## Employment: Terminated Employee Can Assert Adverse Action Due to Lateral Transfer to "Hazardous" Position, Although He Had Previously Applied for That Same Position

## *Deleon v. Kalamazoo County Road Commission,* No. 12-2377 (6th Cir. Jan. 14, 2014).

Robert Deleon commenced his employment with the Kalamazoo County Road Commission (Commission) in 1995 and served as an Area Superintendent during his employment. He generally received positive employment evaluations from the Commission.

In 2008, a vacancy arose for a position entitled "Equipment and Facilities Superintendent," for which Deleon applied. He believed the position offered better potential for career advancement and had he been offered the position, he planned on demanding a $10,000 raise. Deleon was interviewed, but was not ultimately offered the position due to his admittedly deficient computer skills (a requirement for the job). The Commission offered the position to another candidate who left shortly after he was hired. In 2009, the Commission involuntarily transferred Deleon to the position. Deleon objected to the transfer and demanded a raise because of the "hazard" posed by the new position – i.e., diesel fumes and poor ventilation. However, he did not receive his requested raise. Deleon claims that due to the hazardous conditions, he developed bronchitis and sinus headaches.

In his new position, Deleon received lower performance evaluations then he previously had. He was unhappy in his position and complained about being moved to a hazardous position that he was not performing as well in and he believed he was being "set up to fail." Subsequently, he and his supervisor disagreed on an assignment and after a meeting with his supervisor, he was hospitalized for five days. He attributed his hospitalization to work-induced stress and took an eight month leave. In August 2011, he was cleared to return to work, but at that point the Commission had terminated his employment, indicating that he had exhausted all of his available leave.

Deleon brought suit in district court, claiming the lateral transfer to the more hazardous position constituted discrimination in violation of the Equal Protection Clause, race discrimination and national origin discrimination in violation of Title VII, and age discrimination in violation of the Age Discrimination in Employment Act (ADEA). Deleon is a fifty-three year old Hispanic male of Mexican descent. The Commission brought a motion for summary judgment as to all claims and the district court granted summary judgment.

**HELD**: The Sixth Circuit reversed the district court's grant of summary judgment, concluding that a reasonable jury could find that the plaintiff had suffered an adverse employment action based on the lateral transfer.

The elements to establish an Equal Protection Clause violation are the same as those needed to establish a disparate treatment claim under Title VII, which requires a showing that the plaintiff: (1) 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 his protected class or was treated differently than similarly situated employees outside his protected class. *Wight v. Murray Guard, Inc.*, 455 F.3d 702 (6th Cir. 2006). Claims for age discrimination are also analyzed under the same framework as those under Title VII. All three causes of action require the plaintiff to show that he suffered an adverse employment action, defined as a "materially adverse change in the terms and conditions of a plaintiff's employment." Generally speaking, a reassignment without change to title, salary, or benefits is not an adverse employment action, however, a reassignment can be an adverse employment action if it essentially constitutes a demotion. Additionally, the Sixth Circuit explained that a job reassignment can amount to an adverse employment action if it constitutes a "constructive discharge" (although a constructive discharge is not necessary to show an adverse employment action). A constructive discharge occurs where the working conditions are "objectively intolerable to a reasonable person." The Sixth Circuit summarized the current state of the law for material adverse action as requiring the plaintiff to present circumstances that give rise to "some level of objective intolerability." For example, where an employee is transferred to "some wretched backwater" position, the plaintiff may show an adverse action on the basis of intolerability.

The Sixth Circuit held that based on the intolerability of his new position, Deleon had met his threshold for summary judgment and provided sufficient evidence of a material adverse action. Specifically, the fact that he was exposed to toxic and hazardous diesel fumes on a daily basis, which resulted in his contracting bronchitis and sinus headaches was sufficient to demonstrate a material adverse action based on an intolerable work environment.

The Sixth Circuit also held that the mere fact that Deleon had previously applied for the very position that he now claimed being transferred to constituted an adverse action did not "categorically bar a finding of an adverse employment action." The court concluded that the "key focus of the inquiry should not be whether the lateral transfer was requested or not requested, or whether the aggrieved plaintiff must *ex tempore* voice dissatisfaction, but whether the 'conditions of transfer' would have been 'objectively intolerable to a reasonable person.'" The Sixth Circuit therefore reversed the district court's grant of summary judgment.

http://www.ca6.uscourts.gov/opinions.pdf/14a0012p-06.pdf (last accessed Jan. 21, 2014)