 NW2d 633 (2003). This clear, emphatic, contract term is not negated by the later use of "may" in specifying the types or nature of disputes to be submitted to arbitration. Instead, the wording, taken as a whole, indicates that a terminated employee's sole remedy is through arbitration.

Plaintiff additionally protests that the grievance procedure as set forth neither expressly covered civil rights claims, nor advised her that she was waiving recourse to the courts. But the clear statement that the grievance procedure was an employee's exclusive remedy well signaled that ordinary courtroom litigation was ruled out. And the language prescribing arbitration for "any violation of any employment related federal and/or state law" necessarily covers employment-related claims under our state Civil Rights Act. Plaintiff thus understood, or reasonably should have understood, that the terms to which she agreed foreclosed employment-related litigation in the courts, other than to review an arbitration award, and covered all employment-related claims, including such statutory ones as discrimination or retaliation under the Civil Rights Act.[1]

This leaves plaintiff's argument that she was excused from having to conform to the published procedures by defendant's own failure to act accordingly, asserting anticipatory breach. However, in order to avoid obligations under a contract under that doctrine, "it must be demonstrated that a party to a contract *unequivocally* declared the intent not to perform." *Washburn v Michailoff*, 240 Mich App 669, 673-674; 613 NW2d 405 (2000) (italics in the original). In this case, plaintiff supports her assertion that defendant had aborted the internal grievance process only by citing a letter, in which defendant's Director of Human Resources informed plaintiff, "In view . . . that there is an attempt to reach a settlement agreement concerning your Grievance and Civil Rights Complaint, the time limits of the Grievance and Arbitration Procedure for Terminated Employees, outlined in the Supervisors and Non Union Regular Full Time Personnel Practices, are waived until further notice," and invited her to telephone with any questions.

This communication falls far short of a declaration not to act in accordance with the procedures in question, let alone an unequivocal one. To the contrary, it merely announces the granting of time extensions in order to seek resolution of the issues. What plaintiff attempts to characterize as an abrogation of obligations in fact shows a continuing respect for them.

For these reasons, the trial court correctly dismissed this case in recognition of the parties' agreement to arbitrate. MCR 2.116(C)(7).

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[1] Plaintiff also argues that the personnel-practices manual's requirements are invalid because they call upon employees to cover their own attorney's fees, in contravention of the statutory entitlement of successful civil rights claimants to recover such fees. However, we need not reach this issue, because the instant case involves no claim for attorney's fees.

Affirmed.

/s/ Peter D. O'Connell
/s/ Stephen L. Borrello
/s/ Elizabeth L. Gleicher