Legal Update Article

How Little May an Employee Allege for Retaliation Protection?

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March 29, 2021

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The question of when a worker has raised concerns about discrimination sufficient to gain retaliation protection has not been answered consistently and clearly by courts. A case in Texas may provide clarification.

The Texas Supreme Court, in *Apache Corp. v. Davis*, has been asked to evaluate a lower court ruling on the subject. The lower court had ruled that there must be some indication the protected characteristic at issue motivated the conduct opposed. *Apache Corp. v. Davis*, 573 S.W.3d 475 (Apr. 23, 2019). It stated, "To invoke the anti-retaliation protection of the [state] Labor Code, an employee must oppose conduct the employee reasonably believes is prohibited by the Code. [citation omitted]. *Magic words are not required, but simply complaining of 'harassment,' 'hostile work environment,' 'discrimination,' or 'bullying' is not sufficient*. [citation omitted]."

In this case, the worker's email complaint alleged supervisory bullying, belittling, and abusive behavior, including claims that the supervisor has engaged in "beat downs" and intimidation and use of derisive words. Following her termination, she sued the employer alleging it fired her unlawfully in retaliation for her complaint. The jury found in favor of the plaintiff. The plaintiff was awarded $150,000 plus about $696,000 in attorney's fees. The employer appealed the case to the appellate court.

Reports of bullying, intimidation, or "beat downs" are too vague to be protected, the appellate court said, affirming the jury verdict. Instead, there must be an indication that the claimant believed a protected characteristic, such as age or gender, motivated the retaliatory conduct. The appellate court concluded that the worker's email identified acts of age and gender discrimination and upheld the retaliation verdict.

On its appeal to the Texas Supreme Court, the employer asserts that a worker must do more than recite "buzzwords" of gender and age discrimination when complaining about a hostile work environment. The Texas Supreme Court's decision may clarify the standard in such cases.

According to the Equal Employment Opportunity, its fiscal year 2020 data show that retaliation remained the most frequently cited claim in charges filed with the agency, accounting for 55.8 percent of all charges filed, followed by disability, race, and sex. (Charges can include multiple claims.)

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