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Labor & Employment Law: Debating a Longstanding Divide in the Federal Circuits

By: Nancy Richards-Stower and Debra Weiss Ford

US Supreme Court Denied Cert in Louisiana Case That Raised Important Issues

Nancy Richards-Stower

Debra Weiss Ford

Editor's note: This is the 15th Bar News debate between employment lawyers Nancy Richards-Stower (employee advocate) and Debra Weiss Ford (employer advocate). Here, they discuss Lavigne v. Cajun Deep Foundations LLC *(appeal from an unpublished decision of the Fifth Circuit Court of Appeals, (Middle District of Louisiana, 2014)), a case denied certiorari by the US Supreme Court on two issues that have long divided the federal circuits: 1) whether a discriminatory termination claim under Title VII requires a replacement hire from a different class; and 2) what types of claims can grow from an EEOC charge after the statute of limitations has run on the charge filing period.*

Nancy Richards-Stower: Deb, I'm disappointed that a race discrimination case from Louisiana won't decide the federal question: whether an employee can prove a discriminatory termination claim under Title VII without having been replaced by someone from a different group?

Deb Weiss Ford: Are you suggesting the history of race in Louisiana would have been at play?

NR: Just saying, local bias can reflect history and geography, and slavery was abolished only 153 years ago. Since then, Louisiana's economic star has not sparkled as brightly for African-Americans as for Caucasians.

DF: Well, the issues in *Lavigne* require Supreme Court clarification, so it is disappointing that cert was denied on March 20.

NR: Currently, the First Circuit law on both issues is pro-employee. Employees can prove discriminatory terminations without having to allege that the fired employee was replaced by someone outside the protected group (*Cumpiano v. Banco Santander Puerto Rico* (1st Cir. 1990).

DF: Also, the First Circuit has a flexible standard for what claims may arise from an Equal Employment Opportunity Commission (EEOC) charge. For example, in a 2001 New Hampshire case, *Clockedile v. NH Department of Corrections*, a retaliation claim "reasonably related" to the underlying EEOC charge, which arose because of the EEOC filing, can be litigated in the underlying case, without looping back to the EEOC to file a new retaliation charge, just "to exhaust administrative remedies."

NR: In *Lavigne v. Cajun Deep Foundations LLC*, an African-American male claimed he was disciplined for infractions for which white employees were not, and was paid less, then fired for complaining about the disparate treatment. But, since he was replaced by another African-American male, the court dismissed his discrimination claim on summary judgment, for failure to make out a *prima facie* case. Next, it dismissed his retaliation claim on the different ground that he failed to exhaust administrative remedies at the EEOC, because his original charge did not specifically plead retaliation, nor did his EEOC cover form have the retaliation box checked. (He filed his claim pro se, it languished, then was transferred to a different EEOC office where a staff person suggested that he amend his charge to include retaliation, which he did, but by then it was more than 300 days from the retaliatory act, and in most Title VII cases, there is a 300-day statute of limitations for filing at the EEOC).

DF: And while EEOC regulations "cure" such statute-of-limitations issues by an "amendments-relate-back-to-the-date-of-original filing-rule," that regulation had only limited utility in the Fifth Circuit, because its case law held that "relation back" claims were available only under the originally pleaded discriminatory motives. Lavigne had pleaded only discrimination within the 300 days, not retaliation, so his retaliation claims were out.

NR: Predictions?

DF: Although I do not agree, I think the Supreme Court eventually will allow discriminatory termination claims without allegations of replacement by a person of a different category, and I think the EEOC will announce some flexible standard for exhaustion of administrative remedies close to our First Circuit law.

NR: I agree. My bet is that since Levigne amended his EEOC charge to allege retaliation while his case was still pending at the EEOC, the statute of limitations is met by the relation-back doctrine, whether or not the EEOC investigated (it thoroughly investigated both claims).

DF: EEOC investigations were at issue in another recent Supreme Court case, *CRST Van Expedited, Inc. v. EEOC* (2016). It was remanded for a determination of whether the EEOC's argument (that it had investigated and conciliated sufficiently before bringing a class action suit) was a "frivolous argument." If the court on remand finds that the EEOC made a frivolous argument, the EEOC will have to pay the employer's resulting $4 million attorney fees.

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