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Buyer's Remorse No More: Supreme Court Declines to Review Sixth Circuit Decision That Penalizes Employer for Granting Employee's Request for Transfer

This week the United States Supreme Court declined to review *Kalamazoo County Road Commission v. Deleon*, leaving in place a troubling Sixth Circuit Court of Appeals decision that would allow employees to sue for discrimination when they *receive* a transfer *they requested*. In a rare move, Justice Alito filed a dissent to the Supreme Court's decision not to hear the case. He called the lower court's opinion "unprecedented" and "clearly contrary to the statutes."

Deleon, a fifty-three year old Hispanic man, worked for the Kalamazoo County Road Commission for twenty-eight years. When the position of Equipment and Facilities Superintendent became available, Deleon applied. Although the position involved exposure to diesel fumes and loud noises, Deleon believed the position offered better potential career advancement. Deleon also planned to ask for additional hazard pay if awarded the position. Deleon was not offered the position initially, but was ultimately transferred to the job when the position was later vacated. He did not receive his requested hazard pay.

After the transfer, Deleon complained to his supervisors and asked why he had been transferred to a position with such hazardous conditions. He then took eight months of leave due to what he claimed was a job-related and stress-induced mental breakdown. When he attempted to return, the Commission informed him that he had long exhausted his available leave and that his employment was terminated.

Deleon brought suit against the Commission alleging race and national origin discrimination under Title VII of the Civil Rights Act, age discrimination under the Age Discrimination in Employment Act

(ADEA), and a violation of the Equal Protection Clause under the Fourteenth Amendment. The District Court granted summary judgment in favor of the Commission. Deleon appealed the decision to the Sixth Circuit.

The Sixth Circuit held that transferring an employee to a position that the employee previously requested may constitute an “adverse employment action” if a reasonable person in the employee’s position would consider the transfer intolerable. A transfer can be intolerable if the new position is “more arduous or dirtier” or is in “some wretched backwater.” Deleon’s transfer was intolerable because the diesel fumes and poor ventilation made the new position “more arduous and dirty.” Deleon’s previous request for transfer did not prevent him from alleging the transfer was an adverse employment action. Because Deleon was denied hazard pay and because he confronted his superiors, asking them why he was transferred to a position for which he was “set up to fail,” his previous request to transfer to the position was not a bar to his discrimination claims.

Sixth Circuit Judge Jeffrey Sutton disagreed with the decision and argued that the decision subjects employers to liability coming and going. An employer in the Sixth Circuit may now be liable for employment discrimination whether they deny *or grant* an employee’s request for transfer. Judge Sutton would draw the line at an employee’s voluntary request for transfer: such a request should categorically bar an employee from claiming the transfer was discriminatory because the employee requested it.

It was initially believed that the Supreme Court would review the decision. This week the Supreme Court declined to review the case, leaving the Sixth Circuit’s decision intact. In a strongly worded dissent, Justice Alito stated that the Sixth Circuit’s decision “is so clearly wrong that summary reversal is warranted.” Justice Alito also commented that “An old maxim warns: Be careful what you wish for; you might receive it. In the Sixth Circuit, however, employees need not be careful what they ask for because, if their request is granted and they encounter buyer’s regret, they can sue.”

It is not clear whether the Sixth Circuit will limit the *Deleon* case to its specific facts and distinguish future cases. Employers within the Sixth Circuit – Ohio, Kentucky, Tennessee, and Michigan – should consider this case when deciding to transfer employees.

Please contact [Neal Shah](#), [Steve McDevitt](#), or any other member of Frost Brown Todd's [Labor and Employment Practice Group](#) to understand the implications of *Deleon v. Kalamazoo County Road Commission*.

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