

Texas State Law Update

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Chapter 21: Apache Corp. v Davis, p. 1

- Issue: How do you prove causation in a retaliation claim?
- Facts:
 - Davis was a Sr. Paralegal, employed from 2006-2013
 - Previously good relationship with her supervisor, Ricotta, began to sour
 - In 2012, Ricotta changed the flexible hours policy, affecting Davis
 - Davis did not like the change and kept asking to be excepted from it
 - In late 2012, Davis worked overtime despite Ricotta telling her not to do so
 - At this point, Ricotta was almost ready to fire Davis

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Chapter 21:
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- December 3, 2012: Davis sends email: “Confidential – Notice of Discrimination Claim”
- Email said Ricotta had a plan to circumvent challenges to “age discrimination” and “woman discrimination”
- And that Apache had a pervasive negative attitude towards the advancement of female employees

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- 1/9/13: investigation on complaint concluded
- Davis told another Apache lawyer, Bernal, that she did not want to work with Ricotta, but only with Bernal
- 1/25/13: Davis was terminated
- Jury found retaliation (but not discrimination)
- Houston Court of Appeals affirmed
- Texas Supreme Court reversed

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- “But for” causation standard: without employee’s protected conduct, employer would not have terminated employee when it did
- Court said standard prevents an employee who knows she is going to be fired from profiting off an unfounded discrimination claim to protect her from an unrelated employment decision
- Court held that the five factors commonly used to assess retaliation claims (knowledge of protected activity, negative attitude towards it, failure to follow policies, discriminatory treatment in comparison to similarly situated individuals and evidence stated reason was false) are not a substitute for “but for” and may be a distraction in some cases, while helpful in others

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- Court rejected that timing of termination after email (8 weeks) supported an inference of discrimination, given that it was “undisputed” that Davis had been insubordinate
- Court rejected that Ricotta’s negative attitude was attributable to Davis’ email, as opposed to her insubordination
- Court also rejected notion that there was falsity in the reason for termination even with discrepancies in testimony
- And Court rejected notion that Davis was treated differently in being terminated for insubordination (working overtime) in comparison to two younger paralegals who arrived late but did not note that on their timecards – not nearly identical
- Bottom line?

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