

## A Cautionary Tale That Context Matters

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In the shifting landscape of employment law, a recent case illustrates the need to apply context and consider all the circumstances – even when it looks like a general rule applies. In this particular case, involving race and national origin discrimination, the District of Columbia Circuit Court of Appeals changed its mind – reversing its own decision and reversing summary judgment for the United States Department of Housing and Urban Development, which was the employer in this case.

(As a reminder, a denial of the employer’s summary judgment motion does not mean the employee wins the case – it simply means there is enough of a dispute for the case to get to trial.)

On the surface, the case looked easy. The employee complained of race and national origin discrimination because he had not been approved for a lateral transfer. The lower court ruled in favor of the employer by applying the general rule – that denying a *lateral* transfer request was not an adverse employment action and therefore did not actually present a case of discrimination. After all, the employee would have earned the same amount of money and been provided with the same benefits as in his previous position. The employee appealed, but the appellate court agreed. However, a year later, the same three judges changed their mind and decided the circumstances here demonstrated a possible exception.

What made the court think this was a case for the exception instead of the general rule?

The employee provided evidence that even though the lateral transfer itself did not have any obvious advantage, such as increased compensation, the transfers he had requested were to “favored” locations that represented positive stepping stones of experience in a career ladder.

The court also concluded that being required to continue to work for a biased supervisor – instead of being able to “transfer away” from a biased supervisor – had the potential to cause negative consequences to the employee’s career. Those consequences too, could therefore be an adverse employment action. If the employee could show that his supervisor was biased, it would be logical to conclude that having to stay and work for that supervisor would have a negative impact on his career.

The other difference here was that the employee had more than simply his own opinion to back up his claims. Usually, if the complaint or case is only supported by the employee’s own opinion, it is deemed speculative and therefore legally insufficient. Here, the employee was able to offer more support of the supervisor’s bias – including evidence of prior complaints about the supervisor and

that a coworker also thought the supervisor was biased. The evidence also included allegations of the supervisor making biased remarks and instances of the supervisor denying transfer requests from other minorities, while approving them for non-minority employees. Accordingly, there was evidence – more than just mere speculation – that could support finding the supervisor was biased.

But remember, this reflects a change of mind from the appellate court (three legal professionals), so obviously this case had some close and tough calls. For our purposes it serves as a general reminder that in order to apply the general rule, we still have to know enough about the circumstances in order to determine whether an exception to the rule may apply.

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