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Discrimination and Retaliation Claims under Chapter 21 of the Texas Labor Code

***Apache Corp. v. Davis*, 627 S.W.3d 324 (Tex. 2021).**

This case addresses the causation standard used in Chapter 21 retaliation cases. In 2006, Apache hired Davis, then 52, as a Senior Paralegal; there were two other paralegals who had been hired four and five years earlier. They were both under 40; one (Eldridge) had the title of Paralegal; the other (Fielder) had the title of Senior Paralegal. Lawyer Dominic Ricotta was hired a year after Davis to head the litigation department at Apache. Ricotta and Davis worked well together for several years, but their relationship "began to sour" after Ricotta promoted Eldridge to Senior Paralegal and added E-Discovery Coordinator to Fielder's title. Eldridge's salary remained below Davis's, but Fielder's increased to be higher than Davis's. Davis was upset that she was not promoted or did not receive additional responsibilities and asked Ricotta for a promotion. She claimed that Ricotta mocked her for her request and threatened to cut her salary. Davis went to another lawyer at Apache, employment lawyer David Bernal, to complain about why she had not been promoted since she was old enough to be the mother of the other two paralegals. Ultimately, Ricotta, at Bernal's request, added Legal Research Specialist to Davis's title but did not increase her pay.

Prior to late 2012, Apache allowed legal department employees to work flexible hours and manage their own schedules. But in November 2012, Ricotta emailed litigation department employees that they needed to maintain normal business hours and that scheduling accommodation requests had to be made to him. Davis had been using the flexible hours by taking midday breaks of several hours to drive her daughter to and from college classes. She asked Ricotta to allow her to continue a flexible schedule; he responded that she needed to try to work normal business hours and submit a schedule reflecting that. Davis then sent an email to Ricotta about how Apache was not in the list of 100 best places to work in Houston that year and that companies that did make the list seemed to value family-friendly flexibility. Davis continued to ask Ricotta to allow her to work outside of normal hours. Ricotta asked Apache's HR Department to put a note in her file regarding her unwillingness to follow his directions regarding work hours, and he emailed her again to instruct her to submit a compliant schedule. Davis did not, but continued to ask for a schedule with hours outside of normal business hours. In the same month (November), Davis worked on a project incurring overtime hours, after Ricotta had instructed her that overtime would not be necessary. Ricotta, according to later testimony, was almost ready to fire Davis at this point.

Davis sent an email to Ricotta, Bernal and HR on December 3, entitled "Confidential – Notice of Discrimination Claim." In it, she complained that Ricotta created a hostile environment by intimidating her, being negative, using hateful works, etc. She stated that Ricotta had a plan to circumvent legal challenges to "age discrimination" and "woman discrimination" and stated she was prepared to take her claim to another level, reminding him that it was unlawful to discriminate or retaliate against an employee for complaining about discriminatory practices. The email mentioned her observations of a pervasive negative attitude towards the advancement of female employees.

Bernal, copying HR, responded to Davis that Apache would promptly investigate her claims and asked if she would be comfortable if he were involved in the investigation, since he reported to Ricotta. She wanted Bernal involved, so he and HR investigated and notified Davis on January 9, 2013 that their investigation had found no evidence of discrimination. After the investigation was closed, Ricotta spoke to members of the litigation department about Davis, since he planned to pick up where he left off before her complaint in dealing with her insubordination. Employees allegedly told him that Davis was trying to stoke a rebellion over the office hours policy, and some lawyers expressed that they did not want to work with Davis. Davis told Bernal that Ricotta ostracized her after the investigation and that she wanted to work only for Bernal. Bernal relayed this to Ricotta and told Ricotta that he could not retaliate against Davis for her December 3 email. On January 25, 2013, Apache terminated Davis. There was testimony from the HR director, Apache's General Counsel and even Bernal that they had all recommended Davis's termination based on her insubordination.

Davis sued for discrimination and retaliation. The jury found no age discrimination but found for Davis on the issue of retaliation and awarded $150,000 in past noneconomic damages and the court awarded an additional $767,242 in attorneys' fees. The Houston court of appeals affirmed, finding that there was sufficient evidence that but for Davis's gender discrimination complaint in the December 3 email, she would not have been terminated.

The Texas Supreme Court reversed. The Court focused on the "but for" standard applicable to retaliation cases, as previously recognized by the Court in *Texas Dep't of Human Servs. v. Hinds*, 904 S.W.2d 629 (Tex. 1995). Under that standard, an employee's protected conduct must be such that, without it, the employer's prohibited conduct would not have occurred when it did. The Court noted that this standard prevents an employee who knows she is about to be fired for poor performance from profiting off an unfounded discrimination charge to protect her from an unrelated employment decision. The Court then addressed the five factors commonly identified as evidence in retaliation cases – (1) knowledge of the protected activity, (2) negative attitude towards the activity, (3) failure to adhere to established polices, (4) discriminatory treatment in comparison to similarly situated employees, and (5) evidence that the stated reason for discharge was false. The Court opined that these factors are not a substitute for the "but for" standard but can be utilized to analyze circumstantial evidence. "The factors may be more helpful in some cases and less in others. Some of the factors may actually be a distraction." In line with that observation, the Court discounted altogether three of the factors cited by the court of appeals as supporting retaliation. The court of appeals had concluded that the timing of Davis's termination, eight weeks after her December 3 email, supported an inference of discrimination. The Supreme Court rejected this, holding that this short delay in termination was not evidence that Apache would not have terminated Davis if she had not sent the email, given that – according to the Court – her insubordination was undisputed. The Supreme Court also rejected the notion that Ricotta's "negative attitude" could be attributed to her email, as opposed to her insubordination. The Court further noted that Ricotta was about ready to terminate Davis in November 2012 and that carrying out a previously planned decision is not evidence of causation, even if the decision was only in the contemplation stage. In essence, the Court rejected that these three factors (timing,

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