STATE OF MICHIGAN

COURT OF APPEALS

BRANDON BRIGHTWELL,

Plaintiff-Appellee,

v

FIFTH THIRD BANK OF MICHIGAN,

Defendant-Appellant.

UNPUBLISHED
April 9, 2009

No. 280820
Wayne Circuit Court
LC No. 07-718889-CZ

SHARON CHAMPION,

Plaintiff-Appellee,

v

FIFTH THIRD BANK OF MICHIGAN,

Defendant-Appellant.

No. 281005
Wayne Circuit Court
LC No. 07-718890-CZ

Before: Talbot, P.J., and Bandstra and Gleicher, JJ.

TALBOT, J. (*concurring*).

While I concur with the outcome recommended by the majority, I write separately because I believe the reasoning underlying this decision requires further elaboration.

The issue before the Court pertains to whether proper venue exists in Wayne County or Oakland County in these employment discrimination claims. Although the trial judges retained venue in Wayne County where the complaints were filed, we reverse those rulings and find that venue is proper in Oakland County as the situs of the alleged violations or where the decisions were made to terminate plaintiffs' respective employment. In taking this position, the majority relies on the specific statutory provision relating to venue in CRA cases, MCL 37.2801(2), and *Barnes v Int'l Business Machines Corp,* 212 Mich App 223; 537 NW2d 265 (1995).

The dispute distills essentially to an interpretation of MCL 37.2801, which provides:

> (1) A person alleging a violation of this act may bring a civil action for appropriate injunctive relief or damages, or both.

> (2) An action commenced pursuant to subsection (1) may be brought in the circuit court for the county *where the alleged violation occurred*, or for the county where the *person against whom the civil complaint is filed resides or has his principal place of business*.
>
> (3) As used in subsection (1), "damages" means damages for injury or loss caused by each violation of this act, including reasonable attorney's fees. [Emphasis added.]

As noted by the majority, this statutory provision was interpreted in *Barnes*, which held in relevant part:

> [T]he civil rights statute clearly provides that venue is proper where "the alleged violation occurred," not where its effects were felt or where the damages accrued. The violations alleged are adverse employment decisions. Although plaintiff performed some work in Wayne County, he has provided no credible factual evidence that any of the allegedly discriminatory decisions were made in Wayne County, as distinguished from their effects being felt here. [*Barnes, supra* at 226 (internal citations omitted).]

This ruling is distinguishable from the other predominantly cited published case dealing with interpretation of the CRA venue provision, *Keuhn v Michigan State Police*, 225 Mich App 152; 570 NW2d 151 (1997). Unlike the plaintiff in *Barnes*, *Keuhn* demonstrated to this Court's satisfaction that discriminatory decisions pertaining to the plaintiff occurred in more than one county. Notably, this Court opined that venue was proper in Livingston County "because the allegedly discriminatory promotional process included decisions made in that county, not merely because damages from the discrimination resulted in that county." *Id.* at 155.

In her dissent, Judge Gleicher, relies on the concurring opinion in *Barnes* and the tort venue statute, MCL 600.1629, as recently interpreted by our Supreme Court in *Dimmitt & Owens Financial, Inc v Deloitte & Touche (ISC), LLC*, 481 Mich 618; 752 NW2d 37 (2008). Judge Gleicher opines that venue is proper in Wayne County as this is where plaintiffs were notified of the decision to terminate their employment and where "actual" termination occurred. Specifically, Judge Gleicher relies on the concurring opinion of Judge White in *Barnes*, which disputed "venue is proper only in the county where the discriminatory decision is made." However, this reliance is misplaced, as a concurring opinion does not constitute binding authority on this Court.

Judge Gleicher additionally cites to the recent holding of our Supreme Court in *Dimmitt*, interpreting MCL 600.1629.[1] Several difficulties ensue in trying to extrapolate the reasoning in

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[1] MCL 600.1629 provides, in relevant part:

> (1) Subject to subsection (2), in an action based on tort or another legal theory seeking damages for personal injury, property damage, or wrongful death, all of the following apply:

(continued…)

Dimmitt and its discussion of an unrelated statutory provision to the CRA venue statute. The tort venue statute is not so similar to the CRA venue statute to make them interchangeable for purposes of application and interpretation. The most obvious distinction is that according to the CRA venue provision in evaluating the factual continuum that encompasses the occurrence of a "violation" to the manifestation of damages, we are to focus on "where the alleged violation occurred." In contrast, MCL 600.1629 seeks to focus on where "the original injury occurred." As noted by the majority, this language is distinguishable based on the difference in definition between the terms "violation" and "injury" making a strict extrapolation inappropriate because the terms are not synonymous. As such, determination of the situs of a "violation" under the CRA can be differentiated from that of an "injury" in tort. This discrepancy in the language of the two statutes indicates that the range of potential or appropriate venues available under MCL 600.1629 is broader and more encompassing than MCL 37.2801.[2] While these discrepancies in statutory language can result in confusion in application, I believe we are constrained and must follow the more specific venue provision as delineated in MCL 37.2801 and its subsequent interpretation in *Barnes*, which has precedential value. While the Court's reasoning in *Dimmitt* is in conflict with rulings pertaining to the CRA statutory venue provision, this is irrelevant for determination in this case. The only pertinent question to be resolved is whether plaintiffs have demonstrated, pursuant to *Kuehn*, that any of the alleged violations occurred in any county other than Wayne County.

Judge Gleicher contends that neither the "employment-related investigation" nor the decisions to terminate plaintiffs' employment "constitute adverse employment actions or violations of the CRA." However, I believe Judge Gleicher incorrectly focuses on the location of the effectuation of the adverse employment decision rather than on the events and factors comprising the procedure leading to the alleged discriminatory actions.

Our primary goal when interpreting a statutory provision is to give effect to the intent of the Legislature. *Diamond v Witherspoon*, 265 Mich App 673, 684; 696 NW2d 770 (2005). The relevant provisions of the CRA, as applied to plaintiffs' claims of discrimination, are clear with regard to their intent. Article 2, pertaining to employers, employment agencies and labor organizations, specifically forbids these entities from making decisions regarding the hiring, firing, compensation, or other terms of employment "because of religion, race, color, national origin, age, sex, height, weight, or marital status." MCL 37.2202(1). In addition, these entities are also precluded under the CRA from using discriminatory practices "because of religion, race, color, national origin, age, sex, height, weight, or marital status." MCL 37.2203; MCL 37.2204. Hence, at its most basic level, the CRA precludes decision makers from using characteristics such as race, sex and gender, as determining factors in decisions impacting employment. See

(…continued)

> (a) The county in which the original injury occurred and in which either of the following applies is a county in which to file and try the action:
>
> (*i*) The defendant resides, has a place of business, or conducts business in that county.
>
> (*ii*) The corporate registered office of a defendant is located in that county.

[2] Further, MCL 37.2801(1) allows for either damages *or* injunctive relief. The availability of injunctive relief lends further credence to the more restricted interpretation of MCL 37.2801.

Alspaugh v Comm on Law Enforcement Standards, 246 Mich App 547, 563; 634 NW2d 161 (2001); *Town v Michigan Bell Tel Co*, 455 Mich 688, 706; 563 NW2d 64 (1997); *Matras v Amoco Oil Co*, 424 Mich 675, 686-687; 385 NW2d 586 (1986). To follow Judge Gleicher's reasoning and require that venue be established where a decision was effectuated rather than the situs where the decision, impacted by discriminatory animus, occurred would render the intent and purpose underlying the CRA irrelevant. The majority position is also consistent with opinions of our Supreme Court discussing establishment of a prima facie case of discrimination in employment actions using either a direct evidence test or the burden shifting analysis of *McDonnell Douglas*[3], which require a plaintiff to demonstrate "a causal link between the discriminatory animus and the *adverse employment decision*." *Sniecinski v Blue Cross and Blue Shield of Michigan*, 469 Mich 124, 134-135; 666 NW2d 186 (2003) (emphasis added). Hence, for purposes of MCL 37.2801, venue is appropriate where the CRA was violated through the use of improper characteristics in making an employment decision.

/s/ Michael J. Talbot

[3] *McDonnell Douglas Corp v Green*, 411 US 792; 93 S Ct 1817; 36 L Ed 2d 668 (1973).