IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF IOWA CENTRAL DIVISION

DANIEL P. RYAN; GARY W. MCMAINS; and DALE E. PHILLIPS

4:03-cv-90531

Plaintiffs

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V.

*

O'HALLORAN INTERNATIONAL, INC.; and MARK WIEDERIN

MEMORANDUM OPINION

AND ORDER

Defendants.

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This matter comes before the Court on Defendants' Motion to Dismiss for failure to state a claim upon which relief can be granted under Federal Rule Civil Procedure 12(b)(6). Plaintiffs Daniel P. Ryan, Gary W. McMain and Dale E. Phillips bring claims against Defendants O'Halloran International, Inc. and Mark Wiederin for violations of the Age Discrimination in Employment Act ["ADEA"], 29 U.S.C. § § 621 - 634, and the Iowa Civil Rights Act ["ICRA"], Iowa Code Chapter 216.6.

Plaintiffs filed the present action in the Iowa District Court for Polk County, alleging that Defendants adversely changed their working conditions because of the age of the Plaintiffs in violation of the ADEA and ICRA. Defendants removed the case to this Court and filed a motion to dismiss for failure to state a claim under Federal Rule of Civil Procedure 12(b)(6). Plaintiffs have resisted in part, but have agreed to dismiss the federal claim against Mark Wiederin. For the reasons stated below, Defendants' motion is granted in part and denied in part.

I. BACKGROUND

Plaintiffs Daniel Ryan, Gary McMains and Dale Phillips are all employees of Defendant O'Halloran International, a business in Altoona, Iowa. Plaintiffs are 55, 57, and 56 years of age, respectively, and each has been employed at O'Halloran International and its predecessor for more than thirty years. Plaintiffs are also members of a collective bargaining unit, and the terms of their employment are covered by a contract which stipulates that Plaintiffs' employment can only be terminated for cause.

Plaintiffs allege that, beginning in January 2002, Defendant Wiederin, O'Halloran's Chief Operating Officer, and his agents repeatedly changed the working conditions of the Plaintiffs in a way that had an adverse impact on their employment. Specifically, Plaintiffs claim that Defendants removed the work station chairs that Plaintiffs had used for years. After removing the chairs, Defendants required Plaintiffs to work standing for eight hours daily with no opportunity to sit, although similarly situated younger employees were permitted to sit while performing their jobs. Plaintiffs Ryan and Phillips provided letters from their treating physicians in support of the return of their chairs, but Defendants refused to return Plaintiff Ryan's chair. Defendants did return Plaintiff Phillips' chair after he presented a second letter and threatened to sue.

Plaintiffs contend that Defendants' general refusal to return the chairs continued for seven weeks until Defendants provided Plaintiffs with high stools that had minimum padding and no leg, back or arm supports. Plaintiffs, however, retrieved their original work station chairs from storage and resumed using them at their work stations. Defendants' agents removed the chairs a second time and gave them to younger similarly situated employees. Defendants provided Plaintiffs with new stools that

had more padding on the seat, but still without support for the legs, back or arms. Plaintiffs have repeatedly complained to Defendants that the provided stools cause them pain, exacerbate their physical infirmities and are generally harmful to them. Plaintiffs allege they are treated differently than Defendants' younger, similarly situated employees.

II. Standard for 12(b)(6) Motion to Dismiss

In addressing a motion to dismiss under Rule 12(b)(6), this Court "is constrained by a stringent standard A complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove *no* set of facts in support of his claim which would entitle him to relief." *Parnes v. Gateway 2000, Inc.*, 122 F.3d 539, 545-46 (8th Cir. 1997) (quoting *Fusco v. Xerox Corp.*, 676 F.2d 332, 334 (8th Cir. 1982) (citation omitted) (emphasis added)).

In addition, the complaint must be liberally construed in the light most favorable to the plaintiff and should not be dismissed simply because the court is doubtful that the plaintiff will be able to prove all of the necessary factual allegations. *See Parnes*, 122 F.3d at 546. Finally, when considering a motion to dismiss for failure to state a claim, a court must accept the facts alleged in the complaint as true. *See Cruz v. Beto*, 405 U.S. 319, 322 (1972). The Supreme Court has articulated the test as follows:

When a federal court reviews the sufficiency of a complaint, before the reception of any evidence either by affidavit or admissions, its task is necessarily a limited one. The issue is not whether a claimant will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims. Indeed it may appear on the face of the pleadings that a recovery is very remote and unlikely but that is not the test. Moreover, it is well established that, in passing on a motion to dismiss, whether on the ground of lack of jurisdiction over the subject matter or for failure to state a cause of action, the allegations of the complaint should be construed favorably to the pleader.

Scheuer v. Rhodes, 416 U.S. 232, 236 (1974), overruled on other grounds by Davis v. Scherer, 468 U.S. 183, 191 (1984). A motion to dismiss should be granted "only in the unusual case in which a plaintiff includes allegations that show on the face of the complaint that there is some insuperable bar to relief." Frey v. City of Herculaneum, 44 F.3d 667, 671 (8th Cir. 1995).

Rule 12(b)(6) of the Federal Rules of Civil Procedure states that, "[i]f, on a motion for judgment on the pleadings, matters outside the pleadings are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in Rule 56..."

Although both parties have presented matters outside the pleadings, the Court finds that there has not been an adequate opportunity for proper discovery and excludes the additional submissions from consideration for purposes of this motion.

III. DISCUSSION

A. The Prima Facie Case under the ADEA and ICRA

Age discrimination is prohibited under the Age Discrimination in Employment Act, 29 U.S.C. §§ 623 *et seq.*, and the corresponding Iowa Civil Rights Act, Iowa Code Chapter 216.16. To prove a prima facie case of age discrimination, Plaintiffs must demonstrate: (1) they are members of a protected class; (2) their job performance met the legitimate expectations of the employer; (3) they suffered an adverse employment action; and (4) nonmembers of their class (persons under the age of forty) were not treated the same. *Simonson v. Trinity Regional Health System*, 336 F. 3d 706, 710 (8th Cir. 2003); *Breeding v. Arthur J. Gallagher and Co.*, 164 F. 3d 1151, 1156 (8th Cir. 1999).

Plaintiffs' petition presents facts alleging all four elements of age discrimination, and Defendants have not taken issue with Plaintiffs' assertions that they are members of a protected class, that their job

performance was satisfactory, or that they were treated differently than nonmembers of the class.

Defendants do, however, contest the third element, arguing that the "allegedly discriminatory act, the removal of stools, does not satisfy the prima facie requirement of an 'adverse employment action' under the ADEA or ICRA. Plaintiffs, on the other hand, claim that by removing their chairs, Defendants have caused them pain and exacerbated their physical infirmities. In other words, Plaintiffs allege that Defendants repeatedly changed the working conditions of the Plaintiffs in a way that had an adverse impact on their employment.

The Eighth Circuit has held that "[p]roof of an adverse employment action requires a tangible change in duties or working conditions that constitute a material disadvantage." Jones v. Fitzgerald, 285 F.3d 705, 714 (citing *Phillips v. Collins*, 256 F.3d 843, 847 (8th Cir. 2001)); see *Moisant v.* Air Midwest Inc., 291 F.3d 1028, 1031 (8th Cir. 2001); see also Cross v. Cleaver, 142 F.3d 1059, 1073 (8th Cir. 1998). Nothing in the ADEA, the ICRA or case law, however, excludes physical pain or injury from the auspice of adverse employment action. In considering what constitutes "a tangible change" that results in a "material disadvantage," courts focus on actions with a significant economic or responsibility-altering impact, including "significant change[s] in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits." Burlington Industries v. Ellerth, 524 U.S. 742, 760 (1998); Cooney v. Union Pacific Railroad Co., 258 F.3d 731, 734 (8th Cir. 2001) (holding that "[t]ermination, reduction in pay or benefits, and changes in employment that significantly affect an employees future career prospects" meet the adverse employment standard). Nothing, however, forecloses the possibility that a "tangible" change or "material disadvantage" may refer to other than economic effects.

"Recognizing that job discrimination may take many forms, Congress cast the prohibition of Title VII broadly to include subtle distinctions in the terms and *conditions* of employment as well as gross salary differentials based on forbidden classifications." Collins v. State, 830 F.2d 692, 703 (7th Cir. 1987) (holding that the reassignment of a librarian to another job within the library where she had no office, desk, or business cards constituted adverse employment action). Courts, however, have consistently found that "minor or trivial acts that make an employee unhappy" do not constitute materially adverse employment actions. Russell v. Board of Trustees of the University of Illinois, 243 F.3d 336, 342 (7th Cir. 2001); Terry v. Ashcroft, 336 F.3d 128, 138 (2nd Cir. 2003) (adverse employment action under the ADEA is that action which is "more disruptive than a mere inconvenience or an alteration of job responsibilities"). The Supreme Court has identified specific examples of such minor or trivial acts which do not constitute adverse employment action, including: a bruised ego; demotion without change in pay, benefits, duties or prestige; and reassignment to a more inconvenient job. Burlington Industries v. Ellerth, 524 U.S. 742, 761 (1998) (citations omitted). These cases are clearly distinguishable from the situation at hand. While one can continue to work despite a bruised ego or mere inconvenience, working in the face of unnecessary physical pain and injury most certainly puts one at a material disadvantage in any employment situation. The Court, therefore, finds that Plaintiffs' claims of changed working conditions which caused them physical pain or injury may constitute an adverse employment action.

B. Timeliness

The ICRA requires that plaintiffs exhaust their administrative remedies prior to bringing suit.

Iowa Code § 216 (12), § 216.16(1)(a), and § 216.17. Furthermore, in order to initiate a claim under

the ICRC, a party must first timely file an administrative complaint with the ICRC and obtain a right-to-sue letter. Iowa Code § 216; *Lynch v. City of Des Moines*, 454 N.W.2d 827, 830 (Iowa,1990). To be timely, a complaint to the Iowa Civil Rights Commission must be filed within 180 days of the occurrence of an alleged unfair or discriminatory practice or act. Iowa Code §216.15(12); Iowa Admin. Code r. 161–3.3(1).

Defendants move to dismiss the ICRA claim, arguing that Plaintiffs failed to exhaust their administrative remedies under the ICRA in a timely manner. Defendants argue that because Plaintiffs' complaint was not received by the ICRA until October 1, 2002, more than 240 days after the removal of the chairs, the administrative complaint is time barred under the 180-day limitation period set forth in the ICRA. The Court agrees.

The United States Supreme Court has "repeatedly interpreted the term 'practice' to apply to a discrete act or a single 'occurrence,' even when it has a connection to other acts." *Amtrack v. Morgan*, 536 U.S. 101, 111 (2002). Accordingly, each discrete act of discrimination starts a new clock running for the filing of a claim. *Id.* at 113. In contrast, the Court in *Morgan* explained that the application of the continuing violation theory, allowing claims to be filed for actions occurring after the statute of limitations has lapsed when the violations constitute a continuing practice of discrimination, is limited to claims such as claims for a hostile work environment where the nature of the claim is ongoing discrimination and one example of discrimination does not prove the charge. *Id.* at 110-115. Plaintiffs' claim does not demonstrate an ongoing pattern of discrimination but rather the discrete act of the removal of the chairs and the effects resulting from that act. Accordingly, the Court finds that the 180-day deadline began to run on the day Defendants first removed Plaintiffs' chairs. Plaintiffs' charge of

age discrimination under the IRCA, is, therefore, time-barred.

IV. ORDER

Defendants' Motion to Dismiss is granted in part and denied in part. The motion is **denied** as to Count I of Plaintiffs' complaint for alleged age discrimination under the ADEA. Defendant's motion is **granted** insofar as it seeks to dismiss Plaintiffs' ADEA claim against Defendant Mark Wiederin. As Plaintiffs failed to file a timely charge of discrimination with the Iowa Civil Rights Commission, Defendants' motion is **granted** on Count II of Plaintiffs' petition for violations of the ICRA.

IT IS SO ORDERED.

Dated this ___17th___ day of March, 2004.

ROBERT W. PRATT U.S. DISTRICT JUDGE