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## **A Company's Shifting Reasons For An Employment Decision Can Hurt The Company's Defense**

A San Diego federal district court recently provided guidance on what constitutes an "adverse employment action" and how an employer's shifting reasons for its actions may affect a discrimination case. In *Coyne v. County of San Diego*, the plaintiff, an employee, sued her employer for discrimination and retaliation in violation of Title VII and the California Fair Employment and Housing Act. The plaintiff claimed that she was transferred to a lateral position in a different division because of her gender and because she actively supported the gender discrimination claims of other employees. The County filed a motion for summary judgment. The parties conceded that the plaintiff had engaged in protected activity. The issues were whether the transfer constituted a materially adverse employment action and whether the transfer was justified by legitimate non-discriminatory reasons.

The district court explained that an adverse employment action is an action that materially affects the terms, conditions, or privileges of employment. The question is viewed from an objective perspective. Relatively minor actions that are reasonably likely to simply anger or upset an employee do not constitute an adverse action. An adverse employment action is adverse treatment that is reasonably likely to impair a reasonable employee's job performance or prospects for advancement or promotion. An adverse action is material if it is reasonably likely to deter an employee from engaging in protected activity. Depending on the circumstances, lateral transfers, unfavorable job references, and changes in work schedules may constitute adverse employment actions.

In analyzing the facts, the district court concluded that that a jury should decide whether the transfer constituted an adverse employment action. First, assignment to the new division was perceived by the County's employees as less prestigious, unfavorable and, at times, punitive. Second, the transfer interfered with the plaintiff's ability to care for her disabled son because it lengthened her commute. The County knew that the plaintiff needed to care for her disabled son and that her current assignment was more conducive to that need.

Because the plaintiff met her burden of proving a prima facie case of retaliation, the burden shifted to the County to offer a legitimate nondiscriminatory reason. The County offered more than one legitimate non-discriminatory reason for the transfer. The plaintiff, however, offered evidence that the County's reason for the transfer shifted over time from one reason to another. The court concluded that the shift from one reason to another was sufficient to create an issue of fact for a jury whether the non-discriminatory reasons offered by the County were pretexts for unlawful discrimination and retaliation. Accordingly, the court denied the County's motion for

summary judgment.

This case is a reminder to employers to give the honest reason for an employment action at the beginning, and not allow supervisors to give differing and conflicting reasons as time goes on.