

either claim.¹ Plaintiff now asks for reconsideration of this ruling based on the Sixth Circuit's recent decision in White v. Burlington Northern & Santa Fe Railway Company, 364 F.3d 789 (6th Cir. 2004), which addressed the adverse employment action standard in the Sixth Circuit. For the following reasons, the Court denies Plaintiff's motion for reconsideration and upholds its prior ruling that Plaintiff did not show a fact issue on the adverse employment action prong.²

I. Legal Standard

Although the Federal Rules of Civil Procedure do not specifically address reconsideration of a court's orders, a party may make a motion to reconsider an interlocutory order pursuant to Rule 54(b) when there is:

- 1) an intervening change of controlling law;
- 2) new evidence available; or
- 3) a need to correct a clear error or prevent manifest injustice.

Fed. R. Civ. P. 54(b); Al-Sadoon v. FISF*Madison Fin. Corp., 188 F. Supp. 2d 899, 901-02 (M.D. Tenn. 2002) (courts generally use same standards for Rule 54(b) as those under Rule 59(e)). Thus, there are limited circumstances in which a Court may grant a motion to reconsider a prior order. Plaintiff argues that White constitutes an intervening change of controlling law that alters the outcome on summary judgment.

¹The Court also held that Plaintiff did show a genuine issue of material fact on his claim for breach of contract and therefore denied Defendants' motion for summary judgment on that claim.

²The Court notes that Defendants filed their response several days late, on June 21, 2004.

II. White v. Burlington Northern and Santa Fe Railway Company

In White, the en banc Sixth Circuit Court of Appeals upheld its previous case law concerning the adverse employment action standard in Title VII cases. White, 364 F.3d at 800.

The Sixth Circuit requires a Title VII plaintiff to prove an adverse employment action “[t]o prevent lawsuits based on trivial workplace dissatisfactions.” Id. at 795. In White, the Court reviewed several cases that established the adverse employment action requirement in this circuit and defined its contours. See Hollins v. Atlantic Co., 188 F.3d 652, 662 (6th Cir. 1999) (defining “adverse employment action” as a “materially adverse change in the terms and conditions of [plaintiff’s] employment”); Kocsis v. Multi-Care Mgmt. Inc., 97 F.3d 876, 886 (6th Cir. 1996) (mere inconvenience, alteration of job responsibilities, or bruised ego is not enough for adverse employment action); Yates v. Avco Corp., 819 F.2d 630 (6th Cir. 1987) (clear error for court to find that temporary job reassignment that resulted in no reduction in pay or benefits was an adverse employment action under Title VII’s retaliation provision); Jackson v. RKO Bottlers of Toledo, Inc., 743 F.2d 370 (6th Cir. 1984) (termination claim); Geisler v. Folsom, 735 F.2d 991 (6th Cir. 1984). The Court referred to Kocsis as the “seminal” case on this issue. White, 364 F.3d at 797. Kocsis held that

“reassignments without salary or work hour changes do not ordinarily constitute adverse employment decisions in employment discrimination claims” A reassignment without salary or work hour changes, however, may be an adverse employment action if it constitutes a demotion evidenced by “a less distinguished title, a material loss of benefits, significantly diminished material responsibilities, or other indices that might be unique to a particular situation.”

Id. (quoting Kocsis, 97 F.3d at 885-86).

The Court took the case to consider proposed changes in the adverse employment action standard. The plaintiff and the Equal Employment Opportunity Commission (“EEOC”) argued that the Court should adopt the EEOC Guidelines’ interpretation of “adverse employment action” in a Title VII retaliation claim: “any adverse treatment that is based on a retaliatory motive and is reasonably likely to deter a charging party or others from engaging in protected activity.” Id. at 798. The Court declined to adopt this standard, noting that its own standard accomplishes Congress’s goal of ensuring that no person would be deterred from exercising his or her rights under Title VII by the threat of discriminatory retaliation, while counterbalancing the need to prevent lawsuits based upon trivialities. Id. at 799. The Court also pointed out that its own definition applies equally to all discrimination claims, not just retaliation claims. Id.

The plaintiff in White claimed sex discrimination and retaliation. Id. at 791. On appeal was the district court’s denial of the defendant’s motion for judgment as a matter of law, which argued in part that the plaintiff had not shown any adverse employment action based on 1) a thirty-seven day suspension without pay, followed by reinstatement with back pay, or 2) a transfer from one position to a second position, in which she had the same pay and benefits, but the work was more arduous, dirtier, and less prestigious. Id. at 795.

The Court held that the suspension constituted an adverse employment action, even though the plaintiff was ultimately reinstated with back pay, because it was “not trivial.” Id. at 800-03. In so holding, the Court also rejected a proposed “ultimate employment decision” interpretation that would have narrowed adverse employment actions to only hiring, granting leave, discharging, promoting, or compensating. Id. at 801-02. The Court based its decision on 1) the text of the statute; 2) a warning that the adverse employment action requirement, as an exception to a strictly literal

reading of the statute, should not be interpreted too broadly; 3) the purpose of Title VII to make plaintiffs whole for their injuries; and 4) the Supreme Court's holdings that statutes of limitations in Title VII actions are not tolled pending internal grievance processes. Id. at 802-03. The Court distinguished the plaintiff's suspension without pay from the situation in Jackson v. City of Columbus, 194 F.3d 737 (6th Cir. 1999), where it held a plaintiff's suspension with pay and full benefits pending a timely investigation into suspected wrongdoing not to be an adverse employment action. White, 364 F.3d at 803.

The Court also held that the job transfer was an adverse employment action. Id. at 803. Although the new position paid the same amount as the old position, it was more arduous and dirtier. The old position also required more qualifications, indicating that it was more prestigious. Also, evidence indicated that the transfer occurred because other employees considered the old position to be a better job and resented the plaintiff for having it. Thus, based on the indices unique to the particular situation, the reassignment constituted a demotion, even though the pay remained the same. Id.

III. Analysis

The Court first notes that White arguably did not constitute a change in the controlling law, as it reaffirmed the Sixth Circuit's prior standard and cases, rather than reformulating the definition in any way. The en banc opinion did provide two additional examples, however, that the Court may now use as legal authority on which to base its holding regarding an adverse employment action in this case. Therefore, the Court will use White as a basis for reconsideration of the Order. Even with those two examples, however, the Court finds that Plaintiff failed to show a genuine issue of material fact on this prong of his Title VII prima facie case.

The examples in White demonstrate two relevant points about adverse employment actions. First, the Sixth Circuit specifically distinguished between suspensions with full pay and benefits, as in Jackson v. City of Columbus, and suspensions without pay, as in White, which constitute adverse employment actions. When discussing the triviality of the employer's actions, the Court stated, "[t]aking away an employee's paycheck for over a month is not trivial, and if motivated by discriminatory intent, violates Title VII." Id. at 802. It thus appears that the loss of pay was significant in categorizing the White plaintiff's suspension as an adverse employment action. Second, regarding the job transfer, the Court paid considerable attention to non-economic aspects of the plaintiff's new job, including its level of difficulty, dirtiness, and implied prestige. This indicates that, particularly when economic factors remain constant, non-economic factors may constitute the decisive markings of an adverse employment action.

In this case, both the economic and the non-economic factors dictate a finding that Plaintiff's transfer to Manager of Communications for AOD/CSSD was not an adverse employment action. As described by the Court's factual findings in the Order, the details of the transfer were as follows. Plaintiff had the position of Manager of Corporate Relations. (Order at 2.) During a corporate reorganization, Defendants eliminated Plaintiff's work group and transferred Plaintiff into the position of Manager of Communications for AOD/CSSD. (Id. at 3.) Plaintiff did not desire this position but instead wanted one of three other positions: Manager of FXTV, Manager of Community Relations, or Manager of International Public Relations. (Id.) Defendants declined to transfer him to one of those three positions and kept him as Manager of Communications for AOD/CSSD. (Id. at 4.) Plaintiff claimed that he did not have familiarity with his new position, while he did have experience in the areas of the three positions that he wanted. (Id. at 3.)

When the reorganization took effect on June 1, 2000, Plaintiff did not receive a cut in salary, but he also did not receive the 10-20% salary increase that white peer managers in public relations received. Plaintiff received his annual merit-based salary raise of 7% on September 1, 2000. (Id. at 3-4.) Plaintiff's responsibilities have increased as Manager of Communications for AOD/CSSD. He now has more employees reporting to him than he did in 1998 or 1999. (Id. at 4.) He has increased interactions with senior level managers and executives. (Id. at 9.) Defendants also aver that Plaintiff's new position is "crucial" because it deals with internal communications for two very important work groups, the AOD and CSSD. (Id. at 4.) Plaintiff alleges that as a result of being in the Manager of Communications for AOD/CSSD position, he has been unable to apply for certain other jobs that he desires. (Pl.'s Mem. in Supp. of Mot. for Recons. at 6-8.)

On the economic side, Plaintiff suffered no loss in pay or benefits, but he failed to receive a raise associated with the reorganization or as large and as quickly as that of his peers. On the non-economic side, however, the facts show that Plaintiff ended up in an objectively more desirable position as a result of the transfer. He was still a Manager of a work group, indicating no change in his title or rank. His new job had more responsibilities, more interactions with senior-level employees, and was a "crucial" position for Defendants' companies. Such attributes indicate a more prestigious position. The Sixth Circuit has held that, while reassignments without salary changes do not ordinarily constitute adverse employment actions, other factors, including significantly diminished material responsibilities or "other indices that might be unique to a particular situation," might indicate that an action is adverse. On these facts, however, the "other indices" point significantly toward this transfer being a positive change for Plaintiff, rather than a negative one, as shown by his increased responsibilities, increased prestige, and continued management title. That

Plaintiff subjectively may not have desired this managerial position as much as some others does not render the job transfer a materially adverse change in the terms and conditions of his employment.

Accordingly, the Court once again finds no genuine issue of material fact to remain as to whether Plaintiff suffered an adverse employment action when Defendants transferred him to the Manager of Communications for AOD/CSSD position.

IV. Conclusion

The Court finds that, under the controlling precedent of White, Plaintiff did not show a genuine issue of material fact as to whether he suffered an adverse employment action when Defendants transferred him to a new managerial position. Accordingly, the Court **DENIES** Plaintiff's motion for reconsideration of the Order.

IT IS SO ORDERED this ____ day of _____, 2004.

BERNICE BOUIE DONALD
UNITED STATES DISTRICT JUDGE