No. 13-1516

In the Supreme Court of the United States

KALAMAZOO COUNTY ROAD COMMISSION; TRAVIS BARTHOLOMEW AND JOANNA JOHNSON, IN THEIR OFFICIAL AND INDIVIDUAL CAPACITIES, PETITIONERS

v.

ROBERT DELEON AND MAE DELEON

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF *AMICUS CURIAE* STATE OF MICHIGAN IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Can an employer's grant of an employee's request for a job transfer constitute an "adverse employment action" for purposes of maintaining a claim of discrimination or retaliation, and if so, what standard should be applied?

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INTEREST OF *AMICUS CURIAE*

Michigan has an interest in fair and consistent employment laws because it has an interest in healthy, productive businesses and public institutions, and in healthy productive employees. The two are inseparable from each other, and Michigan's general and financial health depends on them both. These twin goals will be served if this Court provides much-needed clarity on the correct standard to be applied when an employer grants an employee's transfer request and the employee then claims an adverse employment action.

Because Michigan also functions as an employer, it has a particular interest in clarity on this important issue involving job transfers. State public employment tends to be larger than private employment, lending itself to frequent transfers, especially lateral ones. Many public employees collectively bargain over the right to transfer, which becomes an important subject to both sides in the bargaining process. There must be a proper balance between protecting employees from discrimination and retaliation, and ensuring that public employers know what actions will subject them to liability so as not to discourage them from acquiescing in a requested transfer that may otherwise benefit the workplace. [1]

[1] Consistent with Rule 37.1, Michigan provided notice to the parties' attorneys more than ten days in advance of filing.

INTRODUCTION

The goal of federal remedial statutes designed to prevent discrimination and retaliation is to encourage a fair work environment. Employment law best serves that goal when it is consistent throughout the country and clear enough that both employers and employees understand the consequences of their conduct.

Contrary to that goal, the current disagreement among the circuits as to whether the grant or denial of a requested transfer constitutes an "adverse employment action"—an essential element of claims under these remedial statutes—has led to confusion. The Sixth Circuit's decision holding that an employee who applied for and then received his requested transfer suffered an adverse employment action exacerbates that confusion and underscores the need for this Court's review.

Employers and employees alike, public and private, suffer from this confusion. Government employers often face the difficulty of having a widely varied work environment with employees who have a bargained-for right to transfer. The current landscape does not help employers understand when their willingness to accommodate a request could subject them to liability. At present, they may be liable no matter what they do—whether they grant the request or deny it. And they may be more at risk in some circuits than in others. The resulting trepidation about granting transfers, particularly lateral ones, is likely to limit options for both the employer and the employee alike and to reduce job satisfaction and productivity.

Judge Sutton captured this dilemma in his dissent in this case. He stated that the majority's interpretation of the law "subjects employers to liability coming and going"—"whether after granting employee requests or denying them"—and will "do more to breed confusion about the law than to advance the goals of a fair and respectful workplace." Pet. App. 18a.

Michigan urges this Court to clarify the current circuit conflict by adopting a workable rule that protects employees while also providing sufficient structure to allow employers to determine when a decision about a requested transfer will subject them to liability. Such a rule will assist employers in successfully developing non-discriminatory work environments.

Michigan suggests the following rule for when a *grant* of an employee's transfer request can qualify as an adverse employment action:

A transfer grant cannot qualify for purposes of a *discrimination* claim unless a plaintiff demonstrates pre-transfer working conditions that would be intolerable to a reasonable person in that position such that the transfer request cannot be deemed "voluntary." Similarly, a transfer grant cannot qualify for purposes of a *retaliation* claim unless a plaintiff demonstrates pre-transfer working conditions that would dissuade a reasonable employee from engaging in protected conduct. And a transfer grant cannot qualify based on post-transfer conditions, because the employee has knowingly accepted those conditions.

ARGUMENT

I. The circuits are in disarray over when the grant of an employee's transfer request constitutes an adverse employment action.

The disagreement among the circuits on this issue is difficult to neatly categorize. It is best described as a confusing disarray of sometimes divergent, sometimes overlapping tests with no consistency in whether the focus should be on pre- or post-transfer conditions or both.

A. The circuits apply various tests and focus on different time periods with respect to employment transfers.

As the majority panel in this case noted, the Second, Fifth, and Seventh Circuits have held that the grant of a voluntary or requested transfer may give rise to an adverse employment action. Pet. App. 11a–12a. But they espouse different reasons why.

The Second Circuit, for example, has recognized that the request for transfer is not a bar where the employee believed she was transferred to a new position "in the hopes that she would quit." *Richardson* v. *New York State Dep't. of Correctional Serv.*, 180 F.3d 426, 444 (2d Cir. 1999), abrogated on other grounds by *Burlington N. & Santa Fe Ry. Co.* v. *White*, 548 U.S. 53 (2006). In that case, the court concluded that a transfer where the employee is set up to fail or essentially punished for engaging in protected activity was an adverse employment decision. *Id.* This "set-up-to-fail" inquiry by its very nature focuses on post-transfer conditions.

In contrast, the Seventh Circuit focuses more heavily on pre-transfer conditions, determining whether the plaintiff's pre-transfer complaints were "so intolerable that a reasonable person would have been compelled to resign." *Simpson* v. *Borg-Warner Automotive, Inc.*, 196 F.3d 873, 877 (7th Cir. 1999). In other words, it looks at whether the transfer request was truly voluntary or whether the employee felt compelled to escape the intolerable conditions by seeking a transfer. Then, raising the bar, it also requires the employee to provide a link between the intolerable conditions and unlawful discrimination. *Id.* at 878.

The Fifth Circuit employs essentially the same test as the Seventh Circuit—whether pre-transfer conditions were so intolerable that a reasonable person would feel compelled to leave. But after applying that test to resolve whether the employee's request was a "constructive demotion," it then examines post-transfer conditions by requiring the employee to show that the move to the new position was a "non-trivial adverse employment action." *Sharp* v. *City of Houston*, 164 F.3d 923, 934 (5th Cir. 1999). So the test examines both ends of the transfer.

Like the Fifth and Seventh Circuits, the Fourth Circuit also looks at whether pre-transfer working conditions were "intolerable" such that the transfer request was not really voluntary. But that circuit's requirement that an employee prove either that the employer created those intolerable work conditions "in a deliberate effort to force the employee to resign" or to force the employee to request a transfer, *Carter* v. *Ball*, 33 F.3d 450, 459 (4th Cir. 1994), is quite

similar to the Second Circuit's "set up to fail" inquiry—except that the "set up" occurs in the pre-transfer position instead of the post-transfer one.

As does the Seventh Circuit, the Eighth Circuit focuses heavily on the pre-transfer conditions. But at least in the context of constructive discharge based on demotion, its burden is higher than proof that conditions were intolerable, requiring an employee to show that conditions were "abusive." E.g., *Tusing* v. *Des Moines Indep. Community Sch. Dist.*, 639 F.3d 507, 521 (8th Cir. 2011) (concluding that no adverse employment action occurred "because [the transferred teacher] admitted . . . that her transfer . . . was voluntary").

The Eleventh Circuit's standard is even more difficult for an employee to meet. There, a voluntary transfer simply negates an employee's claim of an adverse employment action. E.g., *Doe* v. *Dekalb County Sch. Dist.*, 145 F.3d 1441, 1454 (11th Cir. 1998) ("a transfer cannot be 'because of a disability' if it occurred as the result of an employee's own request").

The Sixth Circuit opinion in this case discusses constructive discharge and employs an "objective intolerability" standard similar to the Fourth, Fifth, and Seventh Circuits. But it differs notably from these circuits in that—like the Second Circuit—it focuses exclusively on post-transfer working conditions. Employing an "after-the-fact" inquiry as to the conditions of the new job instead of relying on whether Plaintiff Deleon's lateral transfer was requested or not requested, the panel majority determined that Deleon had been constructively

discharged because his new job exposed him to toxic and hazardous fumes. But as the dissent pointedly noted, Deleon had "applied with full knowledge of the transfer's potential downside." Pet. App. 14a. The dissent concluded that "[t]he Commission's decision to give Deleon what he wanted, what he persisted in seeking when at first he did not succeed, did not amount to an adverse employment action." Pet. App. 15a.

These varying approaches mean that the outcome of a discrimination or retaliation suit involving a request for a transfer will vary depending on where the suit is filed. This disparity will put some employers at a competitive disadvantage. And companies that do business in various states spanning various federal circuits will be unable to develop company-wide transfer policies. Consistency is sorely needed.

B. Settling the circuit conflict is important to workplace predictability and to furthering the goals of remedial anti-discrimination and retaliation statutes.

To prevent discrimination and retaliation in the workplace, predictability amidst the myriad social circumstances that may arise is needed. Employers need to understand their potential for liability when they grant a transfer. In turn, employees benefit from clarity, because that encourages employers to allow transfers. Without this understanding, an employee's request for a transfer does nothing to caution the employer that granting the transfer could be viewed as adverse action by the employee.

Reversing a transfer is not easy. Once an employee is transferred to another position, a number of actions may take place. For example, the former position may be backfilled or the workplace may be reorganized, making it difficult, if not impossible, to return an employee to a previous position. The employer needs clear parameters to provide employees with maximum options for movement while recognizing the need for stability.

Significantly, this Court has recognized that Title VII "provides for equal opportunity to compete for any job, whether it is thought better or worse than another." *Int'l Bhd. of Teamsters* v. *U.S.*, 431 U.S. 324, 338 (1977) (citing *United States* v. *Hayes Int'l Corp.*, 456 F.2d 112, 118 (5th Cir. 1972), which states that "[t]he Civil Rights Act provides for equal opportunity to select and compete for a job notwithstanding its lower pay or other disadvantages")). In *International Brotherhood*, the Court noted that "[a]lthough line-driver jobs pay more than other jobs and the District Court found them to be 'considered the most desirable of the driving jobs,' it is by no means clear that all employees, even driver employees, would prefer to be line drivers." 431 U.S. at 388 n.18.

This recognition of the import of individualized choice is what makes the Sixth Circuit decision in this case so troubling. As the dissent points out, not only was the transfer a lateral one in terms of pay and benefits, the employee had applied for the transfer with full knowledge of the conditions, kept his application active, interviewed for the position even after his supervisors rejected his demands for a

raise, and complained to his supervisors when at first he did not get the job. Pet. App. 16a.

With non-voluntary transfers, employers might be able to predict when the move might be viewed as adverse, particularly if the new job is clearly dirtier, more arduous, more difficult, or known to be more stressful. But where they respond to an employee's request for a transfer, they will have no such warning. The current circuit confusion will leave employers wondering what facts the court will consider, under what standard, and during what time period—pre- or post-transfer or both. Must the employer delve deeper into the employee's reason behind the request? Is the employer expected to counsel the employee about the pros and cons of each job? Will the employer be tempted to factor in whether the requester is a member of a protected group or has previously engaged in protected activity and view the request with more caution?

Employees are often motivated by factors that are not readily apparent to the employer. Family concerns to which the employer is not privy—and which the employer oftentimes cannot, by law, inquire into—often play a role. Sometimes what in hindsight appears to be "adverse" might have been the very element of a new job that was attractive to the employee. In the instant case, for example, indoor diesel fumes might seem to be a downside, but if the indoor environment that gives rise to the fumes motivated the plaintiff to escape the harsh outdoor element of his current job, should exposure to those fumes be viewed as "adverse" by comparison? Similarly, if at the time the plaintiff requested a

transfer, the computer challenges of the new job sparked his desire for personal and professional advancement and were the impetus for the transfer, should courts evaluate in hindsight whether those perceived opportunities panned out? How is an employer to know at what point the transfer an employee thought he wanted becomes sufficiently "harmful" so as to be adverse?

These inquiries are too subjective. They are decidedly less objective than the standards this Court articulated in *Burlington Northern & Santa Fe Railway Co.* v. *White*, 548 U.S. 53 (2006), and *Pennsylvania State Police* v. *Suders*, 542 U.S. 129 (2004). In the context of a Title VII retaliation claim based on a job reassignment, *Burlington Northern* articulated a standard that distinguished trivial from significant harms and was objective with respect to judging harm, evaluating whether the challenged action was materially adverse because it could well dissuade a reasonable employee from engaging in protected conduct. 548 U.S. at 68–69. Similarly, in *Suder*s, this Court held that a plaintiff who advances a hostile-environment constructive discharge claim under Title VII must show working conditions so intolerable that a reasonable person would have felt compelled to resign. *Id.* at 147.

C. Transfer grants should be considered adverse employment actions only where there are pre-transfer conditions that are intolerable for a reasonable person.

Employers, both public and private, need an objective standard and the parameters for its application. An objective standard helps avoid

"uncertainties and unfair discrepancies that can plague a judicial effort to determine a plaintiff's unusual subjective feelings." *Burlington N. & Santa Fe Ry. Co.*, 548 U.S. at 68–69. Analysis that makes reference to an objective standard but actually looks after-the-fact at why a voluntary job transfer did not turn out as the employee had hoped—and then affords the employee a "do-over" at the expense of the employer—is actually a subjective standard.

This subjectivity is contrary to this Court's precedent and the goals of remedial anti-discrimination and anti-retaliation statutes. The purpose of those laws is to "assure equality of employment opportunities and remove artificial, arbitrary, and unnecessary barriers to employment when barriers operate invidiously to discriminate" on the basis of impermissible classifications. *McDonnell Douglas Corp.* v. *Green*, 411 U.S. 792 (1973). The granting of a voluntary transfer is hardly arbitrary.

This Court should adopt a practical rule with an objective standard—a rule that protects employee rights without punishing employers for granting an employee's voluntary transfer request. The rule for when a *grant* of an employee's transfer request can qualify as an adverse employment action should be:

A transfer grant cannot qualify for purposes of a *discrimination* claim unless a plaintiff demonstrates pre-transfer working conditions that would be intolerable to a reasonable person in that position such that the transfer request cannot be deemed "voluntary." Similarly, a transfer grant cannot qualify for purposes of a *retaliation* claim unless a plaintiff demonstrates pre-transfer working

conditions that would dissuade a reasonable employee from protected conduct. And a transfer grant cannot qualify based on post-transfer conditions, because the employee has knowingly accepted those conditions.

II. The conflict harms public sector employment.

The current disarray among the circuits affects all employers, public and private. Judge Sutton captured the dilemma of those employers when he explained that "[a]n interpretation of the . . . laws 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 respectable workplace." Pet. App. 18a. Because of the nature of public sector employment, the disarray on this issue might have an even greater negative impact on public employers and employees.

A. Public sector employment spans a wide variety of working conditions.

The organizational charts of many public institutions are remarkably complex. Even these institutions' own employees may have difficulty navigating the organizational schemes—especially since they change frequently when governing bodies reorganize them. And in part because public employers must perform a breadth of services that are optional for the private sector, the number of public sector positions is immense, spanning numerous job types, classifications, and job locations. These variations provide more options for transfers than more homogeneous employment.

Thus, in the public employment setting, transfer, especially the lateral transfer, is a useful vehicle. Public employers can use it to challenge talented and eager employees, or provide needed variety for long-serving staff. Public employees can use it to provide new or broader job challenges, better utilize job skills, perhaps relocate to a new geographical area, or provide a more conducive schedule.

Additionally, public employee tenure is higher on average than for private employees. U.S. Bureau of Labor Statistics, *Spotlight on Statistics* at 9, available at http://www.bls.gov/spotlight/2013/tenure/pdf/tenure.pdf (last visited July 14, 2014). In 2012, public-sector workers had a median tenure of 7.8 years, compared with 4.2 years for those employed in the private sector. *Id.* State statistics may be higher. State of Michigan employees, for example, have an average of 13.1 years of service. Michigan Civil Service Commission, *Annual Workforce Report, First Quarter, 2013–14* at i, available at http://www.michigan.gov/documents/mdcs/WF_2014_1st_Quarter_Complete_444334_7.pdf (lasted visited July 14, 2014). Retention is highly valued in the public sector as a means of retaining institutional knowledge. Public employers therefore have heightened interest in using transfers to ensure long-term job satisfaction and productivity. But for them to comfortably and fairly use transfers, public employers must understand the parameters of their potential liability, especially when granting a transfer request may be required to comply with negotiated transfer provisions in a collective-bargaining agreement.

B. Transfers, especially lateral ones, are often collectively bargained over.

Many public employees are represented by unions. Although private employees also join unions and their contracts frequently contain transfer provisions and seniority provisions, public sector union rates are higher. The 2013 union membership rate for public employers (35%) was more than five times that of private-sector workers (6.7%). U.S. Bureau of Labor Statistics, T.3, http://www.bls.gov/news.release/union2.nr0.htm (last visited July 14, 2014). The U.S. Bureau of Labor Statistics reports that in both 2012 and 2013 union members accounted for 11.3% of wage and salary workers. *Id.* That figure does not include wage and salary workers who were represented by a union on their main job or were covered by an employee association or contract while not themselves being union members. *Id.* In Michigan, for example, approximately 70% of state classified employees are represented by a union. The three largest public sector unions the State of Michigan deals with as an employer, American Federation of State, County and Municipal Employees (AFSCME), United Automobile Workers (UAW), and Service Employees International Union (SEIU) have total membership of over two million. http://www.unionfacts.com/cuf/ (last visited July 14, 2014).

For these unionized pubic employees, transfers hold special significance. They are often the subject of collective bargaining and frequently appear in collective-bargaining agreements. When public employees have a direct opportunity to affect their working conditions, they often want a say not just

over their salary and benefits but also over where and for whom they work. All of the collective-bargaining agreements between the State of Michigan and unions representing state employees contain negotiated transfer provisions.

Transfers do not just happen. They happen on someone's initiative. Collective-bargaining agreements for public employees in Michigan, for example, often define "transfer" as "the filling of a vacancy or change in assignment *at the employee's initiative or request*." Where a transfer right is bargained for, it is at the employee's initiative and the employer by contract may not refuse.

Employers who have given up managerial prerogatives and agreed to transfer rights and have then accommodated a specific employee's exercise of that right, should not be subject to liability for their mandatory compliance with the collective-bargaining agreement's transfer provision. Employees who have successfully bargained over the right to transfer and then exercise that right should not be able to turn around and claim in hindsight that getting the very thing they requested—and oftentimes required under a bargaining agreement—was an adverse employment action. One can only imagine how such uncertainty will affect the collective-bargaining process going forward.

To be sure, collective-bargaining agreements generally contain many additional nuances and provisos for transfer, including those governing bumping rights for transfers within the requesting employee's classification and work location, the procedure to be used for requesting a transfer, and

special considerations such as disability accommodation. But the point remains: public employers routinely agree in advance (without the ability to know the particular circumstances under which an employee will desire a transfer) to abide by the terms of the transfer agreement. Clarity as to potential liability is essential.

C. Public employers have a heightened need to be able to anticipate liability.

Governmental employers, unlike private employers, have no choice but to perform certain tasks. They must hire employees to house prisoners, provide treatment for the mentally ill, and maintain thousands of miles of road. They cannot opt out of these duties simply because the chances of liability might be great or employee job satisfaction in a particular area historically low. Thus, it is particularly important that they understand the parameters of their potential liability.

They must therefore understand when granting or denying an employee's request for transfer subjects them to liability. If liability is not clear and the public employer misunderstands or miscalculates the factual scenario surrounding a voluntary transfer, the taxpayers bear the cost of litigation and liability.

The uncertainty created by the current circuit conflict and exacerbated by the Sixth Circuit's recent decision in this case is harmful to all employer-employee relationships. It may have even more pronounced ramifications in the public-employment realm.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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