Client Alert: Massachusetts Employers Beware – Denying an Internal Lateral Transfer Request May Now Constitute an Adverse Employment Action

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On January 29, 2019, the Massachusetts Supreme Judicial Court issued a significant **opinion** liberally construing the scope and meaning of the phrase "adverse employment action" – one of the threshold elements that Massachusetts courts consider in determining whether an act of discrimination against an employee is viable under the state's employment discrimination statute, **M.G.L. c. 151B**. In general terms, the SJC decided that denying an employee's request for an internal lateral transfer (*i.e*. a reassignment to a position of equal rank) may constitute an "adverse employment action" where the employee can demonstrate "material differences between [the] two positions in the opportunity for compensation, or in the terms, conditions, or privileges of employment."

The case, *Yee v. Massachusetts State Police*, was initiated by State Police Trooper Warren Yee in 2014, after the State Police denied his request to be transferred to the troop that patrols the area of Logan International Airport (where lucrative opportunities for overtime and details are more frequent). After Yee's initial request was denied, at least seven other officers from his troop received the desired transfer: all were white men, most of them younger than Yee, and many of them less qualified. Yee complained, but still failed to secure the transfer he had long sought. The Suffolk Superior Court granted summary judgment to the State Police, reasoning that Yee would have the same base salary in either position, and that merely denying him the *possibility* of earning additional compensation from more numerous details and available overtime did not amount to "lost money" in such a way that a reasonable jury could conclude that he suffered an adverse employment action. Yee appealed and the state's highest court reviewed the case on its own initiative.

The SJC premised its decision on the legislative directive in c. 151B § 9 that the state anti-discrimination law is to be interpreted and applied liberally in furtherance of its purpose and upon analogous federal precedent interpreting Title VII of the Civil Rights Act of 1964 to prohibit discrimination regarding access to overtime opportunities. An "adverse employment action" is not a phrase that appears in c. 151B, but it is a key element in the four-part common law test developed to determine whether an employee has made out a prima facie case of discrimination under that statute. The SJC determined that evidence that one other trooper earned more in the desired assignment was "adequate evidence that [Yee] would have greater opportunities to earn overtime and obtain paid details in the troop to which he seeks transfer" such that a reasonable jury could draw an inference that the sought-after position was objectively more desirable and materially advantageous.

It still remains to be seen whether the lower court ultimately will find that "there was a genuine issue of material fact whether the denial of Yee's request for a lateral transfer was motivated by discriminatory animus." The State Police

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must now present a legitimate, non-discriminatory motive for the challenged denials of transfer. Should the State Police meet that burden of rebutting Yee's prima facie case of discrimination, it then will be up to Yee to demonstrate that the proffered reason is merely a pretext and that the true motive behind the transfer denials was discrimination based upon race, age, or national origin. Stay tuned. In the meantime, Massachusetts employers should be vigilant about making sure that they can articulate a legitimate, non-discriminatory reason for denying an employee's request for a lateral transfer, particularly where that transfer may offer potential opportunities or advantages that the employee's current position does not offer.

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