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Top Court Affirms Sex Discrimination Award

By Toni Locy, Associated Press

WASHINGTON – The Supreme Court made it easier Thursday for workers to show they suffered retaliation after accusing employers of discrimination.

By a 9-0 vote, the justices said that Sheila White, a railroad forklift operator, was improperly punished when her employer suspended her for 37 days over a Christmas holiday and reassigned her to more physically demanding duties as a yard worker. She had accused a supervisor of sexual harassment.

The ruling significantly eases the legal standard for showing retaliation and could lead to more litigation against companies.

“It’s a slam dunk,” said Eric Schnapper, a University of Washington law professor who represents White.

Under the court’s new standard, the justices defined retaliation as any action taken by an employer that would intimidate “a reasonable employee” into backing off from a discrimination complaint.

White was the only woman working in the rail yard for the Burlington Northern Santa Fe Railway in Memphis, Tenn., when she was hired because of her experience operating a forklift.

A company investigation of White’s sexual harassment allegations led to a foreman’s suspension and enrollment in sensitivity classes. But the railroad simultaneously transferred White to work as a regular track worker, a more physically demanding job.

The railroad eventually cleared White of insubordination charges that also were lodged against her.

A jury rejected the sex discrimination charge but found in her favor on the retaliation claim, awarding her \$43,000.

Justice Stephen Breyer wrote that even though White did receive back pay, she and her family had to live 37 days without any income, not knowing when or if she would return to work.

“Many reasonable employees would find a month without a paycheck to be a serious hardship,” Breyer wrote, adding that “an indefinite suspension without pay could well act as a deterrent, even if the suspended employee eventually received back pay.”

Breyer said the court's ruling doesn't immunize employees who complain of discrimination from "those petty slights or minor annoyances that often take place at work and that all employees experience."

He said it will be up to trial courts to determine on a case-by-case basis whether reasonable employees would have been intimidated by actions taken by employers.

"Context matters," Breyer wrote.

A schedule change may not bother many workers, he said, but it may matter greatly to a young mother with small children. Or, Breyer said, a supervisor's failure to invite a worker to lunch might seem trivial unless the luncheon was a weekly training session crucial to the employee's advancement.

Had the justices upheld a stricter standard favored by the railroad and the Bush administration, "It would have created a hole in civil rights protections big enough to drive a forklift through," said Marcia D. Greenberger, co-president of the National Women's Law Center.

Joel Rice, an attorney who represents businesses in employment disputes, said there could be good reasons for schedule changes or for dropping an employee off a lunch guest list.

"It opens up a Pandora's box of potential claims based upon relatively minor slights," he said.

Over the past decade, retaliation claims by employees have more than doubled, making up more than 30 percent of the Equal Employment Opportunity Commission's caseload.

Daniel P. Westman, another attorney who represents businesses in such disputes, said the ruling probably will result in more jury trials of retaliation complaints and reflected growing concern in the courts about protecting witnesses from intimidation in all sorts of cases.

"Retaliation is different," Westman said. "If you are a judge, you want to protect witnesses, and the Supreme Court has a special interest in looking out for the integrity of the courts."

Justice Samuel Alito wrote in a separate opinion that he agreed White was a victim of retaliation. But he worried that the court had created a standard so broad and confusing that it would "leave juries hopelessly at sea."

Schnapper said the court's ruling should force companies to pay closer attention to how low-level supervisors treat workers who have complained of discrimination, especially sexual harassment.

The case is *Burlington Northern Santa Fe Railway v. White*, 05-259.

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