New York Law Journal
SERVING THE BENCH AND BAR SINCE 1888
WWW.NYLJ.COM
An ALM Publication
VOLUME 262—NO. 17
WEDNESDAY, JULY 24, 2019

SECOND CIRCUIT REVIEW

Expert Analysis

# Proving Retaliation Claims Under The Age Discrimination Act

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In *Davis-Garett v. Urban Outfitters*, 921 F.3d 30 (2d Cir. 2019), decided this past April, the U.S. Court of Appeals for the Second Circuit clarified the standard for plaintiffs bringing claims of discriminatory retaliation under the Age Discrimination in Employment Act of 1967 (ADEA), which makes it unlawful for an employer to retaliate against an employee by taking any adverse employment action in response to reporting age discrimination, among other types of protected activity. 29 U.S.C. §623(d). In a unanimous opinion, written by Judge Amalya Kearse, and joined by Chief Judge Robert Katzmann and Judge Denny Chin, the court reversed the district court's grant of summary judgment in favor of defendants and remanded the case for trial of the plaintiff's federal claims and additional consideration of her state law claims. For the first time, the court applied the Title VII retaliation standard established by the Supreme Court in *Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006), and held that to prove a claim for discriminatory age retaliation, a plaintiff is not limited to demonstrating discriminatory actions that affect "terms and conditions of employment," but can recover by showing that a reasonable employee might have been dissuaded from making or supporting a charge of discrimination based on the alleged retaliatory action taken.

Less than two months later, the Second Circuit applied *White* for a second time in a summary order without precedential effect, overturning the district court's judgment granting defendant's motion to dismiss plaintiff's age discrimination retaliation claim in *Massaro v. Bd. of Educ. of City Sch. Dist. of the City of New York*, No. 18-2980-CV, 2019 WL 2183483 (2d Cir. May 21, 2019).

Taken together, these decisions illustrate a shift by the Second Circuit in connection with certain standards of federal employment law.

## Prior Proceedings In 'Davis-Garett'

In September 2012, Ms. Garett was 54 years old when she began her employment with the popular clothing and home goods store, Anthropologie. During her tenure, which lasted until October 2013, Garett lodged three different complaints with management about her treatment at the company. The first followed comments by her manager that she was "too old" to be an apparel supervisor, a position for which she wanted to apply. She later received a call from her district manager, Amy Shearer, to address her concerns, and was then promoted to the position. Her second complaint was lodged in July 2013 following comments by the same manager that she was per-

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forming poorly in her new role, including her low "energy level" and slow "pace."

Following that incident, Garett interviewed for a job opening at a New Jersey store and asked Shearer to approve the transfer. When she heard nothing, Garett made her third complaint, this time about the way Shearer was handling the transfer approval. After learning about Garett's latest complaint, Shearer and others decided not to approve Garett's transfer to New Jersey. Instead, Garett was transferred to a store in Connecticut, to which she had not applied. Garett worked there for a few weeks where she was relegated to the fitting room and assigned undesirable tasks. After an incident in October 2013 involving a customer, Garett's employment ended.

Garett filed a complaint with the Connecticut Commission on Human Rights and Opportunities on Feb. 13, 2013, which released jurisdiction. She later filed a complaint in the Southern District of New York, which granted summary judgment for the defendant. *Davis-Garett v. Urban Outfitters*, 2017 WL 4326112 (S.D.N.Y. 2017). In analyzing Garett's retaliation claim, the district court applied the well-known *McDonnell Douglas* burden shifting framework, which requires the plaintiff to prove that he or she participated in protected activity and suffered an *adverse employment action* that had a causal connection to the protected activity. Id. The district court further applied *Galabya v. N.Y.C. Bd. of Educ.*, 202 F.3d 636 (2d Cir. 2000), which defined an adverse action as a "materially adverse change … that [is] more disruptive than a mere inconvenience or an alteration of job responsibilities" and held that a mere transfer to a different location than requested was not a "materially adverse change." Id. at *5 (internal citations omitted). It also held that Garett's promotion weighed against her allegations.

### Prior Proceedings in 'Massaro'

Ms. Massaro was a photography teacher in the New York City public school system from 1993 until her retirement at age 55 in 2016. She filed a lawsuit against the department in late 2011 alleging age discrimination and retaliation for filing an earlier age discrimination lawsuit that was dismissed (the 2011 suit was also dismissed). She alleged that while the second lawsuit was pending and until her retirement, she was the subject of harassment including assignments to large and overcrowded classes with a disproportionately high number of students with behavioral issues, given undesirable teaching schedules, and improperly recorded as excessively absent.

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After filing an action with the EEOC in 2016, the case was eventually brought to federal court. As to Massaro's retaliation claim, the district court held that any adverse employment actions that took place prior to the dismissal of her second lawsuit in May 2013 were precluded on res judicata grounds. In addition, the court held that any adverse actions taken after May 2013 were too remote for Massaro to prove a causal nexus between the lawsuit and the adverse action taken.

### The Second Circuit's Decisions

A key issue in *Davis-Garett* was what constitutes an adverse employment action. Prior to the Supreme Court's decision in *White* in 2006, when *Galabya* was the leading precedent, an adverse employment action meant "a materially adverse change in the terms and conditions of employment," which is the same definition in the context of a substantive claim for discrimination and includes changes such as terminations or demotions. Id. at 43. (citations omitted). In *White*, however, the Supreme Court held that Title VII's "antiretaliation provision, unlike the substantive provision, *is not limited* to discriminatory actions that affect the terms and conditions of employment,'" (emphasis added) and instead, a plaintiff can meet his or her burden by showing "that a reasonable employee would have found the challenged action *materially adverse*, which in this context means *it well might have dissuaded a reasonable worker from making*

*or supporting a charge of discrimination*." Id. (emphasis in original) (quotations omitted). The Supreme Court recognized that "the significance of any given act of retaliation will often depend upon the particular circumstances"; for instance, while refusing to invite an employee to lunch "is normally trivial," that may not always be the case. *White*, 548 U.S. at 69. Since Title VII is "virtually identical" to the ADEA, the Second Circuit in *Davis-Garett* held that *White* applies to retaliation claims under the ADEA and the district court erred by applying *Galabya*. Id. at 41.

The Second Circuit then proceeded to apply *White* to the facts in *Davis-Garett* and concluded that a transfer can be an adverse employment action because its occurrence might dissuade reporting. As to causation, the court held that Garett's managers were aware of her complaint against Shearer before she was transferred to Connecticut, and therefore an inference could be drawn that Shearer made the decision not to transfer Garett because of the complaint made by Garett against her. Such an inference could not support granting summary judgment to Anthropologie.

In *Massaro*, the court ruled that the district court should have considered alleged adverse actions taken while the second lawsuit was *pending* because the occurrence of protected activity can occur "mid-litigation." 2019 WL 2183483, at *3. The court also held there was a plausible temporal relationship between the protected activity involved in Massaro's lawsuit that was dismissed in May 2013 and action taken months later, because summer vacation could have precluded the department from taking any such action until the start of the school year. To make it clear on remand that the retaliatory actions Massaro alleged were adverse, the court applied *White* and held that taken in "combination," the alleged adverse actions could "dissuade a reasonable worker from making or supporting a charge of discrimination." Id.

### Summary Judgment

Separately, but no less important, the court in *Davis-Garett* also issued a reminder about the principles governing the decision of summary judgment motions. After setting forth the "well established framework" for summary judgment, which requires a court reviewing summary judgment to draw inferences favorable to the non-moving party, the court concluded that the district court's decision "reveal[ed] either a piecemeal assessment of items in the record or a rejection of Garett's sworn statements." *Garett*, 921 F.3d at 46. The court ruled that by failing to analyze the fact that Garett was promoted *after* lodging a complaint and that she was criticized for being too slow in her new role, the district court "appear[ed] not to have considered the record as a whole and plainly did not describe it in the light most favorable to Garett." Id.

'Davis-Garett' and 'Massaro' provide a definitive clarification about the standard of proof for a retaliation claim under federal employment discrimination laws.

### Conclusion

*Davis-Garett* and *Massaro* provide a definitive clarification about the standard of proof for a retaliation claim under federal employment discrimination laws. *Davis-Garett* is also a valuable reminder for lower courts and practitioners about how the summary judgment standard should be applied in these cases.