

# Refusal to Transfer an Employee as an Adverse Employment Action; or, How Life Imitates 1950s Movies

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In the classic 1955 movie, *Mister Roberts*, Henry Fonda plays Doug Roberts, a frustrated Naval officer aboard a supply ship in a backwater area of the Pacific during World War II. Roberts desperately seeks a transfer to a combat ship more directly involved in the war, but he is continually – and maliciously – turned down by Captain Morton, portrayed by Jimmy Cagney:



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**Doug Roberts:** “I’m asking for it! If I can’t get transferred, I’ll get court martialed off! I’m fed up!”

**Capt. Morton:** “No. You’re a smart boy, Roberts. But I know how to take care of smart boys. I hate your guts, you smart college guys! . . . now YOU can take it for a change! The worst thing I can do to you... is to keep you right here, Mister, and here is where you’re going to stay. Now, GET OUT!”

Although Roberts eventually gets his transfer to a combat ship, many employees share his frustration when their employer denies a transfer to another location or position. ***If the requested, but denied, transfer involves no additional money and is not a promotion, has the employee suffered the type of adverse employment action that will support a lawsuit?***

Many types of employment lawsuits require an adverse action by the employer. The classic example is firing the employee for an illegal reason, such as racial discrimination. Other examples include refusing to hire a qualified applicant, denying a promotion, or refusing to grant a raise. However, when there is *no tangible benefit* to the requested

action, at least some precedent holds that the employee has no basis to sue, even if the denial of the requested action is based on race or another protected status. A recent decision from the Court of Appeals for the D.C. Circuit demonstrates that even an allegedly discriminatory action can fail to provide the basis for a lawsuit, if it involves only “subjective” injury to the employee.

In *Samuel Ortiz-Diaz v. Dep’t of Housing and Urban Development*, Mr. Ortiz-Diaz had worked as an investigator in Washington D.C. under a supervisor named McCarty. Ortiz-Diaz came to believe that McCarty had issues working with Hispanic males and sought a transfer to Albany, New York or Hartford, Connecticut. His request was denied. The transfer would not have been a promotion; indeed, some evidence suggested that it might require Ortiz-Diaz to take a pay cut or reduction in job grade. Ortiz-Diaz sued, alleging unlawful race and national origin discrimination. The district court granted the government employer summary judgment, on the grounds that a purely lateral transfer was not an “adverse employment action.”

On appeal, a divided D.C. Circuit court affirmed the dismissal. The majority ruled that the purely “subjective” injury of working for a supervisor who dislikes you is not a basis for a federal discrimination claim. The Court also rejected Ortiz-Diaz’s argument that a transfer would enhance his *future* opportunities for promotion, on the ground that that was mere speculation.

The case provoked two concurring opinions and a vigorous dissent. One concurrence specifically noted that the requirement of a tangible injury would not apply to harassment cases. A second stated that the result was based only on adherence to prior precedent, and expressed his “skepticism” about the wisdom of the ruling.

A third judge dissented, arguing that the evidence was disputed as to whether the transfer would actually enhance Ortiz-Diaz’s career prospects, so summary judgment was improper. The dissent also noted that other federal courts of appeal have looked more favorably on claims based on lateral transfers.

The case presents several important points for the employer to bear in mind:

- At least in some circumstances, an employee’s claim of discrimination is not sufficient for a lawsuit, where the employer has not taken any actual (and harmful) action against the employee based on the alleged discrimination;
- However, any actions in the workplace based on discriminatory motives present problems and risks for employers. Ortiz-Diaz’s claims might have fared better in a different federal court, and harassment claims do not require an adverse employment action;
- The case also illustrates, for both employers and employees, the importance of presenting cogent, non-speculative evidence at the summary judgment stage. If Ortiz-Diaz had been able to present better evidence that the requested transfer would help his career prospects, he might well have prevailed.

So unlike Mister Roberts in the movie, Ortiz-Diaz did not get his transfer and remained stuck working for McCarty in D.C. On the other hand, Mister Roberts’ transfer did not

produce the desired tangible benefits either; he is killed in a kamikaze attack aboard his new ship. Be careful what you wish for.