

STATE OF MICHIGAN
COURT OF APPEALS

DEBORAH LEE,

Plaintiff-Appellant,

v

CITY OF DETROIT, MARSHALL LYONS and
ERIC EWING,

Defendants-Appellees.

UNPUBLISHED

July 16, 2009

No. 281852

Wayne Circuit Court

LC No. 06-611021-CD

Before: Murray, P.J., and Gleicher and M. J. Kelly, JJ.

PER CURIAM.

In this employment dispute, plaintiff Deborah Lee appeals as of right the trial court's order dismissing her claims under the Elliott-Larsen Civil Rights Act (the Civil Rights Act), MCL 37.2101 *et seq.*, the Persons with Disabilities Civil Rights Act (the Disabilities Act), MCL 37.1101 *et seq.*, and for intentional infliction of emotional distress. On appeal, we conclude that the trial court prematurely dismissed her claims. For that reason, we reverse and remand for further proceedings.

I. Basic Facts and Procedural History

Lee has been a detective investigator with the Detroit Police since 1998. In November 2003, Lee requested assignment to the 9th Precinct Investigative Operations Unit. The request was granted. Lee's immediate supervisor at the 9th Precinct was Lieutenant Pauline Banks.

In August 2004, the police department was reorganized. As part of the reorganization, defendant Eric Ewing became the commander of the investigative units in the Eastern District, which included the 9th Precinct. In addition, defendant Marshall Lyons became the head of all investigative units.

The events giving rise to this suit began with Lee's investigation and preparation of a warrant request for an alleged attack against a woman on October 5, 2004. Records indicate that the woman who was attacked met with other women at a motel and that there was a dispute over whether the complainant stole some money. The complainant told the officers who responded to the scene that three of the four women at the motel beat her with a telephone and broom and then handcuffed her to a radiator for several hours. The officers observed handcuffs attached to the radiator at the scene and injuries on the complainant that were consistent with having been

assaulted. The officers also found narcotics on the fourth woman. All four women were arrested and the case was assigned to Lee.

In her complaint, Lee alleged that the complainant in the assault case followed up at the precinct after the incident and appeared to be under the influence. Lee stated that she began to suspect that the complainant was not credible. Lee indicated that the complainant eventually admitted that she had not been kidnapped by her attackers, but had only been involved in a fight with them over money. Based on this, Lee determined that the only crime was a simple assault and generated a warrant request for that crime. Lee presented the warrant request to the assistant prosecutor on October 13, 2004, but the complainant did not appear and the prosecutor rejected the request.

After the prosecutor rejected the request, Lee and her supervisor, Banks, were asked to come to Lyons' office to discuss the rejection. Ewing was also present at the meeting. Lee alleged in her complaint that Lyons and Ewing were abusive and demeaning toward her at the meeting. She indicated that Ewing accused her of convincing the prosecutor to reject the warrant and that Lyons accused her of being lazy and suggested that she should be fired. Lee further alleged that Banks told her that Sergeant Gary Schaal had been assigned to write up a misconduct report based on Lee's purported false statements with regard to the handling of the investigation. Lee also stated that Banks told her that Ewing made statements attacking her fitness and character.

On October 21, 2004, Banks assigned Schaal to investigate Lee's handling of the incident involving the woman who was allegedly handcuffed and beaten. Schaal resubmitted the warrant request on November 6, 2004, with the added details that the complainant was attacked with a broom and phone and that she had been handcuffed for several hours. Schaal indicated that the warrant was again rejected because the complainant failed to show.

In her complaint, Lee alleged that the "personal crusade against her," which included the investigation into her handling of the assault and the resubmission of the warrant requests, caused her physical and emotional wellbeing to deteriorate. Lee stated that on December 23, 2004, Banks told her that Ewing had referred to Lee as a "slug" and stated that he was going to "take her down." Lee further stated that, on December 27, 2004, Banks informed her that she was being indefinitely transferred to the 11th Precinct. Lee alleged that she was being transferred in order to set her up to be fired.

On December 27, 2004, Lee took an extended sick leave. According to Lee, she had to take the leave because the severe stress resulting from her treatment at work caused her to become "seriously emotionally upset." She indicated that her doctors had determined that she was totally disabled and unable to return to work.

Schaal completed his investigation in March 2005. In his report, Schaal noted that the arrest book showed that Lee had each of the three women discharged on October 6, 2004 with the notation "Discharged—No Case." Schaal stated that Lee also released the fourth woman, who was found with narcotics. Schaal reviewed the police records and noted that there was evidence found at the scene—including the handcuffs—that corroborated the complainant's version of events. He also interviewed the complainant, who indicated that Lee was rude and asked her companion if he was her "pimp." She also stated that Lee did not take her statement

and did not advise her that she needed to appear at the prosecutor's office on October 13, 2004. In conclusion, Schaal found that Lee did not make a thorough and complete warrant request and did not properly handle the case involving the narcotics. For this reason, he recommended disciplinary action.

Banks reviewed Schaal's investigation and report and concurred with it. Banks found that Lee neglected her duty when she failed to properly prepare the warrant request by omitting relevant details and improperly discharged the woman found with narcotics. She also found that Lee improperly investigated the incident by failing to take a statement and failed to properly instruct the complainant on the warrant request. In addition, Banks found that Lee did not treat the complainant in a polite, dignified and courteous manner. Finally, Banks found that Lee was not truthful with Ewing when she indicated that she had taken a written statement. For these reasons, Banks also recommended disciplinary action.

Ewing reviewed the investigation and report and he too concurred in the request for disciplinary action. Finally, the report was sent to the Disciplinary Administration Section where it was determined that the "matter can be adjudicated at the command level," which could include retraining, verbal counseling, ACR entry, an official reprimand, or suspension. However, because Lee was on sick leave, no command action was taken and the matter apparently remains pending.

In April 2006, Lee sued the City of Detroit and Lyons and Ewing. In her complaint, Lee alleged that Ewing and Lyons handled the issues surrounding her investigation and warrant request differently than was done for male investigators. Specifically, she alleged that none of the male officers had had their investigation submitted to review by an independent investigator or had been ordered to resubmit a warrant request. She also alleged that none of the male investigators were ever accused of convincing a prosecutor to reject a warrant. Lee also noted that, although she was the only female officer in her detective squad, she was selected for transfer to the 11th Precinct. This conduct, Lee concluded, created a "discriminating and hostile environment" in violation of the Civil Rights Act. Lee also alleged that defendants violated the Disabilities Act by "willfully and purposely" ignoring Lee's physician's medical opinion and continuing to list her as able to work without restrictions. Finally, Lee alleged that her treatment at work during the period at issue amounted to the intentional infliction of emotional distress.

In August 2007, defendants moved for summary disposition of Lee's claims under MCR 2.116(C)(7), (8), and (10). Defendants argued that summary disposition was warranted, in part, because Lee never suffered an adverse employment action and failed to present any evidence that her treatment was based on her gender. In support of their motion, defendants presented evidence that male investigators have had to resubmit their warrant requests and that the strict requirements for handling investigations were the result of a new management style after the reorganization. Further, they presented evidence that, although there was a pending recommendation for discipline, the investigation into Lee's handling of the warrant request at issue did not actually result in any disciplinary action. Moreover, defendants noted that Lee had not quit and had not been terminated. Defendants also presented evidence that Lee was not transferred to the 11th Precinct, but was temporarily reassigned. Finally, defendants noted that Lee has not actually ever showed up for work at the 11th Precinct and that the reassignment would not adversely affect her compensation or benefits. Defendants also argued that Lee's allegations that she was improperly transferred and was improperly denied duty-related disability

were subject to arbitration. Finally, defendants argued that Lee had not identified any conduct that was so extreme or outrageous that it amounted to the intentional infliction of emotional distress.

In response, Lee noted that her complaint properly alleged facts in support of her claims and argued that there was a genuine issue of material fact as to whether she was transferred or reassigned. Likewise, she contended that the disciplinary action was still pending and was an adverse employment action. She also argued that the act of singling her out and checking her work amounted to harassment. Finally, she argued that defendants' alleged conduct was sufficiently extreme and outrageous to support a claim for intentional infliction of emotional distress.

The trial court heard oral arguments on defendants' motion in October 2007. At the hearing, defendants' counsel reiterated that Lee had not been demoted, transferred or terminated and noted that the reassignment was specifically permitted under the collective bargaining agreement. Defendant's counsel also noted that Lee never took any internal actions based on the allegations that she was improperly subjected to an adverse employment action—that is, Lee never filed a grievance with the union or asked to have the matter arbitrated. Defendants' counsel also argued that having another officer review Lee's investigation and resubmit the warrant request did not amount to disciplinary action.

After hearing the arguments, the trial court concluded that Lee's case should be dismissed:

[T]he parties in this case have a collective bargaining agreement that requires arbitration when there's employment disputes of this nature. The plaintiff has neither been demoted, dismissed or transferred. Therefore the Court will grant Summary Disposition to the defendant.

Parties are ordered to arbitration.

On October 18, 2007, the trial court signed an order dismissing Lee's case in its entirety, but without ordering any arbitration.

This appeal followed.

II. Summary Disposition

On appeal, Lee argues that the trial court erred when it dismissed her claims because they were subject to arbitration. Specifically, she contends that her discrimination claims are not subject to the arbitration clause in her collective bargaining agreement, see *Arslanian v Oakwood United Hospitals, Inc (On Remand)*, 240 Mich App 540, 550; 618 NW2d 300 (2000), and, even if they were, defendants waived the defense of arbitration. See MCR 2.111(F)(2) and (3); *Kemerko Clawson, LLC V RxIV, Inc*, 269 Mich App 347, 351 n 2; 711 NW2d 801 (2005). This Court reviews de novo a trial court's decision on a motion for summary disposition. *Williams v Medukas*, 266 Mich App 505, 507; 702 NW2d 667 (2005).

The trial court's reasons for dismissing Lee's claims are unclear. In a short statement from the bench, the trial court determined that arbitration was required for "employment disputes of this nature" and "ordered [the parties] to arbitration." Thus, one could conclude that the trial court dismissed Lee's discrimination claims based on its conclusion that those claims were subject to the arbitration clause in Lee's collective bargaining agreement. If this were the case, the trial court would be in error. *Arslanian*, 240 Mich App at 550.¹ However, the trial court also seemed to conclude that Lee had "neither been demoted, dismissed or transferred." And, in its order dismissing Lee's claims, it did not actually order the parties to arbitration. As such, the trial court might also have dismissed Lee's claims because she failed to present sufficient evidence that she suffered an adverse employment action, which is an essential element of Lee's claims premised on the Civil Rights Act and the Disabilities Act. See *Lytle v Malady (On Rehearing)*, 458 Mich 153, 172-173; 579 NW2d 906 (1998); *Garg v Macomb Mental Health Services*, 472 Mich 263, 273; 696 NW2d 646 (2005), amended 473 Mich 1205. While the failure to present evidence that she suffered an adverse employment action might be a proper basis for dismissing Lee's discrimination claims, we cannot state with certainty that that was the actual reason for the trial court's decision to dismiss Lee's discrimination claims. Further, although we have the discretion to affirm on an alternate basis, see *Coates v Bastian Brothers, Inc.*, 276 Mich App 498, 508-509; 741 NW2d 539 (2007) (noting that this Court may affirm where the trial court reached the right result, "albeit for the wrong reason"), we do not believe that it would be proper to do so on the record before us. Lee did not address the merits of this alternative basis for dismissal in her brief on appeal and defendants have elected not to file a brief with this Court. Hence, we do not have the benefit of the parties' analyses on the merits of this issue. Finally, to further complicate matters, the trial court did not at all discuss Lee's claim for intentional infliction of emotional distress. Because the trial court failed to clearly state a proper basis for dismissing Lee's claims, we reverse the trial court's order dismissing Lee's case in its entirety and remand for further proceedings.

III. Request for a New Judge

Lee also argues on appeal that the trial judge's conduct indicates that the trial judge is biased against her. For that reason, Lee asks this Court to remand her case to a different judge. However, after review of the lower court record, we do not agree that the trial judge harbored a bias against Lee that would warrant relief. See *Bayati v Bayati*, 264 Mich App 595, 602-603; 691 NW2d 812 (2004). Therefore, we decline to remand this case to a different judge.

Reversed and remanded for further proceedings consistent with this opinion. We do not retain jurisdiction. Lee having prevailed on appeal, she may tax costs under MCR 7.219(A).

/s/ Christopher M. Murray
/s/ Elizabeth L. Gleicher
/s/ Michael J. Kelly

¹ But see the recent decision in *14 Penn Plaza LLC v Pyett*, 556 US ____; 129 S Ct 1456; 173 L Ed 2d 398 (2009), which was decided after submission of this appeal.