

## Is a Lateral Transfer Adverse Employment Action?

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The Sixth Circuit Court of Appeals recently held that, under certain circumstances, a lateral transfer can constitute adverse employment action for purposes of **Title VII, the ADEA, and Section 1983**. In *Deleon v. Kalamazoo Cnty. Road Comm'n*, No. 12-2377 (6<sup>th</sup> Cir. Jan. 14, 2014), the Court held that a lateral transfer may be “adverse” to the employee when the terms and conditions of the transfer are inferior to what the employee originally sought.

The plaintiff Deleon, a 53 year old Hispanic male of Mexican descent, had been employed by the county road commission for 28 years. He worked in an office and claimed to have been subjected to an atmosphere of pervasive racial insensitivity. In 2008, the plaintiff applied for the job of equipment management superintendent, where he would be working in a garage around transit buses. He testified that, had he been offered the job, he would have asked for a \$10,000 raise to compensate for the poor working conditions he expected to encounter in the garage area. Another person was hired but quit shortly thereafter. The commission then offered the position to another person, who declined.

In 2009, the commission transferred Mr. Deleon to the superintendent position involuntarily without a raise. Afterward, the plaintiff claimed that he suffered adverse health effects – there was evidence that he was exposed to toxic and hazardous diesel fumes and that he contracted bronchitis. Another employee compared the workplace environment to “sticking your head in an exhaust pipe” and sitting “behind a city bus.” The plaintiff told his supervisor during his first evaluation that he had been set up to fail. Thereafter, he was hospitalized for stress and took eight months of FMLA leave. When he was cleared to return to work, the commission had already terminated him, claiming that he had exhausted his leave.

Mr. Deleon sued the commission, alleging racial, national origin, and age discrimination, as well as a violation of 42 U.S.C. Section 1983. Although the district court found that such circumstances belied an “adverse” employment action, the appellate court reversed. The 2-1 majority panel acknowledged that a lateral transfer that does not affect pay, title, or work hours is often not deemed “adverse.” Nevertheless, the Court determined that such a transfer may constitute adverse employment action if it amounts to a demotion evidenced by a “less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation.”

The Court also found that the plaintiff’s prior application for the same position did not negate a

finding that the transfer was a constructive discharge, because it was “objectively intolerable to a reasonable person.” Further, it was immaterial to the majority that Mr. Deleon never specifically complained about the job assignment. Such did not render the transfer voluntary or non-discriminatory, because the standard is objective

As this case shows, employers need to be careful when transferring employees involuntarily. Factors other than title, pay, and working hours must be considered.

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