PUBLICATION

Sixth Circuit Finds Employer Discriminated Even Though It Took No Adverse Action Against Employee

April 20, 2012

A sharply divided panel of the Sixth Circuit Court of Appeals recently held a plaintiff claiming race discrimination need not prove an adverse employment action at trial. This remarkable holding came in *Litton v. Talawanda School District*, where the plaintiff, a school custodian, claimed that the school district transferred him and subsequently denied him a later transfer based on his race. The positions at issue all had the same pay, hours and job responsibilities. At trial, the jury found that the plaintiff had not suffered an adverse employment action, but nonetheless, it found that the transfer decisions were discriminatory.

The trial court entered judgment for the plaintiff, and the school district appealed, arguing that it could not be liable for race discrimination in the absence of an adverse employment action. A two member majority of the Sixth Circuit upheld the verdict. The majority reasoned that the requirement of an adverse employment action was part of the *prima facie* case, and once a case reaches trial, the court's focus shifts away from the *prima facie* elements. The Court noted that the *prima facie* elements, including the requirement of an adverse employment action, relate solely to the summary judgment analysis. At trial, the analysis focuses on the ultimate issue of whether there has been intentional discrimination, not the *prima facie* elements, including whether there has been an adverse employment action. Therefore, the majority found that the jury's finding for the plaintiff on the ultimate issue of discrimination should control.

In dissent, one judge on the panel criticized the majority's artificial separation of the adverse employment action inquiry from the ultimate issue of discrimination. The dissent noted that "it is incorrect to disregard a finding that bears on the ultimate issue simply because it is also relevant to the *prima facie* case." The dissent also noted that it is "beyond obvious that Title VII applies only where there has been discrimination against an individual. That requirement is not merely some vestigal prima facie element that fades into the background as the case progresses -- it is at the heart of the claim itself."

As a result of Litton, employers should be aware that decisions that do not adversely affect employees may be subject to challenge under Title VII.