

January 27, 2014

Be Careful What He Asks for..... Employee's Request for Transfer to a Lateral Position Does Not Preclude Finding of "Adverse Employment Action"

In *Deleon v. Kalamazoo County Road Commission* (January 14, 2014), the Sixth Circuit Court of Appeals reversed summary judgment in favor of the Commission, and ruled that the fact that Deleon, a 53 year old Hispanic male, had previously applied for and been rejected for a position to which he was subsequently transferred did not preclude the finding that the action constituted an "adverse employment action" for purposes of his race, national origin, age and equal protection claims. The Court also ruled that a transfer may still be adverse employment action, precluding summary judgment on plaintiff's discrimination and equal protection act claims, even where the transfer did not involve a demotion, pay decrease, or change in title or benefits, so long as the employee can demonstrate "some level of objective intolerability."

Deleon, a long-time employee of the Commission, had been the Area Superintendent, supervising road maintenance activities, since 1995. In 2008, he applied for the position of "Equipment and Facilities Superintendent," which he viewed as having the potential for career advancement and the potential for a pay raise. The job description warned that the working conditions included exposure to "loud noises and diesel fumes." Following an interview, Deleon was rejected, and the job was offered to another candidate. In 2009, as part of "reorganization," Deleon was transferred, over his objections, to the position for which he had previously applied, but he did not receive the "hazardous duty" pay increase he anticipated would accompany the new position. After a confrontation with his supervisor, Deleon was hospitalized for a work-related mental breakdown, went out on FMLA leave, and was terminated by the Commission shortly before being cleared by his psychiatrist to return to work.

For specific information or answers to questions, please contact any of the attorneys in the Portsmouth, NH office:

Attorney Debra Weiss Ford
(603) 559-2727
Debra.Ford@jacksonlewis.com

Attorney Martha Van Oot
(603) 559-2735
Martha.VanOot@jacksonlewis.com

Attorney Daniel P. Schwarz
(603) 559-2730
Daniel.Schwarz@jacksonlewis.com

Attorney Thomas M. Closson
(603) 559-2729
Thomas.Closson@jacksonlewis.com

Attorney Nancy E. Oliver
(603) 559-2725
Nancy.Oliver@jacksonlewis.com

Attorney Elizabeth J. Baker
(603) 559-2722
Elizabeth.Baker@jacksonlewis.com

Attorney K. Joshua Scott
(603) 559-2711
Joshua.Scott@jacksonlewis.com

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The district court granted summary judgment to the Commission on the ground that Deleon had not suffered a materially adverse employment action. In finding that Deleon had created a triable issue of fact that his work environment was “objectively intolerable,” the Sixth Circuit Court of Appeals found that there was evidence upon which a jury could find that the new position to which Deleon had been transferred was “more arduous and dirtier.” The Court also rejected the Commission’s argument that an “action cannot be truly ‘adverse’ if coveted by its actor.” In ruling that a prior request for a lateral transfer does not categorically bar an employee from later arguing that the transfer was an adverse employment action, the Sixth Circuit, over a strong dissent, emphasized that “the key focus should not be whether the transfer was requested or not requested, or whether the plaintiff must *ex tempore* voice dissatisfaction, but whether the “conditions of the transfer” would have been objectively intolerable to a reasonable person.”

Your Jackson Lewis Attorney can answer questions regarding this and other employment law issues.

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In this weekly hour segment that provides valuable insight into successful Human Resource Management, Dave Ciullo interviews key professionals on a variety of timely topics affecting decision-makers; Debra Weiss Ford discusses the “Jerk at Work.” The interview aired on January 11, 2014 on *News Talk WLOB 1310 AM* in Portland, Maine from 10:00 – 11:00 a.m. The audio is available on the website, hrpowerhour.com.