

Women's eNews

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Female Forklifter Takes Her Case to High Court

By Allison Stevens, Washington Bureau Chief

WASHINGTON, D.C. (WOMENSENEWS) – If an employee complains about sexual harassment and his or her superiors then don't invite the employee to lunch, can that be considered a form of employer retaliation?

What if the employee can't get a job recommendation after making the complaint, or is transferred to a less desirable job with similar pay and benefits? What if the employee is not promoted after making the complaint? What if he or she is docked pay or demoted? Or what if the employee is fired?

Just how badly, in other words, does an employee who complains about sexual harassment or discrimination on the basis of race, sex or religion have to be treated before that action meets the standard of employer retaliation?

That was the question considered by the Supreme Court Monday in a hearing involving Sheila White and Burlington Northern Santa Fe Railway Co., a rail delivery company based in Fort Worth, Texas. The outcome will help refine the legal standard of retaliation used in employment discrimination cases under the Civil Rights Act of 1964.

In 1997 Sheila White took a job as the only female forklift operator at a Burlington Northern train yard in Memphis, Tenn. A few months after she was hired, she accused her foreman of sexual discrimination and harassment, saying he treated her differently from male colleagues and spoke inappropriately to her.

After investigating the complaint, the company suspended the foreman for 10 days and transferred White to a position as a track laborer; a job with equal pay and benefits but more strenuous labor requirements.

Suspended Without Pay

White considered the transfer a retaliatory act to punish her for complaining about harassment and discrimination, and filed a report with the Equal Employment Opportunity Commission. Soon after, she was suspended without pay for insubordination for 37 days.

White was eventually cleared of charges of insubordination and given back pay for her suspension. But she was not compensated for mental and physical distress she said she suffered during her temporary suspension and new work conditions.

"It was rough," White recalled at a news conference on the steps of the Supreme Court after the hearing on Monday. A single mother, she said that surviving without income for more than a month

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during the Christmas holidays in 1997 and 1998 disrupted her family life and caused stress and anxiety.

Title VII of the 1964 Civil Rights Act prohibits employment discrimination based on sex, race, color, religion and national origin but only loosely defines retaliatory acts against an employee who makes a complaint of harassment or discrimination. Some districts have adopted a narrow definition of retaliation, meaning only the most serious actions like demotions, discharges or pay cuts constitute retaliation, while others have taken a broader approach.

White filed suit and won \$43,500 in compensatory damages and \$55,000 for attorney fees, but no punitive damages. The Sixth Circuit Court of Appeals reversed the decision, but White successfully petitioned for an “en banc” review – by a panel of all the judges on a given court –which ruled in her favor. Burlington Northern appealed to the Supreme Court, which agreed to take the case last December.

Clearer Protections Sought

Along the way, White won support from women’s rights groups, who called for clearer protections for those who report harassment or discrimination. Such protections are especially important in traditionally male-dominated fields such as White’s shipping industry, where pay is higher but so is the risk of harassment, said Marcia D. Greenberger, co-president of the National Women’s Law Center in Washington, D.C.

“In far too many cases, employees have also faced the added danger of retaliation by their employees,” Greenberger said. “Congress enacted Title VII to protect employees from these types of retaliation, and the court must not take these protections away.”

During the hearing on Monday, discussion focused on the slippery nature of retaliation, with Justice Ruth Bader Ginsburg raising the possibility of being excluded from an informal company lunch as one example of the many intangible ways superiors can punish an employee for complaining about discrimination or harassment.

What if the lunch is a routine event, Ginsburg asked, the kind in which employees network with each other and their superiors in the hopes of climbing the corporate ladder? Or what if it is the kind of “power lunch” that corporate mentors use to groom possible successors? Either way, an employee who is kept out could suffer.

Her sentiments were echoed by Justice Stephen G. Breyer, who suggested that retaliation, like discrimination, can be expressed in subtle and intangible ways. He seemed to push for a broad standard of retaliation that would accommodate the many ways in which an employee might suffer reprisal.

Even Justice Antonin Scalia seemed to express some sympathy for employees who might struggle financially from retaliation. “I worry about that,” he said.

Corporate Effects Raised

But such a broad standard would have a deleterious effect on corporations, said James Whisman, a government attorney from Washington State who argued on behalf of Burlington Northern. That is

already evident, he said, noting that retaliation claims – at an average cost of more than \$130,000 – have skyrocketed over the last decade. The trend will only worsen if judges sided with White, he said.

Whisman and Burlington Northern lawyer Carter Phillips called for a narrower standard that would limit retaliation to actions that have a “direct economic effect or a significant change in the status of an employee,” a standard they said was not met in this case because White received full back pay after her suspension and because she retained a job that had similar pay and benefits to her original one.

A “fallback standard” protects those who suffer from other retaliatory actions outside the basic standard that are “severe or pervasive,” Phillips added.

Lawyers for Burlington Northern also found a sympathetic ear from Scalia, who warned that an overly broad standard could result in countless retaliation lawsuits based on “trivial” or innocuous slights such as an employer’s failure to greet an employee who filed a harassment complaint against him or her with a smile and a cheery “hello.”

But White’s lawyer, Donald Donati, warned of more severe implications if his rivals win.

Employees’ fundamental freedom from discrimination would be undermined if the court adopted a narrow standard for retaliation because it would have a “chilling effect” on those who would file reports of discrimination or harassment, he said.

“An individual who complains about discrimination has to be free to do so, free from the fear of being retaliated against,” he said. That should be the case, he added, “whether the retaliation is severe, like the loss of a job, or relatively minor.”

Allison Stevens is Washington bureau chief at Women’s eNews.

For more information:

National Women’s Law Center amicus brief:

<http://www.nwlc.org/details.cfm?id=2666§ion=newsroom>

Supreme Court Docket 05-259: <http://www.supremecourtus.gov/docket/05-259.htm>

Equal Employment Opportunity Commission – Sex-Based Discrimination:

<http://www.eeoc.gov/types/sex.html>

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