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In the Workplace, Little Things Mean a Lot

By Charlotte Fishman, WeNews Commentator

Editor's Note: The following is a commentary. The opinions expressed are those of the author and not necessarily the views of Women's eNews.



Charlotte Fishman

(WOMENSENEWS) – The wait for the June 22 Supreme Court decision in the case of a female forklift operator who suffered retaliation after she complained of sexual harassment was white-knuckle time for lawyers who represent women fighting gender discrimination in the workplace.

Discrimination is a complex phenomenon and we know that the glass ceiling for women is held in place as much by micro-iniquities as it is by disparate treatment with clear economic consequences. In the workplace, as in life, even little things can mean a lot.

When the Supreme Court accepted the case for review this term, it entered not only a legal dispute but a fierce controversy between opposing world views about what “means a lot” in the world of work. Since every discrimination case begins with a victim’s complaint, establishing the level of protection available to employees who suffer retaliation after they complain determines how vigorously the laws against employment discrimination are enforced.

Forklift operator Sheila White’s experience is a near perfect example of the hostile treatment faced by many women who accept nontraditional jobs in a blue-collar environment to support their families. On her first day of work, as the only woman on the job in Burlington Northern’s Memphis, Tenn., rail yard, White’s foreman singled her out in front of the other trainees:

He said, “Sheila, when you come on your period, let us know and we’ll make your job lighter.”

Punished for Complaining

She ignored that embarrassment and many others, as women do who try to gain acceptance among their male peers. But ultimately she complained and the foreman was disciplined and sent to sexual harassment training. The catch, though, was that the foreman wasn’t the only one who was punished. White was reassigned from forklift duty to rail repair. Her new assignment was dirtier, more arduous and dangerous, especially since none of the men would help her learn the job.

Just in case that wasn't enough to send the message that complaining about discrimination was not a good career move, soon after reassignment she was accused of insubordination and suspended without pay for 37 days. After enduring economic deprivation and uncertainty about whether she would lose her job over the Christmas holidays, a grievance procedure was resolved in her favor: She was reinstated with back pay. She sued the company for violation of Title VII of the 1964 Civil Rights Act (which prohibits both discrimination in employment and retaliation for complaining) and, after a jury trial, she won.

Burlington Northern, the national freight rail company based in Fort Worth, Texas, appealed the original verdict on grounds that neither White's transfer nor her suspension was bad enough to qualify as unlawful retaliation under Title VII. The Sixth Circuit Court of Appeals rejected the company's argument. Undeterred by its defeat at both the trial and appellate levels, Burlington Northern then petitioned the Supreme Court to take up the case.

Employer Bristled at Interference

The company and its supporters argued that courts should not interfere with employers' ability to change workers' job assignments or to suspend them without pay pending disciplinary proceedings, even if those things were done in retaliation.

The court accepted the case to resolve what is called a "split" among the lower courts: different appeals courts had adopted differing standards for determining the level of harm necessary for an action to constitute retaliation under Title VII. Some courts required an "ultimate employment action" (firing, demotion or decisions with "tangible economic consequences"). Others required only that the action be "materially adverse," and still others required that the action be "likely to deter" complaints of discrimination.

The Latin maxim, "De minimis non curat lex," is roughly translated as "the law does not bother with trifles." But what counts as a trifle is inexorably intertwined with larger issues, such as gender, family circumstance and economic status. Burlington Northern hoped for a categorical rule that would judge White's transfer as a trivial action not worthy of a court's attention. Its supporters argued that anything less than a strict "tangible employment action" requirement would amount to a Get Out of Jail Free card for bad employees, insulating them from criticism or discipline.

A Vivid Object Lesson

White's supporters countered that the exclusion of "lesser" adverse actions would create a "safe harbor" for bad employers who abuse their authority by using punitive transfers or bogus disciplinary proceedings to punish employees who complain about discrimination. They pointed out that Burlington Northern's treatment of White provided a vivid object lesson of the type of retaliation that the court would be sanctioning, if it adopted the rule proposed by the company.

To our great relief, the Supreme Court agreed with White, ruling that retaliation can be any action likely to dissuade a reasonable employee from complaining about discrimination. The

Burlington Northern opinion recognizes that there are innumerable ways for an employer to “yank the chain” of a worker to send a message that complaints are unwelcome.

Thankfully, the Supreme Court got it that working mothers are especially vulnerable and that messing with flexible scheduling arrangements is serious business for women across the economic spectrum. Explaining the reasoning behind the court’s decision, Justice Stephen Breyer wrote that the significance of any given act of retaliation will often depend upon the employee’s particular circumstances: “(C)hange in an employee’s work schedule may make little difference to many workers, but may matter enormously to a young mother with school-age children.”

The fact that the decision was unanimous, and that 8 of the 9 justices – Samuel Alito was the exception – approved a flexible and employee-centered deterrence standard, is especially good news for working mothers and others with caregiving responsibilities. Sheila White’s victory will undoubtedly have a profound effect on the lives of all employees, but working women owe her a particular debt of gratitude for persevering in her nine-year struggle for justice.

Charlotte Fishman is executive director of Pick Up the Pace, a nonprofit organization whose mission is to identify and eliminate barriers to women’s advancement in the workplace, and co-author of the amicus brief submitted to the United States Supreme Court in Burlington Northern v. White by the National Women’s Law Center.

For More Information

“Female Forklifter Takes Her Case to High Court”:
<http://www.womensenews.org/article.cfm/dyn/aid/2709/>

“Mothers at Work Are Canaries in the Mine”:
<http://womensenews.org/article.cfm/dyn/aid/2494/>

National Women’s Law Center: <http://www.nwlc.org/>

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