STATE OF MICHIGAN

COURT OF APPEALS

MICHAEL HAASE and ANDRE LEY, Plaintiffs-Appellants,	UNPUBLISHED December 1, 2011
v	No. 298348 Wayne Circuit Court
IAV AUTOMOTIVE ENGINEERING, INC., Defendant-Appellee.	LC No. 09-016792-CL

Before: M. J. KELLY, P.J., and SAAD and O'CONNELL, JJ.

PER CURIAM.

In this action for employment-based national origin discrimination under the Michigan Civil Rights Act (CRA), MCL 37.2101 *et seq.*, plaintiffs appeal from the trial court's order that granted defendant's motion for summary disposition pursuant to MCR 2.116(C)(10). For the reasons set forth below, we affirm.

Plaintiffs are both German national automotive engineers who were hired by defendant's parent company in Germany, IAV GmbH, and assigned to work for defendant in the United States pursuant to temporary assignments. The terms of their employment in Germany guaranteed them the right to be reemployed by IAV GmbH in Germany, if they left their work assignments in the United States.

Both plaintiffs were assigned to work in defendant's office in Northville, Michigan. After working there, both plaintiffs said they developed health problems which they claimed were related to the humidity and air quality in defendant's building. Defendant investigated the matter, but was unable to find the cause of plaintiffs' alleged health problems. Plaintiffs say that in January 2009, defendant's president, Utz-Jens Beister, who is also a German national, told them something to the effect that they should stop talking about the humidity and conditions in the office and instead focus on their work, or they could return to Germany.

Because of his health problems, plaintiff Michael Haase requested and was permitted to take a leave of absence under the Family and Medical Leave Act (FMLA)), 29 USC 2601 *et seq.*, beginning in June 2009. When that leave ended, he was permitted to take an unpaid administrative leave of absence. He later returned to work when an opportunity arose to work offsite for one of defendant's customers. In approximately May 2009, plaintiff Andre Ley was also permitted to work offsite for another one of defendant's customers. Both plaintiffs

remained employees of defendant during the relevant period and there was no evidence that their pay, positions, or benefits were negatively affected.

In July 2009, plaintiffs filed this action against defendant alleging national origin discrimination in their employment. They relied primarily on Beister's remark to support their claim that they were subject to national origin discrimination. Defendant filed a motion for summary disposition pursuant to MCR 2.116(C)(10) and argued that Beister's remark was, at most, a stray remark that referred to the reemployment agreement that many of defendant's German employees had with the parent company in Germany, and was not evidence of any intent to discriminate against plaintiffs because of their national origin. Defendant said that there was no evidence that plaintiffs were subject to national original discrimination, nor did they suffer any type of adverse employment action. The trial court agreed with defendant and granted its motion for summary disposition.

I. STANDARD OF REVIEW

This Court reviews a trial court's summary disposition decision de novo. *Spiek v Dep't of Transp*, 456 Mich 331, 337; 572 NW2d 201 (1998). A motion under MCR 2.116(C)(10) tests the factual support for a claim. A reviewing court must consider the pleadings, affidavits, depositions, admissions, and other documentary evidence submitted by the parties. MCR 2.116(G)(5). Summary disposition should be granted if, except as to the amount of damages, there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Babula v Robertson*, 212 Mich App 45, 48; 536 NW2d 834 (1995).

II. BEISTER'S REMARK

The CRA prohibits employers from discriminating against employees because of their national origin. MCL 37.2202(1)(a). A plaintiff may prove a claim with direct evidence of discriminatory intent or by indirect or circumstantial evidence. *Sniecinski v Blue Cross & Blue Shield of Michigan*, 469 Mich 124, 132-135; 666 NW2d 186 (2003).

Plaintiffs argue that Beister's alleged remark that plaintiffs could return to Germany if they did not like the conditions in defendant's office supports their claim for national origin discrimination. The trial court characterized the remark, if made, as, at most, a stray remark that did not support an inference of discrimination. We agree. The remark was not associated with any adverse employment action at the time it was made. In *Krohn v Sedgwick James of Mich, Inc*, 244 Mich App 289, 292; 624 NW2d 212 (2001), this Court explained that in determining the relevancy of stray remarks made outside the context of an immediate adverse action, courts should consider whether the disputed remarks were: (1) made by a decisionmaker or an agent uninvolved in making the challenged employment decision; (2) isolated or part of a pattern of biased comments; (3) made close in time or remote from the adverse employment action; and (4) ambiguous or clearly reflective of discriminatory bias.

Although plaintiffs contend that Beister was the decisionmaker with regard to any adverse employment action in this case, the evidence on which they rely merely indicates that he was the decisionmaker for hiring decisions. The submitted evidence showed that others, namely

Cheryl Boland and Craig Assenmacher, were involved in handling plaintiffs' complaints about the air quality and other employment-related issues.

Plaintiffs contend that Beister's remark was part of a pattern of biased comments because he made similar comments to other German nationals. However, the evidence showed that Beister's comments were related to German nationals who could return to Germany to work pursuant to reemployment guarantees with IAV GmbH. There is no basis for treating Beister's comments as evidence of discrimination, as opposed to factual statements that simply refer to the employment status of many German nationals who worked for defendant and had jobs waiting for them in Germany, while they were temporarily working for defendant on work visas.

Also, as further discussed in part IV of this opinion, plaintiffs failed to show that Beister's comment was associated with either an adverse employment decision, or an adverse employment decision close in time to the remark. Indeed, the remark was made four or five months before the challenged actions. Therefore, this factor does not support an inference that the remark can be considered evidence of discrimination. *Krohn*, 244 Mich App at 301.

Finally, Beister's comment is not clearly reflective of discriminatory bias. Again, the comment refers to the fact that plaintiffs, because of their status as German nationals with reemployment guarantees with their parent company, had the option of returning to work in Germany if their temporary assignment in this country did not work out. Again, there is no evidence that defendant threatened to return plaintiffs to Germany as a punishment for the complaints. Plaintiffs were never sent back to Germany even after their alleged health problems continued, but instead were allowed to remain employed by defendant. Moreover, they were permitted to work offsite with one of defendant's customers. The trial court did not err in finding that Beister's remark was not evidence of an intent to discriminate against plaintiffs based on their national origin.

III. DISPARATE TREATMENT

Plaintiffs also say that they established a genuine issue of material fact to support a prima facie case of discrimination based on disparate treatment. A prima facie case of disparate treatment discrimination requires that a plaintiff show that he was a member of a protected class under the CRA and that, for the same or similar conduct, he was treated differently than a person outside the protected class. *Betty v Brooks & Perkins*, 446 Mich 270, 281; 521 NW2d 518 (1994). The trial court rejected plaintiffs' argument that they were treated differently than other similarly-situated employees who complained about the air quality or humidity in defendant's office.

Plaintiffs rely on the following excerpt from Beister's deposition to support their claim:

> *Q.* [D]o you know a Hagen Harden?
>
> *A.* Yeah.
>
> *Q.* Did you ever indicate to him that if he didn't like an issue concerning the exchange rate, that he can go back to Germany?

A. Again, the same, same answer. I can't remember what kind of discussions I had with these employees specifically but in general I discuss with employees topics like when and, yeah, when and they [sic] would like to return to Germany, and so that's the best, most I can remember about those topics.

Q. Do you have American-born employees that work at IAV Incorporated?

A. Yes.

* * *

Q. Do you ever tell people, American-born individuals that work at IAV, if they don't like something they can go take another job or something in America?

A. I am – I have not had such discussion with people who are not from IAV GmbH because, as I mentioned earlier, we – the people who came from IAV GmbH have a temporary work assignment here at IAV Incorporated and the employment guarantee at the parent company.

Q. Are the individuals that came from IAV GmbH, are they the only individuals you've ever talked to about going back or going back to another company, at IAV Incorporated?

A. Again, I have not even said I had those discussions with those employees so I can't remember, but I in general have a lot of discussions with employees and I might have discussed topics like returning to the parent company in the discussion.

Plaintiffs' disparate treatment argument fails for the reason that they are not similarly situated to non-German employees. Many individuals who worked for IAV GmbH were on loan from the parent company to defendant and it was undisputed that they were considered temporary employees, like plaintiffs, who agreed to work in the United States on a temporary basis. What distinguishes plaintiffs from the non-German employees is that plaintiffs had renewable reemployment guarantees that permitted them to return to work for the parent company in Germany in the same or comparable position. The return option was part of their employment terms and it was not discriminatory for Beister or other staff members to refer to or discuss that option with them.

Furthermore, as the trial court noted, plaintiffs' claim involves their complaints about the air quality and humidity levels in defendant's building. The facts showed that defendant investigated plaintiffs' complaints, but could not find the cause of plaintiffs' problems. Although plaintiffs claimed that there were harmful volatile organic compounds (VOCs) in the air, they did not produce evidence identifying those compounds or showing a causal connection to their symptoms. Defendant honored Haase's request for a leave of absence based on his doctor's recommendation when no other work was available for him outside defendant's building. When offsite work became available, both plaintiffs were allowed to work at other

locations. The evidence established that defendant accommodated plaintiffs by granting Haase's request for a leave of absence, and by allowing both plaintiffs to work offsite when outside work became available. Plaintiffs did not show that other similarly-situated employees who had complained about the air quality or humidity were treated differently.

Accordingly, the trial court did not err in finding that plaintiffs failed to establish a genuine issue of material fact to support a prima facie case of discrimination based on disparate treatment.

IV. ADVERSE EMPLOYMENT ACTIONS

Plaintiffs also maintain, incorrectly, that the trial court erred in finding that they did not suffer an adverse employment action.

To establish a prima facie case of discrimination under the burden-shifting analysis, plaintiffs were required to show that they suffered an adverse employment action. *Sniecinski*, 469 Mich at 134. In *Wilcoxon v Minnesota Mining & Mfg Co*, 235 Mich App 347, 364; 597 NW2d 250 (1999), this Court stated:

> [I]n order for an employment action to be adverse for purposes of a discrimination action, (1) the action must be materially adverse in that it is more than "mere inconvenience or an alteration of job responsibilities," . . . and (2) there must be some objective basis for demonstrating that the change is adverse because "a plaintiff 's 'subjective impressions as to the desirability of one position over another' [are] not controlling.'" [Citations and footnote omitted.]

There is no exhaustive list of adverse employment actions, but it typically takes the form of an ultimate employment decision, such as termination of employment, a demotion that is evidenced by a decrease in salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or "other indices that might be unique to a particular situation." *Peña v Ingham Co Rd Comm*, 255 Mich App 299, 312; 660 NW2d 351 (2003). "In determining the existence of an adverse employment action, courts must keep in mind the fact that '[w]ork places are rarely idyllic retreats, and the mere fact that an employee is displeased by an employer's act or omission does not elevate that act or omission to the level of a materially adverse employment action.'" *Id.*, quoting *Blackie v Maine*, 75 F3d 716, 725 (CA 1, 1996).

Plaintiffs rely on *Burlington Northern & Santa Fe R Co v White*, 548 US 53; 126 S Ct 2405; 165 L Ed 2d 345 (2006), in which the Court held that the anti-retaliation provision of the Civil Rights Act of 1964, 42 USC 2000e-3(a), can include actions and harms occurring either in or outside the workplace, but any actions must be materially adverse to a reasonable employee or job applicant. Even if the *Burlington* standard is applicable here, plaintiffs have not met that standard.

It was Haase who requested a leave of absence when he continued to experience health problems that he believed were related to the conditions in defendant's building. Defendant granted his leave request. Haase does not contest defendant's claim that it was unable to locate work for him outside the office during the leave period. Once offsite work was found, Haase was allowed to return to work for defendant's customer in January 2010. Haase's leave of

absence, at his request, cannot be considered an adverse employment action, nor can his offsite work assignment. Those actions were accommodations, not adverse employment actions.

Similarly, Ley was not subject to an adverse employment action when he was reassigned to work for Lear Corporation. That reassignment was intended to accommodate Ley by permitting him to work offsite when he continued to experience health problems working in defendant's building. Although plaintiffs assert that Ley is no longer subject to a reemployment agreement while employed by Lear, they did not submit any documentary evidence to support that claim. On the contrary, Ley testified at his deposition in 2010 that he remained defendant's employee, even though he had been assigned to work for Lear since May 2009. Ley did not indicate that he no longer had the benefit of the reemployment guarantee with IAV GmbH. Accordingly, the trial court did not err in finding that Ley had not been subject to an adverse employment action.

Both plaintiffs also claim that they suffered adverse employment actions related to their medical problems, i.e., having to undergo medical testing. However, they do not explain how any medical testing relates to their discrimination claim or to any employment action by defendant.

For these reasons, the trial court did not err in finding that plaintiffs failed to show that they were subject to an adverse employment action.

Affirmed.

/s/ Michael J. Kelly
/s/ Henry William Saad
/s/ Peter D. O'Connell