The Faragher-Ellerth Affirmative Defense as Implied Waiver of Privileges: Is the Defense a Shield or Double-Edged Sword?

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ARTICLE: THE FARAGHER-ELLERTH AFFIRMATIVE DEFENSE AS IMPLIED WAIVER OF PRIVILEGES: IS THE DEFENSE A SHIELD OR DOUBLE-EDGED SWORD?

[*38] Emerging case law involving the implied waiver of privileges has revealed a pitfall for employers defending against discrimination allegations. Employers in those cases unintentionally waived any privileges covering their internal investigations of employee discrimination complaints by relying on those investigations as an affirmative defense in ensuing litigation involving the complaints. The courts refused to allow employers to use privileges as a sword rather than a shield and, consequently, forced employers to produce confidential information and materials gathered during internal investigations and required their legal counsel to divulge privileged communications and work product relating to the investigations.

[*40] Courts have long recognized that notice of workplace discrimination triggers a duty upon employers under Title VII of the Civil Rights Act of 1964, 42 U.SC §§§§ 2000e et seq., to take reasonable steps to investigate and eliminate the conduct. See Snell v. Suffolk County, 782 F.2d 1094, 1104 (2nd Cir. 1986); Ways v. Lincoln, 705 F. Supp. 1420, 1422 (D. Neb. 1988). In landmark companion decisions issued in 1998, the Supreme Court reinforced the importance to employers of taking affirmative steps to prevent discriminatory conduct from occurring and of investigating and responding to incidents of workplace discrimination once they become known. Faragher v. City of Boca Raton, 524 U.S. 775 (1998); Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998).

The holdings in Faragher and Ellerth clarified that, even if a supervisor or manager sexually harassed a subordinate employee, the employer may escape "vicarious liability" under Title VII for the harasser's conduct by proving that it used "reasonable care" to prevent and correct any sexually harassing behavior and that the plaintiff employee "unreasonably failed" to take advantage of available anti-discrimination policies to bring the problem to the employer's attention before resorting to a lawsuit. Faragher, 524 U.S. at 807; Ellerth, 524 U.S. at 765. This defense, commonly referred to as the "prompt remedial action" defense, applies only when the supervisor's or manager's conduct does not result in a "tangible employment action" against

the employee such as a discharge, demotion or undesirable reassignment. Lower court decisions have extended the holdings in Faragher and Ellerth to apply to the other forms of discrimination that Title VII prohibits, including discrimination based on race, color, religion or national origin. See Spriggs v. Diamond Auto Glass, 242 F.3d 179, 186 n.9 (4th Cir. 2001).

By enabling employers to avoid liability in some circumstances based on proof that they undertook prompt remedial action in response to complaints of sexual harassment or discrimination, Faragher and Ellerth give employers a strong incentive to raise the defense in their responsive pleadings and to present evidence at the trial concerning their investigations of the complaints. Because the defense employs a "reasonable care" standard in analyzing the appropriateness of the employers' actions, the fact-finder must necessarily engage in a fact-intensive scrutiny of the extent, quality and details of the employers' investigations of the alleged discrimination to determine whether they satisfied their burden of proving the defense. See Thompson v. Town of Port Royal, 117 F. Supp. 2d 522, 529 (W.D. Va. 2000); Wellpoint Health Networks, Inc. v. Superior Court, 68 Cal. Rptr. 2d 844, 855-56 (Ct. App. 1997).

The Faragher-Ellerth defense focuses on the conduct of the employer's investigator in responding to the allegations of sexual harassment as opposed to the conduct of the alleged harasser. Consequently, the employer's investigation of the harassment complaint is the centerpiece of the employer's prompt remedial action defense and, because of the nature of the investigation that must be conducted to prove the defense, the investigator often becomes the most crucial witness to support the defense at trial. Whenever an employer uses legal counsel to conduct an investigation of an employee's discrimination complaint, there is a good chance that the lawyer will become a fact witness in any ensuing litigation.

Due to the importance of conducting legally sound investigations of harassment and discrimination complaints and given the complexity and sophistication of the workplace discrimination laws, it is unsurprising that employers routinely turn to their in-house and outside legal counsel for assistance in handling these investigations. Legal counsel frequently participate in the investigations by interviewing relevant witnesses; reviewing personnel documents; preparing notes and summaries of important facts; and drafting reports that make findings, conclusions and recommendations. Employers rely upon their legal counsel to evaluate the credibility of witnesses and to help sift through the conflicting factual information.

Employers that hire attorneys to investigate employee claims of sexual harassment or discrimination often do so with the expectation that the investigative materials (including any adverse facts uncovered during the investigation and the employer's communications with the investigating attorney) will be cloaked in the attorney-client or work product privileges. However, although it does not appear that a South Carolina court has addressed this issue, a

growing body of published and unpublished court decisions from other jurisdictions shows that employers are unwittingly waiving important legal privileges by asserting the Faragher-Ellerth affirmative defense.

Even before Faragher and Ellerth, many courts had held that employers could avoid liability under Title [*41] VII by proving the reasonableness of their investigations in responding to and remedying harassment complaints. See Katz v. Dole, 709 F.2d 251, 256 (4th Cir. 1983) (requiring a Title VII plaintiff to "show that the employer knew or should have known of the harassment, and took no remedial action to correct the situation" and holding that the employer may defend against the claim "by pointing to prompt remedial action reasonably calculated to end the harassment"). As employers sought the protection of these cases and began relying upon their investigations as a defense against liability, employees sought access to the materials and information compiled during those investigations to show that the employers failed to exercise reasonable care to correct the problem promptly. In rebuttal, the employers attempted to thwart discovery of this information by relying on various privileges (e.g., attorney-client, work product and self-critical analysis) to shield the information and materials from disclosure.

The early cases confronting this issue routinely invoked the "implied waiver doctrine" to compel disclosure of information prepared or gathered by an employer's legal counsel during the investigation of an employee's harassment or discrimination complaint — even though the material otherwise would have been protected from discovery by the attorney-client, work product or some other privilege — when the employer relied upon the investigation in defending against the employee's lawsuit. See Worthington v. Endee, 177 F.R.D. 113 (N.D.N.Y. 1998); Quiroz v. Hartgrove Hosp., 1998 U.S. Dist. LEXIS 7194 (N.D. Ill. Apr. 28, 1998); Peterson v. Wallace Computer Servs., 984 F. Supp. 821 (D. Vt. 1997); Johnson v. Rauland-Borg Corp., 961 F. Supp. 208 (N.D. Ill. 1997); Payton v. New Jersey Turnpike Auth., 691 A.2d 321 (N.J. 1997). Implied or "at issue" waiver occurs when a litigant asserting a privilege places the allegedly privileged communication "at issue" through an affirmative act such as the assertion of an affirmative defense, thereby making the protected communication relevant and necessary to the litigation. Worthington, 177 F.R.D. at 116; United States v. Bilzerian, 926 F.2d 1285, 1292 (2nd Cir. 1991).

In the seminal case of Harding v. Dana Transp., Inc., 914 F. Supp. 1084 (D.N.J. 1996), two female employees quit their jobs and filed a sexual harassment lawsuit against their former employer under Title VII. Prior to the filing of the lawsuit, the employer hired an attorney (from the same firm that later became its trial counsel in the subsequent lawsuit) to investigate the plaintiffs' claims. The attorney interviewed the employer's president, controller and managers. The employer eventually used the results of the attorney's investigation to prepare a position statement that was submitted to the state administrative agency responsible for investigating the plaintiffs' charges of discrimination, to develop a defense strategy for handling the

administrative charges and any future litigation and to formulate a sexual harassment policy.

During discovery in the sexual harassment lawsuit, the plaintiffs' counsel noticed the deposition of the investigating attorney and requested production of his investigative materials (including attorney notes, tape recordings, time sheets, billing records and correspondence to and from the client). The employer invoked the attorney-client, work product and self-critical analysis privileges in an attempt to secure a protective order prohibiting the deposition and barring discovery of the lawyer's files and records. However, the court rejected the employer's arguments and ordered the discovery to take place even though it agreed that the information was subject to the attorney-client and work product privileges. The court found that the employer affirmatively placed the confidential communications "at issue" and waived any privileges because of its "reliance upon the investigation as a defense to employer liability under Title VII and [state law]." Id. at 1093, 1099. The court predicated its finding of waiver on fairness principles and held that privileges should be used solely in a defensive posture and not as an offensive method of litigation. Stated differently, a defendant cannot use a privilege "as both a sword and a shield." Id. at 1096.

The Harding court rebuked the employer's attempt to "limit exposure of the specifics of the investigation by asserting that it relied only on the fact of the investigation as a defense" and not the content of the investigation. Id. at 1093. The court observed that without evidence of the actual content of the investigation, neither the plaintiffs nor the fact-finder would be able to adjudge the adequacy of the employer's investigation into the plaintiffs' allegations of sexual harassment or the reasonableness of the employer's actions based on the circumstances known to it and its advisors. Id. at 1093-96. The court refused to allow the employer "to define selectively the subject matter of the advice of counsel on which it relied in order to limit the scope of the waiver . . . and therefore the scope of discovery." Id. at 1095. Instead, the court ruled that to rebut the employer's "investigation" defense, the plaintiffs "must be able to test what information had been conveyed by the client to counsel and vice-versa regarding that advice — whether counsel was provided with all material facts in rendering their advice, whether counsel gave a well-informed opinion[,] and whether that advice was heeded by the client." Id.

Since the Supreme Court's decisions in Faragher and Ellerth, the trend of cases has continued to find [*42] that an employer cannot rely on its investigation of harassment or discrimination conducted by or under the supervision of its legal counsel while at the same time shielding the investigation from discovery. Instead, the employer's use of the investigation to support its prompt remedial action defense impliedly waives any applicable privileges. See McGrath v. Nassau County Health Care Corp., 204 F.R.D. 240 (E.D.N.Y. 2001); Jones v. Scientific Colors, Inc., 2001 U.S. Dist. LEXIS 10753 (N.D. Ill. July 26, 2001); Brownell v. Roadway Package Sys.,

Inc., 185 F.R.D. 19 (N.D.N.Y. 1999); Miller v. Fed. Express Corp., 186 F.R.D. 376 (W.D. Tenn. 1999); Volpe v. US Airways, Inc., 184 F.R.D. 672 (M.D. Fla. 1998).

In Brownell, for example, a sexual harassment plaintiff moved to compel production of witness statements that the employer's legal counsel obtained during his investigation of the plaintiff's allegations. Although the court agreed with the employer that the statements were covered by the attorney-client and work product privileges, it held that the employer waived any privileges by pleading the Faragher-Ellerth affirmative defense and by relying upon its investigation of and response to the plaintiff's sexual harassment allegations to prove the defense. The court stated:

The Court finds, however, that [the employer] waived its right to invoke the [attorney-client or work product privileges] by asserting the adequacy of its investigation as a defense to Plaintiff's claims of sexual harassment. First, by arguing that it "fully and fairly" investigated Plaintiff's allegations while objecting to the production of statements obtained in the course thereof, Defendant is attempting to use the privilege as both a sword and a shield. This it may not do. Rather, equity requires that Plaintiff be permitted to explore the parameters of the investigation in order to rebut this affirmative defense. Second, by asserting the adequacy of its investigation as a defense to Plaintiff's allegations, Defendant has implicitly waived the [privileges] by placing the investigation "in issue." Whether an employer's response to an employee's allegation of sexual harassment is reasonable must be assessed from the totality of the circumstances, including "the gravity of the harm being inflicted upon the plaintiff, the nature of the employer's response in light of the employer's resources, and the nature of the work environment." Where, as here, the employer defends itself by relying upon the reasonableness of its response to the victim's allegations, the adequacy of the employer's investigation becomes critical to the issue of liability. The only way that Plaintiff, or the finder of fact, can determine the reasonableness of Defendant's investigation is through full disclosure of the contents thereof.

185 F.R.D. at 25 (citations omitted); see also McIntyre v. Main St. & Main, Inc., 2000 U.S. Dist. LEXIS 19617, at *9 (N.D. Cal. Sept. 29, 2000) ("Plaintiffs are correct that defendant cannot rely on the investigation by outside counsel as part of its defense, while at the same time shielding the investigation from discovery. Any use of the investigation in its defense would waive the [attorney-client and work product privileges].").

It is noteworthy that the Harding court observed that employers can avoid waiver of privileges covering their investigative materials "by refraining from defending themselves on the basis of reasonable investigation." Harding, 914 F. Supp. at 1099. Several other courts have specifically refused to hold that employers waived any privileges covering their internal investigations of discrimination complaints because the employers disavowed any reliance upon their investigations as a defense to subsequent discrimination claims. See McIntyre, 2000 U.S. Dist. LEXIS 19617, at *10-11; Robinson v. Time Warner, Inc., 187 F.R.D. 144, 146-47 (S.D.N.Y.

1999); Scurto v. Commonwealth Edison Co., 1999 U.S. Dist. LEXIS 513, at *13-15 (N.D. Ill. Jan. 11, 1999).

In conclusion, employers should conduct their investigations of discrimination allegations with the objective of using the investigator's testimony, notes and findings to support the employer's prompt remedial action defense in a subsequent discrimination lawsuit, but with the mindset that any and all investigative materials will be subject to discovery. Moreover, employers should not haphazardly plead the Faragher-Ellerth defense in every discrimination lawsuit. Although the defense might provide an employer with a valuable shield against liability and damages under Title VII, raising the defense places at issue the extent, quality and details of the employer's investigation of the alleged discrimination and will most likely cause the waiver of any privileges applicable to the employer's investigative materials. Consequently, before an employer uses its investigation of an employee's discrimination complaint as a shield against liability, it must consider whether production of the investigative materials will instead become a sword for the employee.

