

**Labor & Employment Alert
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**Supreme Judicial Court – Refusing to Grant a Lateral Transfer
to a Preferred Position May Constitute an Adverse
Employment Action**

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In a recent decision, *Yee v. Massachusetts State Police*, the Massachusetts Supreme Judicial Court held for the first time that denying an employee's request for a lateral transfer can constitute an adverse employment action under the Massachusetts General Laws, Chapter 151B which prohibits discrimination in the workplace. The Court's decision addresses the scope of employment actions on which an aggrieved employee may base a discrimination claim, going beyond commonly-challenged actions such as a refusal to hire, a promotional bypass, or discipline.

The Underlying Case

The plaintiff was a lieutenant in the Massachusetts State Police who identified as a Chinese Asian-American. The plaintiff served at Troop H in South Boston, and requested a transfer to Troop F at Logan International Airport. While all State Police lieutenants earn the same base pay and benefits regardless of location, the plaintiff testified that he desired Troop F because he knew it offered more advantageous overtime and paid detail opportunities.

After the plaintiff's initial transfer request, seven white male troopers were either transferred or promoted to lieutenant in Troop F, five of whom were younger than the plaintiff. The plaintiff was never offered a transfer to Troop F and was never interviewed regarding his transfer request. Two days after the State Police received a letter from the plaintiff complaining of discrimination, a white male sergeant in Troop H (the "Comparator") was promoted to lieutenant and transferred to Troop F, without requesting the transfer. While the Comparator served in Troop F, he earned over \$30,000 more per year in overtime and detail pay than he had earned while serving in Troop H.

Yee brought a claim against the State Police under Chapter 151B, alleging that he was denied the transfer on the basis of his age, race, or national origin. The trial court granted the State Police's motion for summary judgment by concluding that a jury could not reasonably find that the plaintiff was subjected to an adverse employment action.

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The Supreme Judicial Court's Decision

The SJC reversed that decision and remanded the case to determine whether the State Police could rebut the employee's circumstantial proof of discrimination. Specifically, the SJC held that the failure to grant a lateral transfer to a preferred position may constitute an adverse employment action under Chapter 151B where "there are material differences between two positions in the opportunity to earn compensation, or in the terms, conditions, or privileges of employment." The Court explained that an action qualifies as an "adverse employment action" where it is "substantial enough to have materially disadvantaged an employee." The disadvantage must be objectively apparent to a reasonable person in the employee's position.

The Court reasoned that the failure to grant a lateral transfer is an adverse employment action if it deprives an employee of the potential to earn additional compensation, and Chapter 151B forbids such denial if it is motivated by discriminatory animus. The decision makes clear, however, that it is not limited to compensation. The employee bears the burden of presenting evidence of an "objective indicator of desirability" which "permit[s] a reasonable factfinder to conclude that the sought for position is materially more advantageous." In *Yee*, the evidence of the Comparator's increased earnings at Troop F, albeit a "closer question", could be sufficient to permit a finding that the transfer to Troop F was materially more advantageous.

Effect on Employers

The Court's holding could affect employers, particularly those with multiple locations or divisions. On the one hand, denying a transfer request, on the surface, does not result in any immediate change to the aggrieved employee's situation. On the other hand, *Yee* makes clear that the focus is on potential opportunities of which the employee is deprived. *Yee* instructs that the employer must affirmatively consider whether denying a transfer request to a location that has different employment opportunities may constitute an adverse employment action.

Moreover, the Court's decision may frustrate employers defending against claims of discrimination because it reinforces the low burden a plaintiff must satisfy to survive a motion for summary judgment and proceed to a jury. The Court acknowledged that the evidence regarding the difference in benefits from the requested transfer was sparse, but it nevertheless sanctioned relying on a single comparator. Notably, the Court did not

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require the employee to provide a broader picture of the operation to determine whether the desired position was in fact materially more advantageous. For example, were the opportunities for overtime and paid details the exact same at Troop H and Troop F, but the Comparator merely elected to take advantage of the opportunities more frequently at Troop F? Consequently, an employee pursuing a claim of discrimination that relies on sparse evidence will now have *Yee* in his or her arsenal to support the claim. As with any employment discrimination claim, the employer is able to rebut the plaintiff's case by articulating a legitimate, nondiscriminatory reason for its decision to deny the transfer. These seemingly simple situations can result in significant liability if not handled properly; experienced legal advice can help avoid trouble if consulted beforehand rather than after the complaint arrives.

A link to the Court's decision can be found on our website at
<http://www.mhtl.com/assets/PDF/12485.pdf>.

If you have any questions about this issue, please contact Paul King or the attorney responsible for your account, or call (617) 495-5000

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