No. 13-1516

IN THE
Supreme Court of the United States

KALAMAZOO COUNTY ROAD COMMISSION, TRAVIS BARTHOLOMEW, IN HIS OFFICIAL CAPACITY AND INDIVIDUALLY, AND JOANNA JOHNSON, IN HER OFFICIAL CAPACITY AND INDIVIDUALLY,

Petitioners,

v.

ROBERT DELEON AND MAE DELEON,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

REPLY BRIEF FOR PETITIONERS

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INTRODUCTION

Deleon's arguments against granting review in this case lack merit.

First, Deleon claims that the question on which the Commission seeks review is not presented, because Deleon's transfer was involuntary rather than in response to his request. Br. in Opp'n 7–9. That is incorrect. As explained in more detail below, the Sixth Circuit panel majority did not necessarily agree with Judge Sutton's characterization of the transfer as "voluntary." But that possible quibble did not affect the majority's holding, which was unequivocally tied to Deleon's request: "under certain circumstances, *a voluntary or requested transfer* may still give rise to an adverse employment action." App. 12a (emphasis added). The majority also defined the post-transfer circumstances that would suffice to prove that the transfer was adverse: post-transfer conditions that are "objectively intolerable to a reasonable person." App. 13a (quotation omitted). The issue is unequivocally presented.

Second, Deleon argues that there is no circuit conflict on the issue presented. Br. in Opp'n 9–14. Not true. Deleon can only make that argument by reiterating his erroneous claim that his transfer was involuntary. Br. in Opp'n 12. Indeed, Deleon "does not dispute the Commission's observation that some circuits have focused on pre-transfer working conditions when assessing the adversity of an employer's action" while the Second and Sixth Circuits have focused on post-transfer conditions. *Id.* It is undeniable that there is a circuit split on this crucial point, *and* over the proper test to apply. State of Michigan Amicus Br. 4–10; Int'l Mun. Lawyers Ass'n Amicus Br. 5–9.

Finally, Deleon says that this case is a "poor vehicle" that comes to this court on material disputes of fact. Br. in Opp'n 14–16. Not so. Once it is understood that the Sixth Circuit panel majority's holding is based entirely on Deleon's transfer request, it is clear that the petition presents only a pure legal question, one where this Court's immediate intervention is crucial not only to resolve the split in authority, but to inform public employers, who frequently confront the problem of transfer liability as a result of collective-bargaining agreements, and who have a heightened need to anticipate liability. State of Michigan Amicus Br. 12–16; Int'l Mun. Lawyers Ass'n Amicus Br. 10–16.

Certiorari is warranted.

REPLY ARGUMENT

I. This case presents a mature circuit conflict regarding the circumstances that transform an employer-granted transfer request into an adverse action.

The bulk of Deleon's brief in opposition is founded on an erroneous premise: "that the transfer here was not based on the employee's request . . . but was instead involuntary." Br. in Opp'n 1. That is not what the Sixth Circuit panel majority held.

As the petition explained, the panel majority did suggest, in *dicta*, that the transfer may have been involuntary even though Deleon requested it. App. 4a n.1. But that fact made no difference to the outcome. The majority's conclusion was that "under certain circumstances, a *voluntary or requested transfer* may still give rise to an adverse employment action." App. 12a (emphasis added).

Contrary to Deleon's assertions in his brief, the panel majority thought "the key focus of the inquiry should *not* be whether the lateral transfer was requested or not requested." App. 13a (emphasis added). Rather, the inquiry must focus on "whether the 'conditions of the transfer'"—which the majority had already interpreted as the *post*-transfer conditions—"would have been 'objectively intolerable to a reasonable person.'" App. 13a (citation omitted).

That crucial holding is where the circuits have gone awry. The Second, Fourth, Fifth, Seventh, Eighth, and Eleventh Circuits all focus on pre-transfer conditions, and whether those conditions made working so intolerable that the employee was essentially "forced" to request a transfer. Pet. 13–16; State of Michigan Amicus Br. 4–7; Int'l Mun. Lawyers Ass'n Amicus Br. 5–7. In contrast, the Second Circuit standard, like the Sixth, allows an employee to challenge a requested transfer based on the work conditions of the *post*-transfer position. Pet. 16; State of Michigan Amicus Br. 4, 6–7; Int'l Mun. Lawyers Ass'n Amicus Br. 7–9.[1]

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[1] Deleon asserts that in *Richardson* v. *New York State Department of Correctional Service*, 180 F.3d 426 (2d Cir. 1999), the Second Circuit did not focus on "post-transfer working conditions to determine whether a requested transfer was an adverse action supporting a retaliation claim." Br. in Opp'n 13. But that is exactly what the Second Circuit panel majority did. While attempting to distance itself from Chief Judge Winter's dissent, see Pet. 13, the majority acknowledged that the plaintiff "sought a transfer." 180 F.3d at 444 n.4. Nonetheless, the majority concluded that the transfer could be an adverse action based on the working conditions of the plaintiff's new job, which "involved inmate contact." *Id.*

Even among those circuits that agree on the time frame to examine when determining whether a transfer is an adverse action, there are a plethora of tests. Pet. 17–18. Deleon belittles this conflict in standards as amounting to "differ[ences] only in verbiage." Br. in Opp'n 10. But semantics matter, and employers deserve to know whether they are going to be held to a standard of "intolerability," "abusiveness," "discrimination," "material adversity," or something else entirely. Pet. 17.

Tangentially, Deleon criticizes the Commission for framing the question presented to include retaliation claims as well as discrimination claims. Br. in Opp'n 8. The Commission never argued that Deleon "asserted a retaliation claim" nor that the Sixth Circuit "purport[ed] to address" one. *Id.* But it makes sense for the Court to deal with both discrimination and retaliation transfer cases in a single ruling because the analytical rubric for these claims is essentially the same, and because employers—particularly public employers—need the conflict and confusion resolved as quickly as possible. State of Michigan Amicus Br. 7–10; Int'l Mun. Lawyers Ass'n Amicus Br. 10–16.

Finally, Deleon suggests that he may satisfy the test the Commission urges this Court to adopt because the Sixth Circuit "had no need to determine whether additional indicia—such as employer coercion or pre-transfer working conditions—might have rendered [Deleon's] seemingly voluntary transfer request effectively involuntary." Br. in Opp'n 12. But Deleon has never advanced that claim at any stage of these proceedings. Quite the opposite, Deleon told the Sixth Circuit that he liked his previous position and wanted it back. Deleon 6th Cir. Br. 13.

In sum, a fundamental conflict exists regarding the test to determine whether an employee's request for a transfer to a new position is an adverse employment action or a materially adverse action. Given the intense need of public employers for certainty on this issue, the Court should not allow this mature split to percolate any longer.

II. The question presented requires immediate resolution.

Deleon urges the Court to decline review so that disputed questions of fact that could render the final result "unimportant" can be resolved. Br. in Opp'n 14–16, quoting *Am. Constr. Co.* v. *Jacksonville, T. & K.W. Ry. Co.*, 148 U.S. 372, 384 (1893). For two reasons, the Court should reject that suggestion.

First, there is no dispute that Deleon (1) asked for the transfer and (2) never alleged he was coerced into making that decision due to intolerable *pre*-transfer work conditions. The only fact "dispute"—created by the Sixth Circuit—is whether Deleon's post-transfer working conditions were intolerable. App. 13a ("We emphasize that the key focus of the inquiry should not be whether the lateral transfer was requested or not requested . . . but whether the 'conditions of the transfer' would have been 'objectively intolerable to a reasonable person.'") (citation omitted).[2]

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[2] Indeed, said the Sixth Circuit, the "*employee's* opinion of the transfer, whether positive or negative, has no dispositive bearing on an employment action's classification as 'adverse.'" App. 14a (emphasis added, citations omitted). So even if the Commission can prove that Deleon embraced the transfer, it can still be held liable for discrimination.

As a result, this Court's adoption of the Commission's proposed rule (or some variation of it) will fully resolve Deleon's claims and end the litigation. There is no need for further factual development.

Second, as the *amici* briefs of the State of Michigan (pp. 12–16) and the International Municipal Lawyers Association (pp. 10–16) have explained at length, the issue presented is exceptionally important. Ambiguity in the test that will be applied to employment claims based on employee transfers hurts all employers, but especially public employers. Collective-bargaining agreements with detailed provisions about transfers are common in the public-employment context. And employer liability based on fuzzy legal standards comes at the expense of funding for roads, schools, and other important priorities. The issue presented is therefore one that calls for immediate resolution notwithstanding the case's interlocutory posture, even if one accepts Deleon's erroneous argument that proceedings on remand could illuminate the record. Accord, e.g., *Burwell* v. *Hobby Lobby Stores, Inc.*, No. 13-354 (granting interlocutory petition); *Am. Broad. Cos.* v. *Aereo, Inc.*, No. 13-461 (same); *Fifth Third Bancorp* v. *Dudenhoeffer*, No. 12-751 (same); *Halliburton Co.* v. *Erica P. John Fund, Inc.*, No. 13-317 (same); *Limelight Networks, Inc.* v. *Akamai Techs., Inc.*, No. 12-786 (same); *State of Michigan* v. *Bay Mills Indian Cmty.*, No. 12-515 (same).

* * *

Deleon's response says nothing to dispel the actuality that the petition presents an issue of substantial jurisprudential and practical significance involving a mature conflict among the circuits. The recurring nature of the question presented—as well as the importance of providing clear guidance to lower courts and public employers on the question presented—counsels strongly in favor of granting the petition.

CONCLUSION

For the foregoing reasons, and those stated in the petition for a writ of certiorari, the petition should be granted.

Respectfully submitted,

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