STATE OF MICHIGAN

COURT OF APPEALS

BRANDON BRIGHTWELL, Plaintiff-Appellee,	UNPUBLISHED April 9, 2009
v	No. 280820 Wayne Circuit Court
FIFTH THIRD BANK OF MICHIGAN, Defendant-Appellant.	LC No. 07-718889-CZ

SHARON CHAMPION, Plaintiff-Appellee,	
v	No. 281005 Wayne Circuit Court
FIFTH THIRD BANK OF MICHIGAN, Defendant-Appellant.	LC No. 07-718890-CZ

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

GLEICHER, J. (*dissenting*).

I respectfully dissent. In my view, proper venue lies in Wayne County.

The lead opinion concludes that "defendants' alleged [Civil Rights Act] violation occurred in Oakland County where it made the decision to terminate plaintiff's employment." *Ante* at 3. But a decision to terminate a plaintiff's employment does not suffice to create a claim under the Civil Rights Act (CRA). "Simply put, a claim for discriminatory discharge cannot arise until a claimant has been discharged." *Collins v Comerica Bank*, 468 Mich 628, 633; 664 NW2d 713 (2003). In *Collins*, our Supreme Court held that a CRA claimant's cause of action did not arise on the day that the defendant suspended her, but only when it "terminated" or "discharged" her. *Id*. at 634.

Here, defendant's Oakland County personnel investigated plaintiffs and ultimately elected to terminate plaintiffs' Wayne County employment.[1] But these Oakland County actions did not violate the CRA, and are not the focus of plaintiffs' complaints. Rather, plaintiffs' CRA claims arise from their actual employment discharge, which occurred in Wayne County. Accordingly, I believe that the circuit courts correctly denied defendant's change of venue motions.

The venue provision of the CRA sets forth that an action seeking damages for racial discrimination "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." MCL 37.2801(2). This Court first considered the CRA's venue provision in *Barnes v Int'l Business Machines*, 212 Mich App 223; 537 NW2d 265 (1995). The plaintiff in *Barnes* performed "some work" in Wayne County. *Id*. at 226. But because the plaintiff failed to demonstrate that "any of the allegedly discriminatory decisions were made in Wayne County," this Court held that venue was properly laid in Oakland County, the location of the defendants' Michigan corporate headquarters. *Id.* at 225-226. In her concurring opinion, Judge Helene White observed, in relevant part,

> I join in the opinion per curiam but write separately to state that I do not do so on the basis that venue of a civil rights action is proper only in the county where the discriminatory decision is made. Discrimination also "occurs," MCL 38.2801 . . . , in the county where the decision is implemented and the discrimination is inflicted. [*Id*. at 227.]

Judge White further explained that because Wayne County was not the "locus" of the plaintiff's employment, the defendants' discriminatory decisions were not implemented there and no discrimination was "inflicted" in that county. *Id.*

This Court next considered the CRA's venue provision in *Keuhn v Michigan State Police*, 225 Mich App 152; 570 NW2d 151 (1997). The plaintiff in *Keuhn* worked for the Michigan State Police in Livingston County, and he filed suit there alleging that the defendant failed to promote him based on his race. *Id*. at 153. Relying on *Barnes*, the defendant sought a change of venue to Ingham County, the location of its headquarters. *Id*. at 154-155. The circuit court denied the defendant's motion to change venue to Ingham County, and the defendant appealed.

This Court rejected the defendant's claim that venue was proper only in Ingham County, noting that the defendant's promotional process incorporated decisions made at the Livingston County state police post and at the defendant's Ingham County headquarters. We distinguished the plaintiff in *Keuhn* from the plaintiff in *Barnes* as follows:

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[1] Defendant maintains a "regional office" in Oakland County. Its principal place of business is located in Kent County.

> Here, plaintiff contends that venue is 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. Indeed, plaintiff's complaint is not limited to allegations of discrimination against him alone but alleges that defendant engaged in a pattern or practice of discriminating against white males. Therefore, the actions giving rise to the alleged liability in this matter include both the recommendation made by the post commander in Livingston County and the final approval given in Ingham County. Accordingly, given these facts, venue in Livingston County is proper. [*Id*. at 155.]

In both *Barnes* and *Keuhn*, this Court determined venue by identifying the county in which an allegedly discriminatory decision had been made. Notably, however, in neither case did this Court critically examine whether venue might have been proper in the county "where the alleged [CRA] violation occurred." MCL 37.2801(2). In my view, this Court's previous decisions construing the CRA's venue provision, including *Barnes* and *Keuhn*, have not strictly adhered to the clear, unambiguous statutory text, which requires that venue lie in the county "where the alleged violation occurred." MCL 37.2801(2). By concluding that venue may properly lie in a county that contains neither the defendant's principal place of business, the location in which the plaintiff actually worked, or the site of the adverse employment action, the instant majority also fails to conform its analysis to the statutory language.

Our Supreme Court provided the appropriate analytical framework in an analogous case involving venue, *Dimmitt & Owens Financial, Inc. v Deloitte & Touche (ISC), LLC*, 481 Mich 618; 624; 752 NW2d 37 (2008). *Dimmitt* involved MCL 600.1629(1), a venue statute applicable in tort actions. The Supreme Court instructed in *Dimmitt* that in construing a venue provision, "our primary obligation is to discern legislative intent as reflected in the plain language of the statute." *Id*. at 624. The statutory language construed in *Dimmitt* permits venue in the county where the "original injury occurred." MCL 600.1629(1)(a), (b). In reaching its decision, the Supreme Court in *Dimmitt* closely examined the "original injury" language selected by the Legislature, and painstakingly distinguished an "injury" from a breach of the standard of care. *Dimmitt* teaches that we must follow the basic rules of statutory interpretation, focusing carefully on the statutory text, when construing venue statutes. "When the language of a statute is unambiguous, the Legislature's intent is clear, and judicial construction is neither necessary nor permitted." *Id*.

The plain language of the CRA's venue provision permits a plaintiff to file suit "where the alleged violation occurred." The venue statute at issue here thus requires this Court to apply the term "violation," and not "decision" or "potential violation." The CRA directs that an employer "shall not … discharge or otherwise discriminate against an individual with respect to employment … because of … race[.]" Therefore, a "violation" of the CRA occurs only when a plaintiff suffers "an adverse employment *action* under circumstances giving rise to an inference

of discrimination," *Wilcoxon v Minnesota Mining & Mfg Co*, 235 Mich App 347, 359; 597 NW2d 250 (1999)(emphasis supplied).[2]

Contrary to Judge Talbot's characterization of my reasoning, I do not "rely" on the holding in *Dimmitt,* the substance of the tort venue statute, or Judge White's concurring opinion in *Barnes.* Rather, I rely solely on the unambiguous language of MCL 37.2801(2), construed in a manner consistent with the analytical method prescribed by our Supreme Court in *Dimmitt.* Our Legislature decreed that venue lies in the county where a CRA "violation" occurs. This Court and our Supreme Court have repeatedly emphasized that a CRA violation is an adverse employment *action*.[3] The adverse employment actions in these cases occurred in Wayne County.

Although defendant apparently formulated its decision to terminate plaintiffs' employment at its regional headquarters in Oakland County, it discharged plaintiffs in Wayne County.[4] The CRA simply does not proscribe the employment-related investigation defendant conducted in its Oakland County office, or the decisions made in the same location. These undertakings, standing alone, do not constitute adverse employment actions or violations of the

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[2] A review of this Court's decision in *Wilcoxon* exposes the majority's analytical error. The plaintiff in *Wilcoxon* asserted that considerations of race motivated the defendant employer's decision to transfer the plaintiff to a different job. This Court accepted as true the plaintiff's claim that her employer made a racially-motivated *decision* to effect a job transfer. But this Court held that the employer's transfer decision did not violate the CRA because the plaintiff could not prove that the transfer constituted an adverse employment action. *Id.* at 363. In *Wilcoxon*, this Court described that an adverse employment action is "materially adverse in that it is more than mere inconvenience or an alteration of job responsibilities," and must exhibit "some objective basis for demonstrating that the change is adverse" that goes beyond "subjective impressions." *Id.* at 364 (internal quotation omitted). Under *Wilcoxon*, the instant plaintiffs possess no cause of action based on their employers' discussions, investigations or plans because those activities simply do not constitute adverse employment *actions*.

[3] I respectfully disagree with Judge Talbot's analysis linking the statutory venue provision with the evidence necessary to establish a prima facie case of discrimination. The direct evidence test and a burden shifting analysis are evidentiary tools relating to proof of a CRA violation. But "discriminatory animus," standing alone, does not violate the CRA, and neither does a decision to discriminate motivated by discriminatory animus. An employer violates the CRA only be *effectuating* an improperly motivated decision. An employer's discriminatory thoughts, ideas, plans, plots and conclusions fall entirely beyond the reach of the law—until they are translated into an *action* that violates the CRA.

[4] Regarding Brightwell, the circuit court found, "Mr. Brightwell's permanent place of employment it appears was in the City of Detroit on Jefferson Avenue as an assistant bank manager and the termination, he was terminated from that position while there . . . ." Plaintiffs' counsel asserted that defendant fired Champion while she was at her home in Wayne County. Defendant's representative attested in his affidavit that defendant formulated its decisions to fire plaintiffs at its headquarters in Oakland County, but made no claim that defendant actually discharged plaintiffs there.

CRA. Because defendant violated the CRA only by actually terminating plaintiffs, not by considering, discussing, or investigating their termination, venue properly rested in Wayne County, the location of both allegedly wrongful discharges. Consequently, the circuit courts did not clearly err by denying defendant's motions to change venue. I would affirm.

/s/ Elizabeth L. Gleicher