

CASE COMMENT

**The Sixth Circuit’s *Deleon* Holding: How Granting  
a Requested Transfer May Be an Adverse  
Employment Action**

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Commenting on *Deleon v. Kalamazoo County Road Commission*, 739 F.3d 914 (6th Cir. 2014).

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*[W]hen the gods wish to punish us, they answer our prayers.*<sup>1</sup>

In January 2014, the Sixth Circuit held that an employee who had previously applied for the position to which he was ultimately transferred was not disqualified from showing that the transfer was an adverse employment action for purposes of discrimination claims against his employer.<sup>2</sup> While from one perspective *Deleon v. Kalamazoo County Road Commission*<sup>3</sup> merely reinforces the standard set forth in *Burlington Northern & Santa Fe Railway Co. v. White*,<sup>4</sup> it is a potentially significant decision because it also requires employers to reevaluate their approach to internal transfers.

I. *DELEON V. KALAMAZOO COUNTY ROAD COMMISSION*

Robert Deleon, a fifty-three-year-old Hispanic man of Mexican descent, had been employed by the Kalamazoo County Road Commission for twenty-

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<sup>1</sup> OSCAR WILDE, *AN IDEAL HUSBAND*, act 2 (1895).

<sup>2</sup> 739 F.3d 914, 920 (6th Cir. 2014).

<sup>3</sup> *Id.*

<sup>4</sup> 548 U.S. 53, 68 (2006).

eight years when his employment was terminated.<sup>5</sup> In 2008, three years prior to his termination, Mr. Deleon had applied for the position of Equipment and Facilities Superintendent.<sup>6</sup> Although it would have been a lateral move, Mr. Deleon hoped to advance his career through the transfer and to obtain a salary increase.<sup>7</sup> After submitting his application, Mr. Deleon was told that the job would not include a pay raise as he had hoped, but Mr. Deleon kept his application open nonetheless, interviewed for the position, and then inquired as to why he did not receive the position after an external candidate was hired instead.<sup>8</sup> The external candidate who was hired over Mr. Deleon left the position shortly thereafter, and another external candidate declined when offered the position.<sup>9</sup> Finally, in 2009, Mr. Deleon was transferred to the position to which he had applied nine months prior.<sup>10</sup> The record indicated that Mr. Deleon was not given an opportunity to decline the transfer.<sup>11</sup> In the new job, Mr. Deleon asserted that he developed bronchitis and other health issues as a result of the exposure to diesel fumes.<sup>12</sup> Unhappy in his new position, Mr. Deleon eventually suffered a “work-induced, stress-related mental breakdown” and took eight months of leave under FMLA.<sup>13</sup> When his psychiatrist cleared him to work again, Mr. Deleon was terminated from his position.<sup>14</sup>

Mr. Deleon alleged that the termination constituted (1) a violation of the Equal Protection Clause,<sup>15</sup> (2) race discrimination under Title VII,<sup>16</sup> (3) national origin discrimination under the same, and (4) age discrimination under the Age Discrimination in Employment Act,<sup>17</sup> each of which would require that Mr. Deleon “show that . . . he suffered an adverse employment action.”<sup>18</sup> Because

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<sup>5</sup> *Deleon*, 739 F.3d at 916–17.

<sup>6</sup> *Id.* at 916.

<sup>7</sup> *Id.* Plaintiff testified that he applied for the position, which was difficult to fill, in order to “help out” but requested a higher salary because the new position required continuous exposure to diesel fumes. Brief of Plaintiffs-Appellants at 10, *Deleon*, 739 F.3d 914 (No. 12-2377).

<sup>8</sup> *Deleon*, 739 F.3d at 921 (Sutton, J., dissenting).

<sup>9</sup> *Id.* at 916 (majority opinion).

<sup>10</sup> *Id.* The defendants assert that the transfer was part of a larger reorganization of the County Road Commission. Brief of Defendants-Appellees at 9, *Deleon*, 739 F.3d 914 (No. 12-2377).

<sup>11</sup> *Deleon*, 739 F.3d at 917.

<sup>12</sup> *Id.*

<sup>13</sup> *Id.*

<sup>14</sup> *Id.*

<sup>15</sup> U.S. CONST. amend. XIV, § 1. The action was brought under 42 U.S.C. § 1983 (2010).

<sup>16</sup> Civil Rights Act of 1964, 42 U.S.C. § 2000e to 2000e-17 (2010).

<sup>17</sup> 29 U.S.C. § 621–634 (2011).

<sup>18</sup> *Deleon*, 739 F.3d at 918. There are two frameworks to establish a prima facie case of intentional discrimination under Title VII: pretext and mixed-motive. 45A AM. JUR. 2D *Job Discrimination* § 526 (2014). The court evaluated this case using the burden-shifting, “pretext” framework from *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *Deleon*, 739 F.3d at 918. Under this framework, the plaintiff must initially show that:

Mr. Deleon was transferred to a position for which he had applied, the district court held that there was no adverse employment action and granted defendants' motion for summary judgment.<sup>19</sup> However, the Sixth Circuit disagreed and reversed; examining the transfer from the perspective of a reasonable person, the appellate court found that there was evidence "for the jury to consider that the new position was 'more arduous and dirtier.'"<sup>20</sup> The majority emphasized that, although Deleon had once applied for the position he received, his transfer was actually *involuntary*.<sup>21</sup> For the majority, the proper inquiry is not whether or not the plaintiff requested the transfer but rather "whether the 'conditions of the transfer' would have been 'objectively intolerable to a reasonable person.'"<sup>22</sup>

In his dissent, Judge Sutton reasoned that when an employer grants an employee a transfer for which he has voluntarily applied, with full knowledge of the conditions of the position, it is not an adverse employment action.<sup>23</sup> The dissent agreed that an objective test is correct but reminded the majority that "[t]he materially adverse inquiry" examines the "reasonable person *in the plaintiff's position*."<sup>24</sup> In doing so, the dissent recognized that there may be instances where an employee *involuntarily* requests a transfer, such as when an employee requests a transfer under the belief that it is necessary to keep her job,<sup>25</sup> or when the employee requested the transfer only in order to remove himself "from discriminatory conditions in his current position."<sup>26</sup> However, for

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"(1) [the plaintiff] was a member of a protected class, (2) *he suffered an adverse employment action*, (3) he was otherwise qualified for the position, and (4) he was replaced by someone outside the protected class or treated differently than a similarly situated, non-protected employee." *Id.* (emphasis added) (citing *Wright v. Murray Guard, Inc.*, 455 F.3d 702, 707 (6th Cir. 2006)). The elements are nearly identical for a claim under the ADEA. *Id.* (citing *Bush v. Dictaphone Corp.*, 161 F.3d 363, 368 (6th Cir. 1998)). The elements are also the same in this case for the § 1983 Equal Protection claim. *Id.* at 917–18 (citing *Lautermilch v. Findlay City Sch.*, 314 F.3d 271, 275 (6th Cir. 2003); *Gutzwiller v. Fenik*, 860 F.2d 1317, 1325 (6th Cir. 1988)). To establish a prima facie case under the mixed motive framework, a plaintiff still must show that the defendant took an adverse employment action against the plaintiff. *White v. Baxter Healthcare Corp.*, 533 F.3d 381, 400 (6th Cir. 2008).

<sup>19</sup> Opinion and Order Granting Defendants' Motion for Summary Judgment at 22, *Deleon v. Kalamazoo Cnty. Rd. Comm'n*, No. 1:11-cv-539 (W.D. Mich. Sept. 18, 2012), *rev'd*, 739 F.3d 914.

<sup>20</sup> *Deleon*, 739 F.3d at 920 (quoting *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 71 (2006)).

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 921 (quoting *Strouss v. Mich. Dep't of Corr.*, 250 F.3d 336, 343 (6th Cir. 2001)).

<sup>23</sup> *Id.* at 922 (Sutton, J., dissenting).

<sup>24</sup> *Id.* (quoting *Burlington N.*, 548 U.S. at 69–70).

<sup>25</sup> *Id.* at 923 (citing *Spees v. James Marine, Inc.*, 617 F.3d 380, 387 (6th Cir. 2010)).

<sup>26</sup> *Deleon*, 739 F.3d at 923 (Sutton, J., dissenting) (citing *Simpson v. Borg-Warner Auto., Inc.*, 196 F.3d 873, 876 (7th Cir. 1999); *Sharp v. City of Hous.*, 164 F.3d 923, 934 (5th Cir. 1999)).

the dissent, subjecting an employer to liability when it grants a voluntary employee request will likely create confusion.<sup>27</sup>

## II. *BURLINGTON NORTHERN* REVISITED

The Sixth Circuit's decision in *Deleon* comes nearly a decade after an en banc decision by the same circuit in *Burlington Northern* that held that an involuntary transfer could be an adverse employment action if the conditions of employment worsened with the transfer, even if the pay was the same.<sup>28</sup> Affirming the Sixth Circuit, the Supreme Court in *Burlington Northern* made the common sense observation "that one good way to discourage an employee . . . from bringing discrimination charges would be to insist that she spend more time performing the more arduous duties and less time performing those that are easier or more agreeable."<sup>29</sup> Specifically, the Court in *Burlington Northern* held that a female employee who was involuntarily transferred from the position of forklift driver to that of track laborer suffered an adverse employment action.<sup>30</sup> The Court noted that even though both jobs paid the same, the forklift position required special qualifications and carried a certain amount of prestige, while the track laborer job was "by all accounts more arduous and dirtier."<sup>31</sup>

There is some merit to the position that *Deleon*'s holding merely repeats the *Burlington Northern* standard: it is an adverse employment action when an employee is involuntarily transferred to a position that is objectively worse<sup>32</sup> than his current position. Indeed, the majority in *Deleon* emphasized that the plaintiff's transfer was involuntary.<sup>33</sup> However, the court's conclusion that

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<sup>27</sup> *Id.*

<sup>28</sup> *White v. Burlington N. & Santa Fe Ry. Co.*, 364 F.3d 789, 803 (6th Cir. 2004), *aff'd*, 548 U.S. 53 (2006).

<sup>29</sup> *Burlington N.*, 548 U.S. at 70–71.

<sup>30</sup> *Id.* at 70.

<sup>31</sup> *Id.* at 71.

<sup>32</sup> While continued exposure to diesel fumes seems to easily meet the "objectively intolerable" threshold, it is puzzling that the defendants failed to argue that Mr. Deleon's previous position carried certain unpleasant conditions as well—specifically, that it required spending considerable amounts of time outdoors in Michigan. See Brief of Plaintiffs-Appellants, *supra* note 7, at 38 ("Plaintiff's prior position as area superintendent mostly entailed working outdoors performing road construction and maintenance."). Average temperatures in Kalamazoo, Michigan hover below freezing for three months out of the year, and the average annual precipitation is over thirty-six inches. *Monthly Averages for Kalamazoo, MI*, WEATHER CHANNEL, <http://www.weather.com/weather/wxclimatology/monthly/USMI0442> (last visited Apr. 18, 2014). Though Mr. Deleon testified that he preferred the working conditions of his previous position, the employee's opinion "has no dispositive bearing on an employment action[']s classification as 'adverse.'" *Deleon*, 739 F.3d at 921 (citing *Sanchez v. Denver Pub. Sch.*, 164 F.3d 527, 532 n.6 (10th Cir. 1998); *Doe v. Dekalb Cnty. Sch. Dist.*, 145 F.3d 1441, 1449–50 (11th Cir. 1998)).

<sup>33</sup> See, e.g., *Deleon*, 739 F.3d at 916 n.1 ("Although Deleon originally applied for the position, his application was denied. Nine months later, Deleon was involuntarily transferred

granting a requested transfer could “still give rise to an adverse employment action”<sup>34</sup> may understandably make employers nervous.

### III. POTENTIAL CATCH-22 FOR EMPLOYERS?

As Judge Sutton indicated in his dissent, the *Deleon* holding may leave employers wondering what they should do when employees apply for internal transfers to “more arduous and dirtier” positions.<sup>35</sup> After all, it is an adverse employment action to reject a qualified individual for a position to which he or she applied;<sup>36</sup> yet the *Deleon* holding also suggests that granting the transfer may be an adverse employment action as well.<sup>37</sup> By allowing plaintiffs some flexibility in showing that they suffered an adverse employment action, *Deleon* arguably creates a dilemma for employers.

A careful reading of *Deleon*, however, shows a way around this dilemma. The *Deleon* holding highlights the importance of clear communication between the employer and employee. To their credit, the defendants in *Deleon* made the employee aware that the position would include exposure to diesel fumes and would not be accompanied by a raise before Mr. Deleon interviewed for the position.<sup>38</sup> However, instead of *offering* the position to Mr. Deleon and giving him an opportunity to negotiate or decline, the defendants merely reassigned him.<sup>39</sup> By empowering their employees with well-informed choices, employers can avoid inadvertently imposing an adverse employment action. This is consistent with the majority’s analysis regarding voluntary transfers as well. The “certain circumstances” under which the majority imagines a voluntary transfer could give rise to an adverse employment action<sup>40</sup> are nearly identical to those described by the dissent as “not . . . *voluntary* request[s] for transfer,”<sup>41</sup> such as an application to be removed from a hostile department or an application for a transfer in order to remain employed at all. So long as the choice is truly—not just facially—the employee’s, an employer should be able to grant a qualified employee’s request for an internal transfer to a dirty job.

Should an employee bring a discrimination claim against an employer, defense attorneys still maintain their typical arsenal for success at the summary

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to the position. . . . The dissent notwithstanding, the facts here do not present a ‘voluntary application,’ but rather an involuntary transfer.”).

<sup>34</sup> *Id.* at 920.

<sup>35</sup> *Id.* at 923 (Sutton, J., dissenting) (“An interpretation . . . that subjects employers to liability coming and going—whether after granting employee requests or denying them—will do more to breed confusion about the law than to advance the goals of a fair and respectful workplace.”).

<sup>36</sup> See *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973).

<sup>37</sup> *Deleon*, 739 F.3d at 920.

<sup>38</sup> *Id.* at 921 (Sutton, J., dissenting).

<sup>39</sup> *Id.* at 916 (majority opinion).

<sup>40</sup> *Id.* at 920.

<sup>41</sup> *Id.* at 923 (Sutton, J., dissenting).

judgment stage. Under the burden-shifting framework, after the employee has set forth a prima facie case of discrimination, the burden shifts to the employer to produce a legitimate, nondiscriminatory reason for the employment action.<sup>42</sup> Though the Sixth Circuit in *Deleon* has left open the possibility that granting a requested transfer could be an adverse employment action, defense attorneys still have ample opportunity to demonstrate that the transfer was the result of legitimate, non-discriminatory reasons. Defense attorneys need not place all of their proverbial eggs in the adverse employment action basket.

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<sup>42</sup>McDonnell Douglas Corp. v. Green, 411 U.S. 792, 802 (1973). The burden then shifts back to the employee to show that the employer's stated reason is mere pretext for discrimination. *Id.* at 804.