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Did the Sixth Circuit just approve a claim for benign discrimination?

In *Litton v. Talawanda Sch. Dist.* (6th Cir. 6/26/12), a demoted and transferred custodian sued his employer for age and race discrimination. At trial, the jury returned the following special verdict:

3. Did plaintiff, Clifford Litton, prove by a preponderance of the legal evidence that

a) defendant's transfer of plaintiff to Talawanda Middle School constitutes a material adverse employment action?

_____ YES __✓__ NO

b) defendant's failure to return him to his position at Talawanda High School constitutes a material adverse employment action?

_____ YES __✓__ NO

4. Did plaintiff, Clifford Litton, prove by a preponderance of the legal evidence that his race was a motivating factor in defendant's decision to transfer plaintiff to Talawanda Middle School?

__✓__ YES _____ NO

5. Did plaintiff, Clifford Litton, prove by a preponderance of the legal evidence that his race was a motivating factor in defendant's failure to return him to his position at Talawanda High School?

__✓__ YES _____ NO

The jury concluded that Litton did not prove that he had suffered an *adverse* action, yet proved that the employer treated him differently because of his race. Under the *McDonnell Douglas* burden-shifting framework, the lack of an adverse action should dispose of the case. If one cannot show a *prima facie* case (which includes the suffering of an adverse action), the ultimate issue of discrimination should never be reached.

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The Sixth Circuit, however, disagreed. It disregarded the jury's finding on the existence of an adverse action as irrelevant to its subsequent finding on the ultimate issue of whether discrimination occurred:

> The jury's assessment of Litton's prima facie case did not control its finding on the ultimate question of discrimination.... he district court was not only permitted to disregard the jury's answer to the adverse employment action question, it was required to do so, and instead to evaluate the strength of the evidence as a whole.

As I read the opinion in *Litton*, I mapped out in my head a grand critique. Then I read Judge Batchelder's dissent, and decided I couldn't say it any better:

> The core problem with the majority's holding is that it treats the question of whether Litton suffered adverse discrimination as distinct from "the ultimate question of discrimination *vel non*." The two are one.... Title VII does not ban mere discrimination, but only adverse discrimination.... It is, to me, beyond obvious that Title VII applies only where there has been discrimination against an individual. That requirement is not merely some vestigial prima facie element that fades into the background as the case progresses—it is at the heart of the claim itself....
>
> In sum, "the ultimate burden of persuading the trier of fact that the defendant intentionally discriminated against the plaintiff remains at all times with the plaintiff." ... The majority should not relieve Litton of his burden, and it certainly should not grant him victory in the face of a jury verdict finding that he never proved that he suffered adverse discrimination at all. The whole purpose of Title VII ... is preventing harmful discrimination, not the lamentable-but-benign discrimination that the jury found Litton experienced.

Did the Sixth Circuit unwittingly create a cause of action for benign discrimination? Or, is this case an anomaly that future courts will distinguish and disregard? Common sense mandates the latter. Right?