No. _____

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether it is an "adverse employment action" for a discrimination claim, or a "materially adverse action" for a retaliation claim, when an employer grants an employee's request for a job transfer.

PARTIES TO THE PROCEEDING

There are no parties to the proceedings other than those listed in the caption. Petitioners are the Kalamazoo County Road Commission, Travis Bartholomew, and Joanna Johnson. Respondents are Robert and Mae Deleon.

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The opinion of the Sixth Circuit Court of Appeals, App. 1a–18a, is reported at 739 F.3d 914 (6th Cir. 2014). The opinion of the United States District Court for the Western District of Michigan, App. 20a–47a, is not reported.

JURISDICTION

The district court had jurisdiction under 28 U.S.C. § 1331. The court of appeals had jurisdiction to review the district court's final judgment under 28 U.S.C. § 1291. The court of appeals filed its opinion on January 14, 2014, and it denied, on March 20, 2014, petitioners' timely filed petition for rehearing en banc. App. 49a–50a. This Court's jurisdiction rests on 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Equal Protection Clause of the Fourteenth Amendment to the United States Constitution provides, in relevant part:

> No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.

Title VII of the Civil Right Act of 1964, 42 U.S.C. § 2000e-2(a)(1), provides, in relevant part:

> (a) It shall be an unlawful employment practice for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin . . . .

The Age Discrimination in Employment Act, 29 U.S.C. § 623(a)(1), provides, in relevant part:

> (a) Employer practices
>
> It shall be unlawful for an employer—
>
> (1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age . . . .

INTRODUCTION

This is an appeal of a Sixth Circuit decision which held that granting an employee's request for a transfer to a new position is an adverse employment action or a materially adverse action if the new position turns out to be less desirable than the pre-transfer position. The Sixth Circuit's decision exacerbates a mature and circuit conflict, and it makes a mockery of workplace discrimination and retaliation laws. As Judge Sutton remarked in his dissent, "subject[ing] 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." App. 18a.

To date, seven circuits have addressed the standard to apply when an employer grants an employee's transfer request and the employee then claims that the transfer was an adverse action. The result is seven rules that differ in varying degrees, making it difficult for employers to know exactly how to comply with federal employment laws when considering transfer requests.

Here, the Sixth Circuit denied summary judgment based on the employee's testimony that the work conditions of the position he requested ended up being worse than those of his previous position. Of the six other circuits to address this issue, only the Second has adopted a similar focus on *post*-transfer conditions, and even among those circuits that focus on pre-transfer conditions, the applicable test is articulated in a variety of different (and potentially outcome-determinative) ways.

Petitioners urge this Court to resolve the conflict among the circuits and adopt a commonsense rule representing a melding of the holdings in the Fourth, Fifth, Seventh, and Eighth Circuits, one that comports with this Court's own rule for proving a constructive-discharge claim. See *Pennsylvania State Police* v. *Suders*, 542 U.S. 129, 146 (2004) ("A plaintiff who advances a [constructive-discharge] claim must show working conditions so intolerable that a reasonable person would have felt compelled to resign."). The rule is this: in the absence of employer coercion or working conditions that are so intolerable that a reasonable person in the employee's position would feel compelled to request a transfer, an employer's grant of an employee's transfer request is not an adverse action for purposes of discrimination and retaliation laws.

This case represents an ideal vehicle to resolve the circuit split because it is undisputed that respondent made the transfer request, and respondent has not even alleged that he was coerced or that his pre-transfer work conditions were intolerable or in any way motivated his request. Thus, the Court's resolution of the question presented will be dispositive of respondents' claims.

As Judge Sutton put it, "Even after plumbing the depths of logic, experience, case law and common sense, I must return to this surface point: When an employee voluntarily applies for, and obtains, a job transfer, his employer has not subjected him to an adverse employment action." App. 18a. Because only this Court can resolve the mature circuit conflict with respect to this recurring issue, the petition for certiorari should be granted, and the Sixth Circuit's ruling reversed.

STATEMENT

A. Deleon's employment history

Respondent Robert Deleon, a 53-year-old Hispanic of Mexican descent, was a nearly 30-year employee of petitioner Kalamazoo County Road Commission. After starting with the Commission as a stockroom clerk in 1983, he was promoted to Assistant Supervisor to the Equipment Director (the forerunner of the Equipment and Facilities Superintendent position he later requested) and then to Area Superintendent. In his 14 years as Area Superintendent, Deleon supervised road maintenance activities, which included exposure to loud noises and diesel fumes, as well as working outside in all manner of weather conditions to supervise and inspect road maintenance and construction projects.

Deleon alleged that during the course of his employment, he was subjected to occasional comments that he deemed to be of a racial nature. When asked to identify when these comments occurred, Deleon could not recall if any such comments had been made since 2005, the relevant date for purposes of the applicable statute of limitations.

B. Deleon's request for a transfer

In late 2008, the Commission posted an opening for the position of Equipment and Facilities Superintendent. The job involved supervising the maintenance, repair, modification, and improvement of Commission vehicles, equipment, and facilities. The job description described the work conditions as "primarily in office conditions and in garage where there is exposure to loud noises and diesel fumes. . . . Works outside in all kinds of weather. Assists with road maintenance activities."

Deleon applied for the open position on November 2008. In his cover letter, he affirmed that his "background has given [him] the hands-on experience with the equipment garage," and that he was "enthusiastic about meeting with you to explore the opportunity of the Equipment and Facilities Superintendent position." His enclosed resume detailed his years of experience working in the equipment garage.

Petitioners Joanna Johnson (who became the Road Commission's Managing Director in 2007) and Travis Bartholomew (who became the Commission's General Superintendent in 2008) met with Deleon to confirm his interest in the open position. Deleon indicated that he hoped for an assistant in the new position, plus a $10,000 raise. Johnson told him that was not going to happen, but Deleon did not withdraw his application; instead, he interviewed for the position.

In March 2009, the Commission hired an outside applicant, Jim Vanderveen, for the open position. Deleon cared enough about not getting the transfer that he asked why he did not receive it. Bartholomew mentioned Deleon's computer skills; Johnson pointed to Deleon's answer to a question about how he would approach management with disagreements.

C. The transfer

Vanderveen left the Road Commission for personal reasons after only a few weeks on the job. After a second external candidate declined the position, Johnson and Bartholomew believed Deleon was the most qualified applicant for the position based on his years of experience working in the Equipment Department. So Johnson granted Deleon's request and transferred him to the vacant Equipment and

Facilities Superintendent position. Deleon's compensation and benefits as Equipment and Facilities Superintendent were the same as those of an Area Superintendent.

D. Subsequent performance

Deleon began work as Equipment and Facilities Superintendent in August 2009. In November 2009, Deleon received his first evaluation in the new position, which concluded that his performance was "acceptable in most critical areas but is not sufficiently above minimum satisfactory level in all areas."

In detailed written comments, Bartholomew thanked Deleon for his hard work and persistence, noting "we are fortunate to have you as part of the management team here at KCRC," and "[t]he tasks you accomplish and the dedication to the organization do not go unnoticed." Bartholomew encouraged Deleon to "work at identifying and applying new technologies in the department" and "[u]nderstand-[ing] the magnitude of your position and how it effects [sic] the organization."

Johnson also thanked Deleon for his work and asked him to look for development opportunities in his new position. She advised: "As issues need to be addressed, take the time to explore, research, and learn; seek to understand and meet with Travis Bartholomew, General Superintendent, with a possible solution and not just the problem; so that he can assist in making an informed decision."

E. The leave of absence

In April 2012, Bartholomew asked Deleon to write a memo to the Board of County Road Commissioners concerning the conversion of a Commission truck to a semi-tractor. Deleon and Bartholomew disagreed about whether the truck should be redesigned, resulting in a May 10, 2012 meeting in Bartholomew's office to discuss the memo and other issues. Deleon asserts that Bartholomew yelled at him, telling Deleon he was not doing enough work and not keeping Bartholomew informed. When Bartholomew asked Deleon how the two of them could better work together, Deleon shut down and refused to respond.

Deleon continued to work for the next three days without incident. Then his wife took him to the hospital for a five-day stay. After the hospital discharged him, Deleon took an extended leave of absence under the FMLA for stress-related reasons. After his leave ended, Deleon failed to return to work at the Road Commission. Deleon then filed his Charge of Discrimination with the EEOC, and this lawsuit followed.

F. District court proceedings

Deleon and his wife filed this lawsuit claiming violations of 42 U.S.C. § 1983, Title VII of the Civil Rights Act of 1964, the Age Discrimination in Employment Act, and loss of consortium. In a comprehensive opinion and order, the district court granted summary judgment to the Commission and dismissed all of the Deleons' claims with prejudice. App. 46a–47a.

The district court began with Deleon's prima facie case under the burden-shifting framework for proving a discrimination or retaliation claim. The court held that, taking the evidence in the light most favorable to respondents, Deleon could not demonstrate he suffered an adverse action. App. 37a. To begin, Deleon had no evidence that the transfer resulted in lower pay or benefits, or that the new position was less prestigious or resulted in significantly diminished responsibilities. App. 37a.

Most pertinent to this petition, Deleon actually sought the transfer position with full knowledge of the working conditions he would experience if the Commission granted his request:

> Plaintiff's only argument relevant to [the adverse-employment action] element of the prima facie case is that Deleon was exposed to diesel fumes after his transfer, but was not exposed to diesel fumes in his position as Area Superintendent. This difference between the two positions is not material. First, the job descriptions for Area Superintendent and the Equipment and Facilities Superintendent both state that the job involves working in areas where one would be exposed to diesel fumes. Second, *Deleon applied for the position*. In other words, Deleon was willing to work in an area where he would be exposed to diesel fumes. *Deleon cannot now, after being given the job, complain about the working conditions for a job he actively sought*. Plaintiffs have not established that the working conditions in the new position were objectively intolerable. [37a–38a (emphasis added).]

The district court also rejected, for the same reason, Deleon's argument that the transfer was an adverse action because Deleon was set up to fail. "Plaintiffs offer[ed] no legal authority in support of their novel theory," and, more important, "Plaintiffs overlook the fact that *Deleon applied for the position to which he was eventually transferred*." App. 38a (emphasis added). The record "contain[ed] no evidence that Deleon ever declined, or attempted to decline, the transfer," "ever protested or complained about the transfer," or "ever asked to be transferred back to his prior position." App. 38a. And "[n]othing in the record suggests that Defendants wanted Deleon to fail at the position." App. 39a.

G. The Sixth Circuit's divided decision

In a 2-1 published opinion, the Sixth Circuit reversed. The panel majority held that "a transfer may classify as an adverse employment action where it constitutes a 'constructive discharge.'" App. 9a. The majority adopted an "objective intolerability" standard based on the employee's *post*-transfer working conditions, App. 9a–11a, and, as explained below, effectively ignored that Deleon requested the transfer. The majority concluded there was a question of fact as to whether Deleon's post-transfer working conditions were objectively intolerable:

> Deleon provided evidence that he was exposed to toxic and hazardous diesel fumes on a daily basis. He testified further that he had to wipe soot out of his office on a weekly basis. As a result, Deleon claims that he contracted bronchitis, had frequent sinus headaches, and would occasionally blow black soot out of his nostrils. [App. 10a–11a (citations omitted).]

The panel then catalogued decisions of the Second, Fifth, and Seventh Circuits, opining that "our sister circuits have held that the request of a transfer, and accession to the new position, does not categorically bar a finding of an adverse employment action." App. 11a–12a. "Accordingly, we conclude that under certain circumstances, a voluntary or requested transfer may still give rise to an adverse employment action." App. 12a.

In *dicta*, the panel majority suggested the transfer may have been involuntary, because Deleon had no choice in the matter. App. 4a n.1. But in the majority's view, "the key focus of the inquiry should not be whether the lateral transfer was requested or not requested, . . ." App. 13a. Instead, the inquiry should 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).

Judge Sutton dissented: "When an employee voluntarily applies for, and obtains, a job transfer, his employer has not subjected him to an adverse employment action." App. 14a. Deleon "applied with full knowledge of the transfer's potential downside" and "kept his application active and interviewed for the position *after* his supervisors told him that the job would not come with a raise or another employee." App. 14a–15a. "The 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." App. 15a.

Judge Sutton also criticized the panel majority's voluntariness *dicta*: "The record makes clear that Deleon never complained about the transfer—he sought it out—and his supervisors never told him that he had no choice in the matter. . . . No reasonable employee could interpret a transfer as an attempt to punish him . . . when he gave his employer no reason to believe that he did not want the transfer and every reason to believe that he did." App. 16a–17a. "To repeat: When an employee voluntarily applies for, and obtains, a job transfer, his employer has not subjected him to an adverse employment action." App. 17a.

Acknowledging the panel majority's split from other circuits, Judge Sutton noted that "[n]o case to my knowledge holds that granting a sought-after transfer by itself amounts to an adverse employment action. The majority's case citations say nothing to the contrary." App. 17a. "Whatever the correct interpretation of the employment . . . laws may be, they surely stop at this line: imposing liability on employers *whether they grant or deny* an employee's request for transfer." App. 18a. "An 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." App. 18a.

Judge Sutton concluded, "Even after plumbing the depths of logic, experience, case law and common sense, I must return to this surface point: When an employee voluntarily applies for, and obtains, a job transfer, his employer has not subjected him to an adverse employment action." App. 18a.

REASONS FOR GRANTING THE PETITION

I. The petition should be granted to resolve a circuit conflict over when an employer's grant of an employee's transfer request is an adverse action.

The circuits are in disarray over the test to use when analyzing a plaintiff's claim that a job transfer was an adverse action for purposes of federal anti-discrimination and retaliation laws.

The Second Circuit has held that a requested transfer is an adverse employment action if the new position is less desirable than the employee's former position. *Richardson* v. *New York State Dep't of Corr. Serv.*, 180 F.3d 426, 444 (2d Cir. 1999), abrogated in part by *Burlington N. & Santa Fe Ry.* v. *White*, 548 U.S. 53, 67–68 (2006) (adopting material-adversity standard for retaliation claims rather than the adverse-employment-action standard). Chief Judge Winter disagreed sharply:

> This decision creates a Catch-22 for employers. Once an employee files a discrimination claim and requests a transfer, the offering of a transfer to the only open position seems less adverse to the employee than either denying the request or ordering a mandatory transfer. If offering a transfer to the only job available can support a finding of retaliation, then surely denying or ordering one can also support such a finding. An employee who files a discrimination claim and request for transfer, therefore, *will have automatically established a prima facie case under my colleagues' theory*. Because that cannot be the law, I respectfully dissent. [*Id.* at 451 (Winter, C.J., dissenting) (emphasis added).]

The Fourth Circuit has reasoned that an employer's "acceptance of a voluntary request to transfer is not an adverse employment action" unless the employee can satisfy a constructive-discharge theory. *Hooper* v. *State of Maryland*, 45 F.3d 426, at *5 (4th Cir. 1995) (unpublished) (citing *Stone* v. *Univ. of Maryland Med. Sys. Corp.*, 855 F.2d 167, 173 (4th Cir. 1988), and *Glymph* v. *Spartanburg Gen. Hosp.*, 783 F.2d 476, 479 (4th Cir. 1986). And the fact that the employee did not like an aspect of his original position "does not make the transfer involuntary." *Id.* Demonstrating a constructive discharge in the Fourth Circuit requires the employee to prove that "an employer create[d] intolerable working conditions in a deliberate effort to force the employee to resign," *Carter* v. *Ball*, 33 F.3d 450, 459 (4th Cir. 1994), or (analogously) proof of an employer's deliberate effort to force the employee to request a transfer.

In the Fifth Circuit, "a 'voluntary' transfer can contribute to finding an adverse action." *Sharp* v. *City of Houston*, 164 F.3d 923, 934 (5th Cir. 1999). To establish liability, the employee must show that the transfer, albeit at the employee's request, "was a constructive demotion, the involuntary result of conditions so intolerable that a reasonable person would feel compelled to leave, and that the transfer constituted a non-trivial adverse employment action." *Id.* Because the defendants' pre-transfer conduct in *Sharp* "caused her reasonably to fear for her safety if she stayed in" her original position, the jury was entitled to find that the transfer "was not, in fact, voluntary." *Id.*

The Seventh Circuit also holds that a plaintiff alleging that a requested transfer is an adverse action must establish that the transfer amounted to a "constructive discharge." *Simpson* v. *Borg-Warner Auto., Inc.*, 196 F.3d 873, 876 (7th Cir. 1999). The Circuit's two-part test is marginally different than that of the Fourth or Fifth Circuits. First, the employee must show that working conditions "were so intolerable that a reasonable person would have been compelled to resign." *Id.* at 877 (citing *Rabinovitz* v. *Pena*, 89 F.3d 482, 489 (7th Cir. 1996)). Second, the employee must prove that the conditions were intolerable "because of unlawful discrimination." *Id.* (citing *Drake* v. *Minnesota Mining & Mfg.*, 134 F.3d 878, 886 (7th Cir. 1998)). Since the plaintiff's pre-transfer complaints did not equate to "an intolerable work environment," her claim failed. *Id.* at 878.

The Eighth Circuit's analysis of transfer requests rejects the "intolerable" work environment standard in favor of an "abusive" standard. In other words, a voluntary transfer is not an adverse action unless the plaintiff can show "both that he found the environment to be *abusive* and that an objective person in his position would have felt that he had to [request the transfer] because of his discriminatory work conditions." *Tusing* v. *Des Moines Indep. Cmty. Sch. Dist.*, 639 F.3d 507, 521 (8th Cir. 2011) (emphasis added) (quoting and analogizing *Fenney* v. *Dakota, Minn. & E.R. Co.*, 327 F.3d 707, 717 (8th Cir. 2003), a constructive-discharge case).

And finally, the Eleventh Circuit has said that the fact that an employee voluntarily requests a transfer negates as a matter of law the contention that the employee has suffered an adverse employment action. E.g., *Doe* v. *Dekalb Cnty. Sch. Dist.*, 145 F.3d 1441, 1454 (11th Cir. 1998) ("a finding that Doe's transfer was purely voluntary would have been dispositive in the School District's favor") (citing *Stewart* v. *Bd. of Trs. of the Kemper Cnty. Sch. Dist.*, 585 F.2d 1285, 1289 (5th Cir. 1978), *Hooper* v. *Maryland*, 45 F.3d 426 (4th Cir. 1995), and *Devine* v. *Thalhimers*, 1992 WL 296350 (4th Cir. 1992)). Even if the transfer is involuntary, the plaintiff must show that a "reasonable person" in the employee's position would have viewed the transfer as adverse. *Id.* This is an objective showing based on facts and circumstances "that a reasonable person would deem materially adverse." *Id.* at 1453.

The Sixth Circuit's ruling here echoes the objective-intolerability standard referenced in some of these circuit decisions. But like the Second Circuit, the panel majority's opinion allows an employee to change a transfer request into an adverse action based not on the intolerability of the *pre*-transfer work conditions, but based solely on the work conditions of the *post*-transfer position. Deleon has never argued that petitioners created such intolerable conditions in his pre-transfer position that he was compelled to request a transfer. Quite the opposite, Deleon has asserted that he liked his previous position and desired to go back to it. E.g., Deleon 6th Cir. Br. 13.

In sum, the circumstances establishing that a requested job transfer is an adverse employment action can be broken down into roughly the following categories, depending on the circuit where a case originates:

- When the employer creates "intolerable" pre-transfer working conditions such that the employee is forced to request the transfer (Fourth Circuit);
- When the employer creates "intolerable" pre-transfer conditions forcing the employee to request a transfer *and* the transfer itself was a constructive demotion and "non-trivial" (Fifth Circuit);
- When the *post*-transfer working conditions are "objectively intolerable to a reasonable person" (Sixth Circuit and Second Circuit);
- When the employer creates "intolerable" pre-transfer conditions, "*because of unlawful discrimination*," forcing the employee to request a transfer (Seventh Circuit);
- When the pre-transfer conditions are "abusive" *and* a reasonable person in the employee's position would have felt compelled to request a transfer because of those conditions (Eighth Circuit); and
- When the transfer request is involuntary and the transfer is objectively "materially adverse" to the employee (Eleventh Circuit).

To be sure, a number of these circuit precedents overlap in some way. But there are also distinct differences that dictate different outcomes. For example, Deleon has not even alleged that "intolerable" or "abusive" conditions (regardless of their connection to discrimination or protected conduct) caused him to make his transfer request; accordingly, his claims would fail as a matter of law in the Fourth, Fifth, Seventh, Eighth, and Eleventh Circuits. Yet the Sixth Circuit denied petitioners' summary judgment motion, a result that would likely be mirrored in the Second Circuit, which also focuses on post-transfer work conditions. In other words, an employee claiming discrimination or retaliation after an employer grants his request for a transfer will experience a different result depending entirely on where the lawsuit is filed.

The importance and recurring nature of the question presented, the uncertainty in the law that the split of authority creates, and the different outcomes that result from such varying rules, all counsel strongly in favor of granting the petition.

II. The question presented is of national importance and requires prompt resolution. This case is an ideal vehicle to do just that.

The numerous circuit court decisions addressing claims of discrimination or retaliation in transfer-request cases demonstrate that the issue presented is recurring and in need of immediate resolution. Several additional reasons support that conclusion.

First, as Judge Sutton pointed out in this case, and former Chief Judge Winter observed in *Richardson*, the law in the Sixth and Second Circuits places employers in a bind, where they are likely to be legally responsible for discrimination or retaliation no matter how they respond to an employee's transfer request. Such an interpretation of the law "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." App. 18a.

Second, public and private employers around the nation should not be left to guess as to the legal standard that will be applied to their decisions in response to an employee transfer request. Is it necessary for the employer to gauge whether pre-transfer work conditions were "intolerable"? Or "abusive"? Does the law require employers to warn an employee making a transfer request about the downsides of the new position? (That is certainly the strong implication of the Sixth Circuit's ruling here.) Resolution of the question presented will undoubtedly add clarity to employers responding to the many transfer requests made in the course of employment.

Third, the issue presented is more than ripe for review. At least seven federal courts of appeals have addressed the question and responded with seven rules that differ in varying degrees. Nothing more would be gained by allowing further percolation of the issue other than additional uncertainty and confusion.

Finally, this is an ideal vehicle to resolve the question presented. The Sixth Circuit decided the transfer-request standard in a thorough opinion and over a vigorous dissent. The issue requires the Court to answer a purely legal question: what are the circumstances that transform an employer-granted transfer request into an adverse action? And the facts of this case provide an excellent vehicle for considering the question presented. If the Court adopts some version of the test applied in the Fourth, Fifth, Seventh, Eighth, or Eleventh Circuits, that holding will fully dispose of respondents' claims. That is because it is undisputed that Deleon (1) did in fact request the position transfer, and (2) Deleon has never even alleged that he was coerced into making that decision by virtue of intolerable *pre*-transfer work conditions.

Consistent with this Court' test in *Pennsylvania State Police* v. *Suders*, 542 U.S. 129, 146 (2004), for proving a constructive-discharge claim, petitioners respectfully request that the Court adopt the following rule: in the absence of employer coercion or working conditions that are so intolerable that a reasonable person in the employee's position would feel compelled to request a transfer, an employer's grant of an employee's transfer request is not an adverse action for purposes of discrimination and retaliation laws. Such a rule acknowledges that employers should not be punished for granting an employee's uncoerced transfer request. It would create consistency among the circuits and with this Court's precedent. And it would give employers the kind of clear guidance they need when evaluating employee transfer requests.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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JUNE 2014

PETITION APPENDIX TABLE OF CONTENTS

RECOMMENDED FOR FULL-TEXT PUBLICATION

Pursuant to Sixth Circuit I.O.P. 32.1(b)
File Name: 14a0012p.06

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ROBERT DELEON and MAE DELEON, *Plaintiffs-Appellants*, *v.* KALAMAZOO COUNTY ROAD COMMISSION; TRAVIS BARTHOLOMEW and JOANNA JOHNSON, in their official and individual capacities, *Defendants-Appellees*.	No. 12-2377

Appeal from the United States District Court for the Western District of Michigan at Grand Rapids.
No. 1:11-cv-00539—Paul Lewis Maloney, Chief District Judge.

Argued: October 8, 2013

Decided and Filed: January 14, 2014

Before: KEITH and SUTTON, Circuit Judges; BLACK, District Judge*

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* The Honorable Timothy S. Black, United States District Judge for the Southern District of Ohio, sitting by designation.

COUNSEL

ARGUED: Lennox Emanuel, THE NATIONAL LAW GROUP, P.C., Detroit, Michigan, for Appellants. Thomas H. Derderian, MICHAEL R. KLUCK & ASSOC., Okemos, Michigan, for Appellees. **ON BRIEF:** Lennox Emanuel, THE NATIONAL LAW GROUP, P.C., Detroit, Michigan, for Appellants. Thomas H. Derderian, MICHAEL R. KLUCK & ASSOC., Okemos, Michigan, for Appellees.

KEITH, J., delivered the opinion of the court, in which BLACK, D.J., joined. SUTTON, J. (pp. 11–14), delivered a separate dissenting opinion.

OPINION

DAMON J. KEITH, Circuit Judge. Robert Deleon ("Deleon") appeals the dismissal of certain of his claims from the district court's grant of summary judgment in Defendants' favor. The district court granted Defendants' motion on the basis that Deleon did not suffer an "adverse employment action." Deleon was laterally transferred from one department to another, which he alleges constituted an action giving rise to sustainable claims of discrimination. On appeal, the principal issues before this Court are: (1) whether the conditions were sufficiently intolerable to maintain actionable discrimination claims; and (2) whether the fact that Deleon applied for and interviewed for the position to which he was eventually transferred disqualifies him from showing that the employment action was truly "adverse." For the reasons that follow, we answer in Deleon's favor on both issues. Accordingly, we **REVERSE** the grant of summary judgment and

REMAND for proceedings consistent with this opinion.

I. BACKGROUND

Deleon, a fifty-three year old Hispanic male of Mexican descent, was employed by the Kalamazoo County Road Commission ("the Commission") for twenty eight years. Beginning in 1995, Deleon served as an "Area Superintendent" for the Commission. In that capacity, Deleon supervised road maintenance activities, road crews, and oversaw repairs. Deleon generally received positive reviews throughout his time in this position. Deleon alleges a pervasive atmosphere of racial insensitivity and derogatory comments throughout the course of his employment.

While serving as Area Superintendent, Deleon was supervised by Defendants Travis Bartholomew ("Bartholomew") and Joanna Johnson ("Johnson"). In 2008, a vacancy arose for the position of "Equipment and Facilities Superintendent." The job description described the working conditions as "primarily in office [ ] and in garage where there is exposure to loud noises and diesel fumes." R. 55-4, Ex. 5. Deleon applied for this position on November 13, 2008. Had he been offered the position, Deleon attested that he would have demanded a $10,000 salary increase. He also viewed the position as possessing better potential for career advancement.

After an interview, Deleon was informed that he did not receive the position. He admits that his computer skills, which were a substantive qualification for the position, were insufficient. Consequently, the commission hired another candidate who left the position shortly thereafter. The Commission then offered the position to an external candidate; this

candidate eventually declined. In 2009, Deleon was involuntarily transferred to the position.[1]

According to the Commission, this was part of a larger "reorganization." R. 55-3, Ex. 4. Bartholomew admitted that he and Johnson decided to transfer Deleon. Deleon voiced numerous objections to the hazards posed by the new position. Deleon testified that, in applying for the position, he demanded a raise because of the "hazard posed by diesel fumes and poor ventilation in the equipment and facilities area." Deleon did not receive his requested raise. Another employee corroborated the description of the conditions: "It's a stinky environment. It's like sticking your head in an exhaust pipe. Have you ever sat in traffic behind a city bus? That's what it was like in the maintenance facility . . . diesel fumes all the time." R. 64, Ex. 8, p. 31. Deleon stated that it was "an office and enclosed garage facility with running trucks and equipment that resulted in constant exposure to diesel fumes." R. 64, Ex.1, pp. 230-231. According to this employee, this was the only Area Superintendent position subject to these conditions. Deleon asserts that he developed bronchitis— as well as a cough and sinus headaches due to the diesel

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[1] Although Deleon originally applied for the position, his application was denied. Nine months later, Deleon was involuntarily transferred to the position. R. 64 at 110-11 (Deposition of [employer] Bartholomew: "Q. This wasn't something that he had a choice in terms of moving from area superintendent to equipment and facilities superintendent. Correct? A. Correct. Q. He had to do whatever he was told to do in terms of the transfer. Correct? A. Correct."). The dissent notwithstanding, the facts here do not present a "voluntary application," but rather an involuntary transfer.

fumes—and would blow black soot from his nostrils as a result.

Thereafter, Deleon's first evaluation indicated that his performance was "acceptable in most critical areas but [was] not sufficiently above minimum satisfactory level in all areas." R. 55-5, Ex. 8. Bartholomew thanked Deleon for his hard work, but identified technology as an area in which he could improve. Deleon, who was unhappy in his new position, inquired as to why he "had been involuntarily moved from a position where he was performing well to one that was more hazardous." R.64 Ex.1, p. 61. Bartholomew stated that Deleon had no choice but to accept the transfer. R. 64-1 at 110-11. Deleon asserts that the transfer was a deliberate attempt to set him up to fail.

Bartholomew asked Deleon to write a memorandum about the redesign of a truck. However, Deleon disagreed in principle with the strategy, and was summoned into Bartholomew's office. Deleon testified as to having a fractious meeting with Bartholomew. Four days after the meeting, Deleon was hospitalized for five days. He attributes the hospitalization to a work-induced, stress-related mental breakdown, for which he took eight months' leave under the FMLA. In August 2011, Deleon's psychiatrist cleared him to return to work, but, at that point, the Commission had terminated him. According to the Commission, Deleon had exhausted all of his available leave.

II. STANDARD OF REVIEW

We review a district court's grant of summary judgment *de novo*. *City Management Corp. v. United States Chem. Co.,* 43 F.3d 244 (6th Cir. 1994).

Summary judgment is appropriate only if the pleadings, depositions, answers to interrogatories and admissions, together with the affidavits, show there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law. FED. R. CIV. P. 56(A); *Tucker v. Tennessee*, 539 F.3d 526, 531 (6th Cir. 2008). The burden is on the moving party to show that no genuine issue of material fact exists. FED. R. CIV. P. 56(C)(1); *Bennett v. City of Eastpointe*, 410 F.3d 810, 817 (6th Cir. 2005). The facts, and the inferences drawn from them, must be viewed in the light most favorable to the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). The question is "whether the evidence presents a sufficient disagreement to require submission to the jury or whether it is so one-sided that one party must prevail as a matter of law. *Id*. at 251-52.

III. ANALYSIS

A. QUALITATIVE INTOLERABILITY

Deleon brings claims of: (1) a violation of the Equal Protection Clause of the Fourteenth Amendment, predicated under 42 U.S.C. §1983; (2) race discrimination in violation of the Civil Rights Act of 1964, 42 U.S.C. §2000e *et seq*.; (3) national origin discrimination in violation of the same; and (4) age discrimination in violation of the Age Discrimination in Employment Act ("ADEA"). The elements for establishing an Equal Protection claim under § 1983 and the elements for establishing a violation of Title VII disparate treatment claim are the same. *Lautermilch v. Findlay City Schs.*, 314 F. 3d 271, 275 (6th Cir. 2003); *Gutzwiller v. Fenik*, 860 F.2d 1317, 1325 (6th Cir. 1988). Similarly, "[t]o state a claim under the Equal Protection Clause, a § 1983 plaintiff

must allege that a state actor intentionally discriminated against the plaintiff because of membership in a protected class." *Henry v. Metro. Sewer Dist.*, 922 F.2d 332, 241 (6th Cir. 1990) (internal quotations omitted). Title VII prohibits employers from discriminating against individuals on the basis of both race and national origin. 42 U.S.C. §2000e-2(a)(1); *Davis v. Cintas Corp.*, 717 F.3d 476 495 (6th Cir. 2013). To establish a *prima facie* case of intentional discrimination, a plaintiff must show that (1) he 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. *Wright v. Murray Guard, Inc.*, 455 F.3d 702, 707 (6th Cir. 2006) (citation omitted).

The ADEA generally prohibits employers from discriminating by failing or refusing to hire, discharging, or discriminating against an individual "with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." *Provenzano v. LCI Holdings, Inc.*, 663 F.3d 806, 811 (6th Cir. 2011) (quoting 29 U.S.C. § 623 (a)(1)). Generally, discrimination claims brought under Title VII and the ADEA are analyzed under the same framework. *See Policastro v. Northwest Airlines, Inc.*, 297 F.3d 535, 538 (6th Cir. 2002). To establish a *prima facie* case for age discrimination under the ADEA, a plaintiff must show that (1) he was a member of the projected class, *i.e.*, 40 years old or older, (2) he suffered an adverse employment action, (3) he was otherwise qualified for the position, and (4) he was replaced by a substantially younger employee, or additional evidence shows that the employer was motivated by age. *Bush*

v. Dictaphone Corp., 161 F.3d 363, 368 (6th Cir. 1998).

Importantly, all three causes of action require that the aggrieved plaintiff show that he suffered an adverse employment action. An adverse employment action has been defined as a "materially adverse change in the terms and conditions of a plaintiff's employment." *White v. Burlington N. & Santa Fe Ry. Co.*, 364 F.3d 789, 795 (6th Cir. 2004) (*en banc*) (citation omitted). A "mere inconvenience or an alteration of job responsibilities" is not enough to constitute an adverse employment action. *Id.* at 797 (citing *Kocsis v. Multi-Care Mgmt. Inc.*, 97 F.3d 876, 885-87). The Commission, and indeed the district court, relied on the proposition that "[r]eassignments without changes in salary, benefits, title, or work hours usually do not constitute adverse employment actions." *Kocsis*, 97 F.3d at 885. Nevertheless, a reassignment without salary or work hour changes, however, may be an adverse employment action if it constitutes a demotion evidenced by a "less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation." *White v. Burlington N. & Santa Fe Ry. Co.*, 364 F.3d 789, 795 (6th Cir. 2004), *aff'd sub nom. Burlington N. & Santa Fe Ry. Co.*, 548 U.S. 53 (2006) (emphasis added).

The Supreme Court addressed the issue at length in *Burlington Northern*. 548 U.S. 53 (2006). As in the instant case, the matter involved a transfer from one employment unit to another without a change in "salary benefits, title, or work hours." *Burlington N.*, 364 F.3d at 797. The Court held that "[w]hether a particular reassignment is materially

adverse depends upon the circumstances of the particular case," and "should be judged from the perspective of a reasonable person in the plaintiff's position, considering 'all the circumstances.'" *Burlington N.*, 548 U.S. at 71. We have held that a transfer may classify as an adverse employment action where it constitutes a "constructive discharge." *Policastro v. Nw. Airlines, Inc.*, 297 F. 3d 535, 539 (6th Cir. 2002). In order for an employee to be constructively discharged, the working conditions "must be objectively intolerable to a reasonable person." *Id.* (quoting *Kocsis*, 97 F.3d at 886) (emphasis added).

Even still, our Circuit has not foreclosed the possibility that a transfer not rising to the level of a constructive discharge might nonetheless constitute a tangible employment action. *See*, *e.g.*, *Keeton v. Flying J, Inc.*, 429, F.3d 259, 265 (6th Cir. 2005); *Hollins v. Atl. Co.*, 188 F.3d 652, 662 (6th Cir. 1999). In those cases, the focus narrows to whether there are "other indices that might be unique to the particular situation" which could turn what would ordinarily not be an adverse employment action into one. *Id.* At a minimum, the employee must be able to show a quantitative or qualitative change in the terms of the conditions of employment. *See Patt v. Family Health Sys., Inc.*, 280 F.3d 749, 753 (7th Cir. 2002).

The case law thus indicates that an employee's transfer may constitute a materially adverse employment action, even in the absence of a demotion or pay decrease, so long as the particular circumstances present give rise to some level of objective intolerability. Again, *Burlington Northern* is instructive. There, the Supreme Court granted a writ of

certiorari after we issued an *en banc* opinion. The plaintiff-respondent was the only woman working at the Burlington Northern & Santa Fe Railway Company. *Burlington N.*, 548 U.S. at 58. Though she was initially staffed as a "track laborer," she was later transferred to operate a forklift. *Id.* She was subsequently removed from forklift duty and was reassigned to perform track laborer tasks. *Id.* A supervisor opined that, "in fairness, a more senior man should have the less arduous and cleaner job of forklift operator." *Id.* (quotations omitted). The plaintiff filed a complaint with the EEOC, and later federal court, contending that the reassignment of her duties amounted to unlawful gender-based discrimination. *Id.* In determining whether the plaintiff had suffered a materially adverse employment action, the Supreme Court relied on the "considerable evidence" that the new position was "more arduous and dirtier," *id.* at 71, despite the lack of a diminution in salary, benefits, or title. On this basis, the Supreme Court held that a "jury could reasonably conclude that the reassignment would have been materially adverse to a reasonable employee." *Id.* In the same vein, this Court has also held that, where an employee is transferred to "some wretched backwater," a showing of adverse action is supplied on the basis of intolerability. *Mattei v. Mattei*, 126 F.3d 794, 808 (6th Cir. 1997).

Accordingly, insofar as we assess the level of intolerability, we conclude that Deleon has met his threshold at the summary judgment stage. Reminded that we must view the evidence in the light most favorable to the plaintiff, we conclude that Deleon has alleged an actionable claim. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986). Deleon provided evidence that he was exposed to toxic and

hazardous diesel fumes on a daily basis. R. 64, Ex.1, pp. 230-233. He testified further that he had to wipe soot out of his office on a weekly basis. *Id.* at 231. As a result, Deleon claims that he contracted bronchitis, had frequent sinus headaches, and would occasionally blow black soot out of his nostrils. *Id.* at 231. The work conditions were corroborated by another employee, Timothy Landrum, who compared the air quality in the position to "sticking your head in an exhaust pipe," and sitting "behind a city bus." R. 64, Ex. 8, p. 31. Deleon avers that his previous position never exposed him to the level of hazard presented by the new position. R. 64, Ex. 1, p. 230. The testimony presents sufficient indication that the work environment was objectively intolerable. *Kocsis*, 97 F.3d at 886. Accordingly, we conclude that "the evidence presents a sufficient disagreement," *Anderson*, 477 U.S. at 251-52, as to whether the transfer was materially adverse to a reasonable person, especially in light of the factual similarities between the instant case and *Burlington Northern*. Here too there is evidence for the jury to consider that the new position was "more arduous and dirtier." *Burlington N.*, 548 U.S. at 71.

B. APPLICATION FOR THE POSITION

We must also address the issue that Deleon applied for the position before being "involuntarily" transferred. Semantically, the argument follows that an action cannot be truly "adverse" if coveted by its actor. No case within this circuit has ruled on this precise issue. Nevertheless, our sister circuits have held that the request of a transfer, and accession to the new position, does not categorically bar a finding of an adverse employment action. *See, e.g.*, *Richardson v. New York State Dep't of Correctional*

Services, 180 F.3d 426, 444 n.4 (2d Cir. 1999) (finding sufficient evidence to support a conclusion that a transfer requested by plaintiff constituted an adverse employment action where there was evidence that another, more desirable, lateral job opening for which plaintiff was qualified may have existed but was not offered to the plaintiff); *Sharp v. City of Houston*, 164 F.3d 923, 934 (5th Cir. 1999) (reversing grant of summary judgment where "[t]he jury could have found that the transfer, albeit at Sharp's request, was a constructive demotion, the involuntary result of conditions so intolerable that a reasonable person would feel compelled to leave"); *see also Huck v. Belknap*, 2:06-CV-1088, 2008 WL 2247069 at *6 (S.D. Ohio May 29, 2008) ("The fact that Huck once applied for the job to which she was transferred does not as a matter of law mean that she wanted it at the time of her involuntary transfer and that it cannot be a materially adverse action"); *cf. Simpson v. Borg-Warner Auto., Inc.*, 196 F.3d 873, 876-78 (7th Cir. 1999) (holding that voluntary transfer was not an adverse employment action where the work environment was not intolerable and assessing voluntariness under "constructive discharge" analysis). Accordingly, we conclude that under certain circumstances, a voluntary or requested transfer may still give rise to an adverse employment action.[2]

The record reflects that Deleon applied for the position with the intention of commanding a substantial raise and under the impression that employment benefits would inure to the benefit of his

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[2] *See* note 1, *supra*.

career. Such a request for "hazard pay," which was never provided, tilts the issue as to whether Deleon really requested or wanted the position in his favor. Nor are we persuaded by the fact that Deleon technically never withdrew his request, and did not complain at the time he received the transfer. Although Deleon did not testify that he specifically told a superior that he did not "like" his new job, he did testify that he approached his supervisors and asked them "why they took me out of a job [where] I was doing a good job and put me in a more hazardous job." R. 64, p. 61. This supports Deleon's argument that he was "set up to fail."[3] We are leery of a holding that would require that an involuntarily transferred employee, alleging a discriminatory work environment, must demand a transfer from the very superiors engaging in the discrimination.

We emphasize 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 the transfer" would have been "objectively intolerable to a reasonable person." *Strouss v. Michigan Dep't of Corr.*, 250 F.3d 336, 343

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[3] Deleon's assertion that he was "set up to fail" finds support in the case law as well. *See Ford v. Gen. Motors Corp.*, 305 F.3d 545, 554 (6th Cir. 2002); *accord DiIenno v. Goodwill Indus. of Mid-Eastern Pennsylvania*, 162 F.3d 235 (3d Cir. 1998) (court erred in granting summary judgment where an employee alleged that she was transferred to a job that her employer knew she could not perform). Considering the volume of testimony at Deleon's deposition detailing the nature and extent of the racially-charged atmosphere at the Commission, in passing, we observe that it is plausible that Deleon was "set up to fail."

(6th Cir. 2001) (citation omitted). Indeed, an employee's opinion of the transfer, whether positive or negative, has no dispositive bearing on an employment actions classification as "adverse." *See Sanchez v. Denver Pub. Sch.*, 164 F.3d 527, 532 n.6 (10th Cir. 1998); *Doe v. Dekalb County Sch. Dist.*, 145 F.3d 1441, 1449–50 (11th Cir. 1998). Removing the issue of material fact on the grounds that, as a matter of law, the plaintiff's initial request to obtain the position precludes him from a finding that he suffered a materially adverse employment action would, in our judgment, be improper. On that basis, and for the other foregoing reasons, we **REVERSE** the order of the District Court, and **REMAND** for further proceedings.

DISSENT

SUTTON, Circuit Judge, dissenting. When an employee voluntarily applies for, and obtains, a job transfer, his employer has not subjected him to an adverse employment action.

Robert Deleon applied for a transfer to the equipment and facilities superintendent position, no strings attached. When the Road Commission posted the position, Deleon (then an area superintendent) saw an opportunity for advancement and applied. R.55-4 at 1–3, 5–6; R.64 at 19 (Tr. at 75). He applied with full knowledge of the transfer's potential downside. As to diesel fumes: The job description warned that the position involved "exposure to loud noises and diesel fumes," R.55-4 at 1–3, something he had seen firsthand and had ideas for mitigating. R.64 at 19 (Tr. at 75–76). As to the additional responsi-

bilities: Deleon understood he would need to learn new skills on the job. R.64 at 13, 17, 30 (Tr. at 46, 62, 138, 140). Yes, his application included a request for a higher salary and an additional employee. But he kept his application active and interviewed for the position *after* his supervisors told him that the job would not come with a raise or another employee. R.55-3 at 6–8; R.64 at 30 (Tr. at 138–39). After the Commission offered the job to an external candidate, Deleon complained to his supervisors about not getting the job. R.55-1 at 8–9 (Tr. at 42, 44–49); R.64 at 36 (Tr. at 224). When the initial hire resigned for personal reasons and a second external candidate turned down the job, the Commission gave Deleon the job. R.55-3 at 11–13; R.64 at 37 (Tr. at 229). In recounting the facts, the majority offers hints to the contrary—that Deleon somehow did not seek out the job, Maj. at 2, 3 and 10—but they all turn on citations to Deleon's appellate brief, not the summary judgment record.

The 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, much less a retaliatory one. Deleon voluntarily applied for the job with full knowledge of its pros and cons, making it difficult to fathom how he could premise a claim of retaliation on the transfer alone. A retaliation claim requires the employer to do something bad to the employee—something that might "have dissuaded a reasonable worker from making or supporting a charge of discrimination." *Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 68 (2006). That concept cannot be bent and stretched to cover an employer's decision to grant an employee's request for a transfer. No reasonable employee in Deleon's position would have

interpreted the transfer as an act designed to prevent him from exercising his rights against anti-discrimination.

In this setting, it adds nothing to the claim that the soot and diesel fumes in Deleon's new office were unpleasant or difficult to deal with. Deleon applied for the job with full knowledge of the conditions—and indeed complained when he did not initially get the job. An adverse employment action requires conduct by the employer that would hinder a reasonable employee from complaining about discrimination. How could a reasonable employee interpret the granting of a sought-after transfer as a warning not to complain about this or that conduct of the employer? The answer escapes me.

The same goes for the description of the transfer by one of Deleon's supervisors as a situation where Deleon "had to do whatever he was told." R.64-1 at 18 (Tr. at 110–11). Relying on this description—one Deleon references indirectly for the first time in his reply brief on appeal and never referenced below in his summary judgment briefs—the majority alternatively calls Deleon's transfer an "involuntary" one in a footnote. Maj. at 3 n.1. But why? The record makes clear that Deleon never complained about the transfer—he sought it out—and his supervisors never told him that he had no choice in the matter. As Deleon admits, he "didn't tell anybody" that he did not want the transfer. R.64 at 16 (Tr. at 61); R.64-1 at 18 (Tr. at 110); R.64-2 at 11 (Tr. at 89). That the Commission might have transferred Deleon even *if* he had objected to it does not change, cannot change, the outcome of a *retaliation* lawsuit. No reasonable employee could interpret a transfer as an attempt to punish him for exercising his anti-

discrimination rights when he gave his employer no reason to believe that he did not want the transfer and every reason to believe that he did. To repeat: When an employee voluntarily applies for, and obtains, a job transfer, his employer has not subjected him to an adverse employment action.

The majority worries that, by focusing on Deleon's circumstances, the court will transform an objective test into a subjective one. No need to worry. The materially adverse inquiry asks whether a "reasonable person *in the plaintiff's position*" would forgo filing a complaint of discrimination because of the employment action. *Id.* at 69–70 (emphasis added). The inquiry remains objective. The answer to the question simply must concern the facts at hand.

No case to my knowledge holds that granting a sought-after transfer by itself amounts to an adverse employment action. The majority's case citations say nothing to the contrary. They instead stand for these uncontroversial propositions. An employee may recover for a requested transfer when the employee "believed the change was necessary in order to keep her job." *Spees v. James Marine, Inc.*, 617 F.3d 380, 387 (6th Cir. 2010); *see Garrett v. Univ. of Ala. at Birmingham Bd. of Trs.*, 507 F.3d 1306, 1312 (11th Cir. 2007). That of course is not a *voluntary* request for a transfer. The same goes for an employee who applies for a transfer seeking refuge from discriminatory conditions in his current position. *Compare Sharp v. City of Houston*, 164 F.3d 923, 934 (5th Cir. 1999) (holding that a requested transfer could be an adverse employment action because the plaintiff's coworkers "caused her reasonably to fear for her safety if she stayed"), *with Simpson v. Borg-Warner Auto., Inc.*, 196 F.3d 873, 876 (7th Cir. 1999) (reaching the

opposite conclusion where plaintiff voluntarily "sought her downgrade").

Whatever the correct interpretation of the employment retaliation laws may be, they surely stop at this line: imposing liability on employers *whether they grant or deny* an employee's request for a transfer. All would agree that today's case is the harder one—where the employee got what he wanted—and yet, according to the majority, he still has a cognizable claim. It follows under the majority's analysis that, when the employer denies what the employee wants, he also has a cognizable claim. *See Taylor v. Geithner*, 703 F.3d 328, 338 (6th Cir. 2013) (finding that a plaintiff's allegation that "she applied for and was rejected" from a position was "plainly an adverse employment action"). An interpretation of the retaliation 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 respectful workplace. Even after plumbing the depths of logic, experience, case law and common sense, I must return to this surface point: When an employee voluntarily applies for, and obtains, a job transfer, his employer has not subjected him to an adverse employment action.

The majority seeing it differently, I must respectfully dissent.

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

No. 12-2377

ROBERT DELEON and MAE DELEON,

Plaintiffs - Appellants,

v.

KALAMAZOO COUNTY ROAD COMMISSION; TRAVIS BARTHOLOMEW and JOANNA JOHNSON, in their official and individual capacities,

Defendants - Appellees.

Before: KEITH and SUTTON, Circuit Judges; BLACK, District Judge.

JUDGMENT

On Appeal from the United States District Court for the Western District of Michigan at Grand Rapids.

THIS CAUSE was heard on the record from the district court and was argued by counsel.

IN CONSIDERATION WHEREOF, it is ORDERED that the judgment of the district court is REVERSED, and the case is REMANDED for further proceedings consistent with the opinion of this court.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk

Filed January 14, 2014

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ROBERT DELEON and MAE DELEON,	)	
Plaintiffs,	)	No. 1:11-cv-539
-v-	)	HONORABLE PAUL L. MALONEY
KALAMAZOO ROAD COMMISSION, TRAVIS BARTHOLOMEW, and JOANNA JOHNSON,	)	
Defendants.	)	

OPINION AND ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Plaintiffs Robert and Mae Deleon (collectively "Plaintiffs") filed an employment discrimination lawsuit against Defendants Kalamazoo County Road Commission, Travis Bartholomew, and Joanna Johnson (collectively "Defendants"). Robert Deleon ("Deleon") began working for the Kalamazoo County Road Commission ("Road Commission") in 1983. His last day of work was in May 2010. Mae Deleon is Robert Deleon's wife. At the time his employment ended, Joanna Johnson ("Johnson") was the managing director for the Road Commission and Travis Bartholomew ("Bartholomew") was the General Superintendent.

The complaint alleges six counts.[1] In Count 1, Plaintiffs allege, under 42 U.S.C. § 1983, a violation of Deleon's rights under the Due Process Clause of the Fourteenth Amendment. In Count 2, Plaintiffs allege, under § 1983, a violation of Deleon's rights under the Equal Protection Clause of the Fourteenth Amendment. In Count 3, Plaintiffs allege race discrimination in violation of the Civil Rights Act of 1964, 42 U.S.C. § 2000e, *et seq*. In Count 4, Plaintiffs allege national origin discrimination in violation of the Civil Rights Act. In Count 5, Plaintiffs allege age discrimination in violation of the Age Discrimination in Employment Act ("ADEA"). Finally, in Count 6, Plaintiffs allege loss of consortium on behalf of Mae Deleon.

Defendants have moved for summary judgment on each of Plaintiffs' claims. (ECF No. 54.) Plaintiffs filed a response.[2] (ECF No. 60 "Pl. Resp.".)

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[1] In their response brief, Plaintiffs suggest that they also have a § 1981 claim for nationality discrimination. (ECF No. 60 Pl. Resp. 22.) Each count of the complaint identifies the authority under which the claim arises. The complaint makes no reference to § 1981. Plaintiffs have not moved to amend their complaint.

[2] As noted by Defendants in their reply, Plaintiffs' response brief is 34 pages. The Local Rules allow up to 25 pages for a response to a motion for summary judgment. W.D. Mich. L.R. Civ. P. 7.2(b). Plaintiffs' response brief violates at least two other requirements of the Local Rules. On pages 20-23, Plaintiffs do not use double-spacing, as required by Local Rule 10.1. Also, the right side of Plaintiffs' brief does not use a one-inch margin, as required by the same provision. In spite of these violations of the Local Rules, the Court has considered the entire brief.

Defendants filed a reply. (ECF No. 65.) A hearing on the motion occurred on August 27, 2012.

LEGAL FRAMEWORK

Summary judgment is appropriate only if the pleadings, depositions, answers to interrogatories and admissions, together with the affidavits, show there is no genuine issue of material fact and that the moving party is entitled to a judgment as a matter of law. Fed. R. Civ. P. 56(a); *Tucker v. Tennessee*, 539 F.3d 526, 531 (6th Cir. 2008). The burden is on the moving party to show that no genuine issue of material fact exists, but that burden may be discharged by pointing out the absence of evidence to support the nonmoving party's case. Fed. R. Civ. P. 56(c)(1); *Bennett v. City of Eastpointe*, 410 F.3d 810, 817 (6th Cir. 2005) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986)). The facts, and the inferences drawn from them, must be viewed in the light most favorable to the nonmoving party. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 255 (1986) (quoting *Matsushita Elec. Indust. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587 (1986)). Once the moving party has carried its burden, the nonmoving party must set forth specific facts in the record showing there is a genuine issue for trial. *Matsushita*, 475 U.S. at 574; *Jakubowski v. Christ Hosp., Inc.*, 627 F.3d 195, 200 (6th Cir. 2010) ("After the moving party has met its burden, the burden shifts to the nonmoving party, who must present some 'specific facts showing that there is a genuine issue for trial.'" (quoting *Anderson*, 477 U.S. at 248)). The question is "whether the evidence presents a sufficient disagreement to require submission to the jury or whether it is so one-sided that one party must prevail as a matter of law." *Anderson*, 477 U.S. at 251-252.

BACKGROUND

The following facts find support in the record.[3] Robert Deleon began working for the Kalamazoo County Road Commission in 1983, (ECF No. 64 Pl. Ex. 1 "Deleon Dep." 15 PgID 495), as a stockroom clerk (*id.* 19 PgID 497). From sometime in the late 1980s to 1995, Deleon worked as assistant supervisor to the Equipment Director. (*Id.* 37 PgID 501.) Deleon became an Area Superintendent in 1995. (*Id.*) According to the Road Commission's description of the Area Superintendent position, the job requires the individual to supervise road maintenance activities performed by road commission employees, among other things. (ECF No. 55-2 Def. Ex. 2 "Area Superintendent Description" 1 PgID 359.) The document states, under the section titled "Working Conditions," that the individual will work in an office where there is exposure to loud noise and diesel fumes and will

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[3] Plaintiffs' response contains a section titled "Facts," which consists of a summary of each deposition and a list, with a short description, of the exhibits. Neither the Federal Rules of Civil Procedure nor the Local Rule dictate how a party must set forth the relevant facts in a motion for summary judgment or response. That said, by norm, custom, or convention, most parties set forth the factual record in some sort of chronological order or by topic. The Court finds unhelpful the manner in which Plaintiffs' counsel has opted to set forth the facts in the record. The Court has endeavored, as it must, to view the record in the light most favorable to Plaintiffs. The Court will not, however, scour the record on Plaintiffs' behalf. *See Shorts v. Bartholomew*, 255 F. App'x 46, 50 (6th Cir. 2007.) Summarizing each deposition does not synthesize common factual assertions or topics that cross those depositions. The method selected by Plaintiffs' counsel complicates, rather than clarifies, the task of identifying where the material facts are in genuine dispute.

also work outside in all kinds of weather conditions. (*Id.* 2 PgID 360.)

Soon after he started working for the Road Commission, other employees occasionally referred to Deleon as "Poncho" or "Jose." (Deleon Dep. 16 PgID 496.) Deleon admits he did not complain about this treatment until 2005. (*Id.* 18-19 PgID 497.) Deleon claims, at that point in 2005, his then supervisor, Lloyd Lambert, would make racially derogatory comments about Mexicans. (*Id.* 23-24 PgID 498.) Ultimately, Deleon complained to Dar Perkins and Ron Reid about the vulgar and racial language used by Lambert. (*Id.* 26 PgID 499.) Deleon testified that, other than this instance, he never complained to any supervisor about racial discrimination. (*Id.* 34 PgID 501.)

As a result of Deleon's complaints, the Road Commission began an investigation. (*Id.* 27 PgID 499.) The investigators did not find that Lambert unlawfully discriminated against Deleon. (ECF No. 55-2 Def. Ex. 3 "Discrimination Investigation" PgID 361.) A memo, written by Ron Reid, the Managing Director of the Road Commission, directed Lambert to avoid offensive language, avoid publically criticizing individual supervisors, apply policies even-handedly, and avoid using language or conduct that would be offensive to Mexican-Americans or other minorities. (*Id.*)

Deleon testified that he heard Travis Bartholomew make derogatory comments about Mexicans. (Deleon Dep. 27.) Deleon recalled one instance when there was an announcement on the television about a drug bust and Bartholomew turned to him and asked "are them your people?" (*Id.* at 21 PgID 497.) Deleon recalled another instance

when Bartholomew said he was "going to hire me some little Mexicans and work them hard on a farm and pay them cheap." (*Id.* 26.) When asked to identify when these comments occurred, Deleon testified he could not recall if any of the comments were made since 2005.[4] (*Id.* 30-31 PgID 500.)

In 2007, several important positions in the management of the Road Commission changed. Lambert left the Road Commission and Ron Reid retired. Joanna Johnson was hired as the new Managing Director of the Road Commission in November 2007. (ECF No. 64-2 Pl. Ex. 3 "Johnson Dep." 4 PgID 564.) In 2008, Johnson promoted Bartholomew from Area Superintendent to General Superintendent, the position previously held by Lambert. (Johnson Dep. 46 PgID 365.)[5]

Deleon was asked if he recalled any derogatory comments made by Bartholomew after Bartholomew became the General Superintendent. Deleon recalled one incident when another Area Superintendent was complaining about not being able to understand the broken English of the Mexicans with whom he was working. (Deleon Dep. 236 PgID 530.) According to Deleon, Bartholomew looked at him and said "Bob should have been out there." (*Id.*) Deleon also testified that when Bartholomew would hear Mexican sounding names on the news he would ask Deleon if "those were my people." (*Id.* 236-37.)

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[4] At one point, Deleon testified that Bartholomew made some of the comments in 2006. (Deleon Dep. 27.)

[5] This page of Johnson's deposition is not included in Plaintiffs' exhibit. The page is included as part of Defendants' exhibit. (ECF No. 55-3 Def. Ex. 4 "Johnson Dep. PgID 365.)

In late 2008, a vacancy occurred in the position of Equipment and Facilities Superintendent. (Johnson Dep. 54-55 PgID 568.) The job description included, among other things, computer skills on fleet maintenance software, Microsoft Office, and Outlook. (ECF No. 55-4 Def. Ex. 5 " Job Description" 2 PgID 379.) The document described the working conditions as "primarily in office conditions and in garage where there is exposure to loud noises and diesel fumes. May travel throughout the County to inspect equipment. Works outside in all kinds of weather. Assists with road maintenance activities." (*Id.* 3 PgID 380.) Deleon applied, in writing, for the position. (ECF No. 55-4 Def. Ex. 6 PgID 382.) Johnson and Bartholomew met with Deleon on November 18, 2008, to answer a question or two about the position. (Johnson Dep. 59-60 PgID 569.) Johnson informed Deleon that there would not be a clerk or storekeeper to assist the position and that the position would be part of the emergency on-call rotation. (*Id.* 60-61.) After this meeting, Johnson was under the impression that Deleon was still interested in the position. (*Id.* 64 PgID 370.) Deleon interviewed for the position on November 24, 2008. (*Id.*) Ultimately, in March 2009, Jim Vanderveen was hired for the position.[6] (*Id.* 76 PgID 570.)

Deleon asked Bartholomew and Johnson why he was not offered the position. Deleon testified that Bartholomew explained that Deleon's computer skills were not any good. (Deleon Dep. 42 PgID 503.) According to Deleon, Johnson informed him that he

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[6] Defendants state that Vanderveen was 57 years old. His age is not mentioned on the cited page in Johnson's deposition.

was not offered the position because of his answer to a question about how he would approach management if he disagreed with management. (*Id.* 46-49 PgID 504.)

The position became vacant again soon after Vanderveen was hired. For personal reasons, Vanderveen left the Equipment and Facilities position after only a few weeks on the job. (Johnson Dep. 76.) Johnson inquired whether another candidate, Shawn Schlicker, still had an interest in the position. (*Id.* 77 PgID 570.) Schlicker declined. (*Id.*) Johnson testified that, in May 2009, she hired an employment agency to help fill the position, but the effort was not successful. (*Id.* 80 PgID 571.) During this time, William DeYoung covered some of the Equipment and Facilities Superintendent's tasks. (*Id.* 81-82 PgID 571-72.) Ultimately, Johnson made the decision to transfer Deleon to the Equipment and Facilities Superintendent position, and backfilled Deleon's Area Superintendent position with DeYoung. (*Id.* 83 PgID 572.) The transfer occurred on August 10, 2009. (Compl. and Ans. ¶ 26.) Johnson testified that Deleon had expressed an interest in the position and that she found him qualified. (*Id.* 83-84.) Johnson did not recall if she received input or what input she might have received from Bartholomew about offering the position to Deleon. (*Id.* 85-86 PgID 572-73.) Johnson admitted she thought that Deleon's computer skills needed improvement. (*Id.* 88-89 PgID 573.) Bartholomew testified that he and Johnson discussed the Equipment and Facilities position, and that he recommended Deleon. (ECF No. 64-1 "Bartholomew Dep." 110 PgID 550.) Johnson, however, was responsible for the decision to transfer Deleon. (Johnson

Dep. 89, 91 PgID 574; Bartholomew Dep. 117 PgID 551.)

Deleon worked as the Equipment and Facilities Superintendent from August 2009 through May 2010. In November 2009, Deleon was given a performance review.[7] (ECF No. 55-5 Def. Ex. 8 "Nov. 09 Performance Eval." PgID 388-400.) The Evaluation Form contained nineteen questions requiring the reviewer to mark an "X" on a scale in one of nine spaces . (*Id.*) Below the nine spaces are four categories. (*Id.*) The wording for each category is not uniform across the nineteen questions. Fairly summarized, the left side of each scale marks the lowest or worst score, and the the right side of each scale marks the highest category or best score. The reviewer scores the employee in one of nine spaces covering the four categories, including three spaces that straddle two categories. Of the nineteen questions, Deleon was marked straddling the far left and middle left categories on six of those questions. (*Id.*) Deleon received higher marks for the other thirteen questions. (*Id.*) Under "Overall Assessment," Deleon received the following rating: "Performance is acceptable in most critical areas but is not sufficiently above minimum satisfactory level in all areas. The employee has been informed of the nature and amount of improvement which will be required to

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[7] Bartholomew testified that this performance review covered both positions that Deleon had been working over the previous year, the Area Superintendent job and the Equipment and Facilities Superintendent job. (Bartholomew Dep. 129-30 PgID 553-54.)

meet satisfactory levels in all areas."[8] (*Id.* 8 PgID 395.)

Sometime in April 2010, Bartholomew asked Deleon to write a memorandum concerning the conversion of a truck to a semi-tractor.[9] (Deleon Dep. 91 PgID 350.)[10] Deleon disagreed with Bartholomew about whether the truck should be redesigned. (*Id.* 92 PgID 350, 95-96 PgID 513.) On May 10, 2010, Bartholomew called Deleon into Bartholomew's office to discuss performance issues. (*Id.* 93 PgID 350.) Deleon testified that the meeting largely consisted of Bartholomew harassing him, telling Deleon that he was not doing enough work, and that Deleon was not keeping Bartholomew informed. (*Id.* 94 PgID 513.) Deleon admits, after trying to engage Bartholomew, he just stopped responding to Bartholomew's questions. (*Id.* 95.) Deleon explained that Bartholomew kept yelling and then asked how the two could work together better. (*Id.*) The meeting lasted about 45 minutes and, in the end, Deleon felt the situation was so hostile he simply shut down. (*Id.* 97 PgID 513.)

Deleon reported to work for the next three days and could not recall any further incidents. (*Id.* 101 PgID 352.) Deleon's wife then took him to the

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[8] There are six options on the form and the box is marked next to the box containing the quoted language.

[9] Both parties indicate that this memo had to be rewritten numerous times. Neither party cites to any document supporting that claim.

[10] This page of Deleon's deposition is not included in Plaintiffs' exhibit. The page is included in Defendants' exhibit. (ECF No. 55-1 PgID 350.)

hospital. (*Id.* 104-05 PgID 353.) Deleon recalls being in the hospital, but not much else about his visit. (*Id.* 102-03 PgID 353.) Deleon testified he spoke with doctors about having suicidal thoughts, which started about the time he checked into the hospital. (*Id.* 103-04.) Deleon left the hospital after 5 days. (*Id.* 104.) On the advice of his doctors, Deleon did not, however, return to work. (*Id.* 146-147 PgID 356.)

While Deleon was away from work, Bartholomew mailed Deleon a letter informing him of disciplinary action. (ECF No. 63-1 Def. Ex. 30 "Letter" PgID 484.) The letter is dated May 26, 2010. Attached to the letter is a Notice of Reprimand stating that Deleon would be suspended without pay for 3 days upon his return to work. (ECF No. 63-1 Pl. Ex. 30 "Discipline" PgID 485-88.) The basis for the discipline was "gross neglect of duty or refusal to comply with a Supervisor's instruction" and "insubordination." (*Id.* PgID 484.)

Deleon never returned to work.

DISCUSSION OF CLAIMS

A. DUE PROCESS CLAIM

In the complaint, Plaintiffs state that Deleon was employed by the Road Commission and, under Michigan state law, had a constitutionally protected interest in continued employment. (Compl. ¶¶ 78 and 79.) Plaintiffs state that, in May 2010, Bartholomew imposed disciplinary measures on Deleon without a hearing or meaningful opportunity to respond. (*Id.* ¶¶ 81-82.)

To establish a claim under 42 U.S.C. § 1983, a plaintiff must demonstrate a violation of a right secured by the federal Constitution or laws, and must also demonstrate that the violation was committed

by a person acting under color of state law. *Flagg Bros., Inc. v. Brooks*, 436 U.S. 149, 155 (1978); *Dominguez v. Corr. Med. Servs.*, 555 F.3d 543, 549 (6th Cir. 2009). The Due Process Clause of the Fourteenth Amendment to the Constitution prohibits the state from depriving a person of life, liberty, or property without due process of law. *Kizer v. Shelby Cnty. Gov't*, 649 F.3d 462, 466 (6th Cir. 2011).

> But, "[p]roperty interests are not created by the Constitution, 'they are created and their dimensions are defined by existing rules or understandings that stem from an independent source such as state law. . . .' Where a state civil service system categorizes public employees as classified - that is, not subject to removal at will - employees have a state-law-created, constitutionally protectable property interest in maintaining their current employment. Conversely, unclassified employees have no property rights in maintaining their jobs; and the State may terminate them summarily.

Id. (internal citations and citations omitted). Any property interest Deleon had his in continued employment must find support in Michigan law. *See Pucci v. Nineteenth Dist. Ct.*, 628 F.3d 752, 765-66 (6th Cir. 2010).

Under Michigan law, a presumption exists that employment is at-will and terminable by either party. *Lytle v. Malady*, 579 N.W.2d 906, 910 (Mich. 1998). An employee does not have a constitutionally protected property interest in continued employment in an at-will employment relationship. *Pucci*, 628 F.3d at 766; *Manning v. City of Hazel Park*, 509 N.W.2d 874, 878-79 (Mich. Ct. App. 1993) ("Public

employment in and of itself is not a property interest automatically entitling the employee to procedural due process."). An employee may overcome the presumption of an at-will employment relationship by establishing any of the following:

> (1) proof of a contractual provision for a definite term of employment or a provision forbidding discharge absent just cause; (2) an express agreement, either written or oral, regarding job security that is clear and unequivocal; or (3) a contractual provision, implied at law, where an employer's policies and procedures instill a legitimate expectation of job security in the employee.

Lytle, 579 N.W.2d at 911 (quotations omitted).

Defendants are entitled to summary judgment on Plaintiffs' Due Process claim. Plaintiffs have not identified any property interest that would be protected by the Due Process Clause. The presumption under Michigan law that Deleon is an at-will employee has not been overcome. In a footnote in their response to the motion, Plaintiffs do "not oppose the dismissal of the Due Process claim." (Pl. Resp. 34 n.14.)

B. EQUAL PROTECTION, RACE AND NATIONALITY CLAIMS

Plaintiffs' theory is that he was discriminated against when he was transferred to a position for which he was not qualified. The transfer constitutes discrimination because the individual who was given Deleon's old job, who was also not qualified for that position, was younger and white. Plaintiffs reason that, by transferring Deleon to the new position, Defendants were setting him up to fail.

"'To state a claim under the Equal Protection Clause, a § 1983 plaintiff must allege that a state actor intentionally discriminated against the plaintiff because of membership in a protected class.'" *Henry v. Metro. Sewer Dist.*, 922 F.2d 332, 341 (6th Cir. 1990) (quoting *Johnson v. Morel*, 876 F.2d 477, 479 (5th Cir. 1989) (en banc)). Critical to an Equal Protection claim is the victimization of the plaintiff *because* of his or her membership in a protected class. *LRL Props. v. Portage Metro. Hous. Autho.*, 55 F.3d 1097, 1111 (6th Cir. 1995) (quoting *Booher v. USPS*, 843 F.2d 943, 944 (6th Cir. 1988) (distinguishing constitutional injuries from common torts)).

The elements for establishing an Equal Protection claim under § 1983 and the elements for establishing a violation of Title VII disparate treatment claim are the same. *Lautermilch v. Findlay City Schs.*, 314 F.3d 271, 275 (6th Cir. 2003); *Gutzwiller v. Fenik*, 860 F.2d 1317, 1235 (6th Cir. 1988). Title VII prohibits employers from discriminating against individuals on the basis of both race and national origin. 42 U.S.C. § 2000e-2(a)(1); *Idemudia v. J.P. Morgan Chase*, 434 F. App'x 495, 499 (6th Cir. 2011). A Title VII race or national origin claim that relies on circumstantial, rather than direct, evidence utilizes the familiar burden-shifting framework set forth in *McDonnell Douglas v. Corp. v. Green*, 411 U.S. 792 (1973). *Idemudia*, 434 F. App'x at 500-501; *see Wright v. Murray Guard, Inc.*, 455 F.3d 706-07 (6th Cir. 2006). Under this framework, a plaintiff must first establish a prima facie case. *Wright*, 455 F.3d at 706. The defendant then bears the burden of production to put forth a legitimate, non-discriminatory reason for the adverse treatment. *Id.* If the defendant meets the burden, the

plaintiff must show that the defendant's explanation was a mere pretext for discrimination. *Id.* at 707.

To establish a prima facie case of intentional discrimination, a plaintiff must show (1) he 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. *Wright*, 455 F.3d at 707; *Idemudia*, 434 F. App'x at 501. Under the adverse employment action prong, the plaintiff must show that the employment action was "materially adverse" in the terms or conditions of employment. *Michael v. Caterpillar Fin. Servs. Corp.*, 496 F.3d 584, 593-94 (6th Cir. 2007).

> A materially adverse change in the terms and conditions of employment must be more disruptive than a mere inconvenience or an alteration of job responsibilities. A materially adverse change might be indicated by a termination of employment, a demotion as evidenced by a decrease in wage or salary, a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation.

Id. at 594 (quoting *Ford v. Gen. Motors Corp.*, 305 F.3d 545, 553 (6th Cir. 2002). Ordinarily, a transfer or reassignment, without a salary or work-hour change, will not constitute an adverse employment action, unless the "conditions of the transfer would have been objectively intolerable to a reasonable person, thereby amounting to a 'constructive discharge.'" *Strouss v. Michigan Dep't of Corr.*, 250 F.3d 336, 342 (6th Cir. 2001) (citation omitted); *see Spees*

v. James Marine, Inc., 617 F.3d 380, 391 (6th Cir. 2010); *Kocsis v. Multi-Care Mgmt., Inc.*, 97 F.3d 876, 885-87 (6th Cir. 1996).

Plaintiff has not established a prima facie case for race or national origin discrimination. In their response, Plaintiffs do not consider the possibility that they might be able to establish a discrimination claim on the basis of direct evidence, relying exclusively on the burden-shifting framework. In such circumstances, the Sixth Circuit Court of Appeals has found that a plaintiff has failed to adequately develop a claim using the direct-evidence method of proof. *See Idemudia*, 434 F. App'x at 499-500 (citation omitted); *Speck v. Agrex, Inc.*, – F. Supp. 2d –, 2012 WL 3764769, at * 8 (N.D. Ohio Aug. 30, 2012) (citing *Idemudia*). *Accord Langley v. Diamler Chrysler Corp.*, 502 F.3d 475, 483 (6th Cir. 2007) ("As Langley has not addressed the controlling issues, or only 'adverted to [them] in a perfunctory manner, unaccompanied by some effort at developed argumentation,' she has waived them." (quoting *Indeck v. Energy Servs. v. Consumers Energy*, 250 F.3d 972, 979 (6th Cir. 2000)).

Although not necessary for this Court to consider, the only evidence in the record that might be considered direct evidence of race or national origin discrimination are the derogatory remarks made by Bartholomew and Lambert, when those individuals held supervisory positions over Deleon. However, any constitutional claim based on those remarks are barred by the relevant statute of limitations.[11] The

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[11] Defendants properly raised this issue in their motion. Plaintiffs failed to address the statute of limitations issue in their

[Footnote continued on next page]

statute of limitations for civil rights suits brought in Michigan under 42 U.S.C. § 1983 is three years. Mich. Comp. Laws § 600.5805(10); *see JiQiang Xu v. Michigan State Univ.*, 195 F. App'x 452, 455 (6th Cir. 2006) (applying Michigan's three-year statute of limitations to § 1983 claims for violations of Due Process and Equal Protection); *Otworth v. Vanderploeg*, 61 F. App'x 163, 165 (6th Cir. 2003) (same); *see also Owens v. Okure*, 488 U.S. 235, 249-50 (1989) (holding that, because § 1983 does not have a statute of limitations, courts must select the state statute of limitations "most appropriate" to the particular § 1983 claim).

Taken in the light most favorable to Plaintiffs, the record does not contain any evidence of derogatory statements made by Bartholomew in the three years prior to the filing of the lawsuit. First, Deleon could only remember comments made in 2005 and 2006 and testified he could not recall if any derogatory comments were made more recently. (Deleon Dep. 27-31.) Much later in his deposition, Deleon recalled a conversation where Bartholomew suggested that Deleon should have been out on a job where another supervisor was having trouble understanding the broken English of some of the workers. (*Id.* 236.) Bartholomew's statement, however, referred to Deleon's fluency in Spanish and English, and cannot be understood as a racial slight. Deleon did not provide any date for Bartholomew's "your people" question. (*See id.* 236-37.)

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response. Therefore, Plaintiffs have waived any argument against application of the statute of limitations claim to their constitutional claims. *See Langley*, 502 F.3d at 483.

Plaintiffs' prima facie case under the burden-shifting framework also fails. Without dispute, Deleon is a member of a protected class: he is Hispanic and is of Mexican-American nationality. However, Plaintiffs cannot demonstrate that Deleon suffered an adverse employment action.

Taking the evidence in the light most favorable to Plaintiffs, Deleon did not suffer any materially adverse employment action. Plaintiffs argue that the transfer from Area Superintendent to Equipment and Facilities Superintendent was an adverse employment action.[12] Plaintiffs' argument is not persuasive. The record contains no evidence that Deleon's transfer resulted in lower pay or lower benefits. The record contains no evidence that the Equipment and Facilities Superintendent position was less prestigious or resulted in significantly diminished responsibilities.

In the response brief, Plaintiffs' only argument relevant to this element of the prima facie case is that Deleon was exposed to diesel fumes after his transfer, but was not exposed to diesel fumes in his

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[12] In their response brief, Plaintiffs do not argue that the disciplinary letter sent to Deleon by Bartholomew, after Deleon left work, constitutes an adverse employment action. Neither did Plaintiffs raise this possibility at the hearing. Therefore, that argument has been waived. *See Langley*, 502 F.3d at 483. Even if Plaintiffs had made that argument, it would not establish that Deleon suffered an adverse employment action. Deleon received the discipline letter after he left work, and he did not return to work to serve the discipline. *Cf. Plautz v. Potter*, 156 F. App'x 812, 817 (6th Cir. 2005) ("Cuccia's threats to discharge or discipline Plautz were not adverse employment actions because it is settled in this circuit that a threat to discharge is not an adverse employment action.").

position as Area Superintendent.[13] This difference between the two positions is not material. First, the job descriptions for Area Superintendent and the Equipment and Facilities Superintendent both state that the job involves working in areas where one would be exposed to diesel fumes. Second, Deleon applied for the position. In other words, Deleon was willing to work in an area where he would be exposed to diesel fumes. Deleon cannot now, after being given the job, complain about the working conditions for a job he actively sought. Plaintiffs have not established that the working conditions in the new position were objectively intolerable.

Plaintiffs reason that because Deleon was not qualified for the position to which he was transferred, the transfer constitutes an adverse employment action. Plaintiffs offer no legal authority in support of their novel theory. Plaintiffs overlook the fact that Deleon applied for the position to which he was eventually transferred. In addition to submitting a resume, Deleon was interviewed for the position. The record contains no evidence that Deleon ever declined, or attempted to decline, the transfer. The record contains no evidence that Deleon ever protested or complained about the transfer. The record contains no evidence that Deleon ever asked to be transferred back to his prior position.

The evidence in the record does not support Plaintiffs' theory that the transfer merely set him up to fail. Separate from the question of whether this

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[13] Plaintiffs raise this argument in the portion of their response brief addressing the age discrimination claim. (Pl. Resp. 32.)

novel theory has legal support, Plaintiffs' theory lacks factual support. The record does contain evidence establishing that Bartholomew and Johnson did not find Deleon a desirable candidate for the job, when initially compared to the other candidates who had applied. However, those candidates did not work out for various reasons, and Deleon was eventually given the position. Nothing in the record suggests that Defendants wanted Deleon to fail at the position. Both Bartholomew and Johnson wrote positive and supporting comments in Deleon's performance evaluation, in addition to noting areas for improvement. (*See* Nov. 09 Performance Eval. PgID 395-96, 398.)

Because this Court concludes that Plaintiffs have not demonstrated a prima facie case, the remaining stages of the burden-shifting framework need to be discussed.

C. ADEA CLAIM

The ADEA generally prohibits employers from discriminating by failing or refusing to hire, discharging, or discriminating against an individual "with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's age." *Provenzano v. LCI Holdings, Inc.*, 663 F.3d 806, 811 (6th Cir. 2011) (quoting 29 U.S.C. § 623(a)(1)). "A plaintiff may establish a violation of the ADEA by either direct or circumstantial evidence." *Id.* (citing *Geiger v. Tower Auto.*, 579 F.3d 614, 620 (6th Cir. 2009)). When a plaintiff relies on circumstantial evidence to establish an age-based claim, the court analyzes the claim using the familiar three-step framework developed in *McDonnell Douglas Corp. v. Green*, 411 U.S. 792 (1973). *Id.* at 811-12. Generally, discrimination claims brought

under Title VII and the ADEA are analyzed under the same framework. *Policastro v. Northwest Airlines, Inc.*, 297 F.3d 535, 538 (6th Cir. 2002).

To establish a prima facie case for age discrimination under the ADEA, a plaintiff must show that: (1) he was a member of the protected class, i.e., 40 years old or older, (2) he suffered an adverse employment action, (3) he was otherwise qualified for the position, and (4) he was replaced by a substantially younger employee, or additional evidence shows that the employer was motivated by the plaintiff's age in making the adverse employment decision.[14] *Hagedorn v. Veritas Software Corp.*, 129

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[14] In their briefs, both parties describe the fourth element as requiring the plaintiff to show that he was replaced by someone outside the protected class. (Def. Br. 16; Pl. Resp. 31.) The parties' error is explained by Sixth Circuit opinions that continue to describe the fourth element of an ADEA claim using "outside the protected class" language. *See, e.g., Allen v. Highland Hosp. Corp.*, 545 F.3d 387, 394 (6th Cir. 2008); *Policastro*, 297 F.3d at 538-39. Although the Sixth Circuit Court of Appeals occasionally relies on this formula in ADEA cases, in 1996, the United States Supreme Court rejected the "outside the protected class" element for a prima facie ADEA claim using the *McDonnell Douglas* framework. *See O'Connor v. Consol. Coin Caterers Corp.*, 517 U.S. 308, 312 (1996) (rejecting the "element of replacement by someone under 40."). Justice Scalia, writing for a unanimous court, explained that the statute prohibited discrimination because of an individual's age, but only protected those 40 years old or older. *Id.* He reasoned that "there can be no greater inference of *age* discrimination . . . when a 40-year-old is replaced by a 39-year-old than when a 56-year-old is replaced by a 40-year-old. *Id.* (emphasis in original). The Court held that "the proper solution lies not in making an utterly irrelevant factor an element of the prima facie case, but rather in recognizing that the prima facie case requires '*evidence adequate to create an inference that an employment*

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F. App'x 1000, 1002 (6th Cir. 2005); *see Bush v. Dictaphone Corp.*, 161 F.3d 363, 368 (6th Cir. 1998). A plaintiff can also satisfy the fourth prong by showing that he was treated differently than similarly-situated and substantially younger employees. *Hagedorn*, 129 F. App'x at 1002; *see Martin v. Toledo Cardiology Consultants, Inc.*, 548 F.3d 405, 410 (6th Cir. 2008). A plaintiff bringing a disparate treatment claim must ultimately show that "age was determining factor in the adverse employment action that the employer took against him." *Allen*, 545 F.3d at 394.

Plaintiffs' age discrimination claim fails for the same reason that Plaintiffs' race and nationality discrimination claims fail. Plaintiffs have not established that Deleon suffered an adverse employment action. Deleon was transferred to a position for which he had applied.

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decision was based on an illegal discriminatory criterion." *Id.* (brackets and alterations omitted) (emphasis added in *O'Connor*) (quoting *Teamsters v. United States*, 431 U.S. 324, 358 (1977). The Sixth Circuit has acknowledged that the fourth element for an ADEA claim was altered by *O'Connor*. *See, e.g., Grosjean v. First Energy Corp.*, 349 F.3d 332, 335 (6th Cir. 2003). In light of the holding in *O'Connor*, and despite the language that appears in cases like *Allen* and *Policastro*, for an ADEA claim, a plaintiff must compare himself to a "substantially younger" employee, although that other employee need not be under the age of forty.

D. CLAIMS AGAINST TRAVIS BARTHOLOMEW AND JOANNA JOHNSON

Plaintiffs sued Travis Bartholomew and Joanna Johnson in both their official capacities and their individual capacities.

1. INDIVIDUAL LIABILITY UNDER FEDERAL CIVIL RIGHTS STATUTES

Neither Title VII nor the ADEA provide for individual liability of supervisors who are not otherwise considered employers. "Title VII does not permit individual liability." *Hopkins v. Canton City Bd. of Ed.*, No. 10-3876, 2012 WL 1415380, at * (6th Cir. Apr. 24, 2012) (citing *Wathen v. Gen. Elec. Co.*, 115 F.3d 400, 404-05 (6th Cir. 1997)). In *Wathen*, the court held that "[a] majority of our sister circuits that have addressed this issue have held that an employee/supervisor, who does not otherwise qualify as an 'employer,' cannot be held individually liable under Title VII and similar statutory schemes." *Wathen*, 115 F.3d at 404 (collecting cases). The same is true under the ADEA. *See, e.g., Liggins v. State of Ohio*, 210 F.3d 372, at * 2 (6th Cir. Feb. 8, 2000) (unpublished opinion) ("The district court properly dismissed Liggin's Title VII and ADEA claims against the individual defendants. The named defendants, sued in their individual capacities, are not included within the statutory definition of 'employer' under Title VII and its sister civil right statutes, and accordingly cannot be held personally liable for discrimination."); *Sabouri v. Ohio Dep't of Ed.*, 142 F.3d 436, at * 2 (6th Cir. Feb. 2, 1998) (unpublished table opinion) ("Furthermore, no genuine issue of material fact exists concerning the individual defendants' status as employees. As a matter of law Sabouri may not seek relief from the individual

defendants because neither Title VII nor the ADEA provides for individual liability.").

Defendants' are entitled to summary judgment on the Title VII and ADEA claims brought against Bartholomew and Johnson in their individual capacities. The record contains no evidence that either Bartholomew or Johnson were acting as employers, rather than supervisors, at any point during Deleon's employment with the Road Commission. Plaintiffs have failed to address this argument in their response. Accordingly, the claim is waived. *See Langley*, 502 F.3d at 483.

2. QUALIFIED IMMUNITY

"'Government officials who perform discretionary functions are generally protected from liability for civil damages as long as their conduct does not violate 'clearly established statutory or constitutional rights of which a reasonable person would have known.'" *Holzemer v. City of Memphis*, 621 F.3d 512, 518-19 (6th Cir. 2010) (quoting *Sallier v. Brooks*, 343 F.3d 868, 878 (6th Cir. 2003) (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982)); *see Pearson v. Callahan*, 555 U.S. 223, 231 (2009) (same). The Sixth Circuit has set forth a three-step analysis for determining whether a defendant is entitled to qualified immunity. *Holzmer*, 621 F.3d at 519 (quoting *Feathers v. Aey*, 319 F.3d 843, 848 (6th Cir. 2003).

> First, we determine, whether, based upon the applicable law, the facts viewed in the light most favorable to the plaintiff show that a constitutional violation has occurred. Second, we consider whether the violation involved a clearly established constitutional right of which a reasonable person would have

> known. Third, we determine whether the plaintiff has offered sufficient evidence "to indicate that what the official allegedly did was objectively unreasonable in light of the clearly established constitutional rights."

Id. (quoting *Feathers*, 319 F.3d at 848 (quoting *Williams v. Mehra*, 186 F.3d 685, 691 (6th Cir. 1999) (en banc))). The "clearly established" inquiry "'must be undertaken in consideration of the specific context of the case, and not as a broad general proposition . . . .'" *Jones v. Byrnes*, 585 F.3d 971, 979 (6th Cir. 2009) (quoting *Saucier v. Katz*, 533 U.S. 194, 201 (2001)); *see Sheets v. Mullins*, 287 F.3d 581, 589 (6th Cir. 2002) ("[T]he 'clearly established' standard becomes meaningless if the relevant 'legal rule' is defined in abstract or general terms. Instead, the relevant 'legal rule' must be articulated in a particularized sense, such that the contours of the rule are sufficiently clear to put a reasonable official on notice that what he is doing is probably unlawful.").

As the moving party, the defendant must first demonstrate that there are no genuine issues of material fact that would defeat his or her claim for qualified immunity. *Hoard v. Sizemore*, 198 F.3d 205, 211 (6th Cir. 1999). "When a defendant raises a defense of qualified immunity, the plaintiff bears the burden of demonstrating that the defendant is not entitled to qualified immunity." *Baker v. City of Hamilton, Ohio*, 471 F.3d 601, 605 (6th Cir. 2006); *see Sheets,* 287 F.3d at 586 ("The defendant bears the burden of pleading the defense, but the plaintiff bears the burden of showing that the defendant's conduct violated a right so clearly established that a reasonable official in his position would have clearly

understood that he or she was under an affirmative duty to refrain from such conduct.").

Defendants Bartholomew and Johnson are entitled to qualified immunity. This Court has already concluded that no constitutional violation occurred. Deleon was an at-will employee and had no property right for which he was entitled to Due Process. Plaintiffs have not established a prima facie case for race, national origin, or age discrimination because Deleon did not suffer an adverse employment action. Therefore, Plaintiffs cannot maintain their Equal Protection claims under § 1983. Because no constitutional violation occurred, Bartholomew and Johnson are entitled to qualified immunity. Even if a constitutional violation had occurred, the constitutional rights at issue have not been clearly established, at least not within the context of the facts here. Plaintiffs have advanced a novel theory of employment discrimination. Plaintiffs and Defendants have not directed this Court's attention to any case holding that a transfer or reassignment to a position for which the employee applied constitutes discrimination in violation of the United States Constitution.

E. Loss of Consortium Claim - Mae Deleon

Mae Deleon brings her loss of consortium claim as a pendant claim under Michigan common law. (Compl. Introduction and ¶ 1.) The "Background Facts" portion of the complaint does not mention Mae Deleon. The complaint does not state any facts about how Mae and Robert's relationship has been affected by his employment situation.

Plaintiffs acknowledge that Mae Deleon's state-law claims are derivative of Deleon's federal

claims.[15] A loss of consortium claim "is derivative and recovery is contingent upon the injured spouse's recovery for the injury." *Berryman v. K Mart Corp.*, 483 N.W.2d 642, 646 (Mich. Ct. App. 1992); *see Eide v. Kelsey-Hayes Co.*, 427 N.W.2d 488, 489 (Mich. 1988). The claims from which Mae Deleon's claim could derive are subject to dismissal on summary judgment. Therefore, the loss of consortium claim is also subject to dismissal on summary judgment.

CONCLUSION

Defendants are entitled to summary judgment. Deleon has no property interest in any job, therefore he has no Due Process claim. Plaintiffs have not established a prima facie case for the Equal Protection claim, the Title VII race and national origin claims, or the ADEA claim because Deleon did not suffer any adverse employment action. Defendants are entitled to summary judgment on the Title VII and ADEA claims against Bartholomew and Johnson in their individual capacities because they were acting as supervisors, not employers. Bartholomew and Johnson are also entitled to qualified immunity on the constitutional claims brought against them. Finally, Defendants are entitled to summary judgment on Mae Deleon's loss of consortium claim because it is derivative of the dismissed claim by Deleon.

ORDER

For the reasons provided in the accompanying Opinion, Defendants' motion for summary judgment

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[15] In footnote 14, Plaintiffs concede that the loss of consortium claim is a derivative claim, and hinges on the viability of Deleon's other claims. (Pl. Resp. 34.)

(ECF No. 54) is **GRANTED.** Plaintiffs' claims are **DISMISSED WITH PREJUDICE. IT IS SO ORDERED.**

Date: September 18, 2012

/s/ Paul L. Maloney
Paul L. Maloney
Chief United States
District Judge

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MICHIGAN
SOUTHERN DIVISION

ROBERT DELEON and MAE DELEON, Plaintiffs, -v- KALAMAZOO ROAD COMMISSION, TRAVIS BARTHOLOMEW, and JOANNA JOHNSON, Defendants.	)	No. 1:11-cv-539 HONORABLE PAUL L. MALONEY

JUDGMENT

Having granted Defendants' motion for summary judgment and having dismissed the claims against them, under Rule 58, **JUDGMENT** enters in favor of Defendants and against Plaintiffs.

THIS ACTION IS TERMINATED.

IT IS SO ORDERED.

Date: September 18, 2012

/s/ Paul L. Maloney
Paul L. Maloney
Chief United States District Judge

No. 12-2377

UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

ROBERT DELEON AND MAE DELEON, Plaintiffs-Appellants, v. KALAMAZOO COUNTY ROAD COMMISSION, ET AL., Defendants-Appellees.	)	ORDER Filed March 20, 2014

BEFORE: KEITH and SUTTON, Circuit Judges; and BLACK,* District Judge.

The court having received a petition for rehearing en banc, and the petition having been circulated not only to the original panel members but also to all other active judges of this court, and no judge of this court having requested a vote on the suggestion for rehearing en banc, the petition for rehearing has been referred to the original panel.

The panel has further reviewed the petition for rehearing and concludes that the issues raised in the petition were fully considered upon the original submission and decision of the case. Accordingly, the petition is denied. Judge Sutton would grant rehearing for the reasons stated in his dissent.

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* The Honorable Timothy S. Black, United States District Judge for the Southern District of Ohio, sitting by designation.

ENTERED BY ORDER OF THE COURT

Deborah S. Hunt, Clerk