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January 22, 2014

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Sixth Circuit: Transfer to Previously Sought-After Position Can Be an Adverse Employment Action

By Matthew J. Feery

Across the myriad employment discrimination statutes, whether they be at the federal or state level, the facts and circumstances of cases can differ greatly, but the plaintiffs in virtually every case must show the same thing: there was an adverse employment action. After all, if the statutes are meant to be remedial, then there must be some specific action for which the plaintiff is seeking a remedy. Many times, the alleged adverse employment action is clear - termination, refusal to hire, demotion, reduction in pay, etc. But can an employer subject an employee to an adverse employment action by transferring the employee to a position that the employee voluntarily applied for in the first place? According to last week's decision from a 2-1 majority of the Sixth Circuit (covering Kentucky, Michigan, Ohio, and Tennessee), the answer, under certain circumstances, is yes.

The case is *Deleon v. Kalamazoo County Road Commission*, 2014 WL 114016 (Jan. 14, 2014). Robert Deleon was an Area Superintendent for the Kalamazoo County Road Commission (the "Commission"). In 2008, the Commission had an opening for an "Equipment and Facilities Superintendent," which, according to the position's job description, entailed working conditions of a "garage where there is exposure to loud noises and diesel fumes." Other

employees described the working conditions as being akin to "sticking your head in an exhaust pipe" and "[sitting] in traffic behind a city bus."

Mr. Deleon applied for the position, which he later testified to be, in his view, a position that possessed better potential for his career advancement. The Equipment and Facilities Superintendent position did not involve a change in pay, benefits, or work hours. However, on his application, Mr. Deleon requested a raise. After being told he would not receive a raise if awarded the position, Mr. Deleon continued with his application. He later testified that he had intended to demand a $10,000 raise had he been offered the position because of the "hazard posed by diesel fumes and poor ventilation in the equipment and facilities area."

Mr. Deleon interviewed for the position but was not hired. Mr. Deleon admitted that his computer skills - which were a substantive qualification for the position - were insufficient for the job. The Commission gave the job to another candidate, who subsequently left the position voluntarily. The Commission next offered the job to an external candidate, who turned it down. The Commission then transferred Mr. Deleon to the position as part of what it stated to be a larger reorganization. This occurred about nine months after Mr. Deleon's unsuccessful application to the job.

In his performance reviews after the transfer, Mr. Deleon received "acceptable" ratings in most critical areas, but was told he was not sufficiently above minimum performance levels and needed to improve in several areas, including technology skills. Mr. Deleon was unhappy in the new position, but he never informed the Commission of his feelings. Rather, he inquired why he "had been involuntarily moved from a position where he was performing well to one that was more hazardous." Eventually, after a contentious meeting with his supervisor over a project, Mr. Deleon was hospitalized for what Mr. Deleon described as a work-induced, stress-related mental breakdown. He then took eight months' leave under the FMLA. However, by the time he was cleared by his psychiatrist to return to work, the Commission had terminated him because he had exhausted all of his available leave.

Mr. Deleon subsequently sued the Commission, alleging, in part, discrimination under Title VII because of his race and under the ADEA because of his age. The Commission eventually moved for and prevailed at summary judgment, with the federal district court ruling that Mr. Deleon's transfer to the Equipment and Facilities Superintendent position did not constitute an adverse employment action because the reassignment did not have any commensurate change in benefits, title, salary, or work hours.

In a 2-1 decision, a panel of the Sixth Circuit disagreed, finding

for the first time in its history that the transfer of an employee to a position that the employee previously sought could constitute an adverse employment action. In its holding, the Sixth Circuit majority looked to previous case law regarding adverse employment actions, including the Supreme Court's 2006 decision in *Burlington Northern and Santa Fe Company v. White*, 548 U.S. 53 (2006). The Sixth Circuit noted that in *Burlington*, the Supreme Court said that "whether a particular reassignment is materially adverse depends on the circumstances of the particular case" and "should be judged from the perspective of a reasonable person in the plaintiff's position," taking into account all the circumstances. Thus, the Sixth Circuit held, an employee transfer, even if there is no demotion or pay decrease, could constitute an adverse employment action if the particular circumstances "give rise to some level of objective intolerability."

Applying this standard to Mr. Deleon's case, the Sixth Circuit reversed the grant of summary judgment to the Commission. The Sixth Circuit noted that in the new position, Mr. Deleon had daily, regular exposure to toxic and hazardous diesel fumes, that Mr. Deleon claimed to have developed bronchitis and sinus headaches as a result, and that Mr. Deleon had to sweep soot out of his office on a weekly basis. Thus, according to the Sixth Circuit, there was enough evidence for a jury to consider that the new position was "more arduous and dirtier" than Mr. Deleon's pre-transfer position.

As for the fact that Mr. Deleon had previously applied for the Equipment and Facilities Superintendent position, the Sixth Circuit found that fact unavailing. The appellate court noted that Mr. Deleon testified that he intended to request a substantial raise for "hazard pay," and thus there was a question as to whether he really wanted the job in the first place. The Sixth Circuit also found it unavailing that Mr. Deleon never withdrew his application or complained to his supervisors about the new position. Rather, the Sixth Circuit found that the transfer of Mr. Deleon out of a position where he was performing well was potential evidence that Mr. Deleon was "set up to fail." In closing and remanding the case back to the district court, the Sixth Circuit noted, in words that employers likely will not find comforting, that "the key focus should not be whether the lateral transfer was requested or not requested, or whether the aggrieved plaintiff must [voice dissatisfaction at the time], but whether the 'conditions of the transfer' would have been 'objectively intolerable to a reasonable person.' . . . Indeed, an employee's opinion of the transfer, whether positive or negative, has no dispositive bearing on an employment actions [sic] classification as 'adverse.'"

Although the Commission may eventually appeal, the *Deleon* decision provides no comfort to employers in the interim, as it broadens the scope of what may be considered an adverse

employment action, at least in federal courts in the Sixth Circuit.

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