Avoid the Common Mistakes

A Proper Investigation May Provide a Good Defense, and Vice Versa

By Linda G. Burwell

Investigating is clearly one of the most important things that an employer can do to reduce its exposure to retaliation and whistleblower claims.

Employers often call upon lawyers when faced with internal allegations of discriminatory behavior. Such lawyers and their clients should be aware of the implications that may arise in these circumstances. Even a properly conducted investigation could result in the loss of the attorney-client privilege if certain precautions are not followed. A poorly conducted investigation can make a bad situation worse.

Conducting a proper investigation may help an employer make the right decision at the outset and avoid a retaliation claim. According to the Equal Employment Opportunity Commission's statistics, retaliation claims continue to be the most common claim filed, constituting more than 40 percent of all claims filed in 2013. The growing numbers of filed retaliation cases coupled with the fact that many federal agencies continue to add new whistleblower protections for employees, make it increasingly important that employers know how to conduct investigations properly.

Some courts have extended the *Faragher-Ellerth* defense to whistleblower cases as well as to Title VII cases. The *Faragher-Ellerth* affirmative defense, established by the United States Supreme Court holdings in companion cases, *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), and *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998), allows an employer faced with a hostile work environment case the opportunity under certain circumstances to avoid vicarious liability by affirmatively alleging and proving "(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm

■ Linda G. Burwell is the president of National Employment Counsel PLLC in Pleasant Ridge, Michigan, a national niche firm serving in-house counsel, law firms, and insurers, specializing in workplace investigations, consulting, monitoring, and mediation. Ms. Burwell is a long-time member of DRI and the DRI Employment and Labor Law Committee. She is an ABA Foundation fellow and has received numerous awards and honors including being recognized in the Best Lawyers in America, Chambers USA, and as one of Michigan's Super Lawyers, Leaders in the Law by *Michigan Lawyers Weekly*.

otherwise." *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807.

Conducting a prompt, thorough, and impartial investigation into an employee's concerns is not only good business sense, it is often a crucial element of the *Faragher/Ellerth* defense. Amazingly, employers too often lose the ability to assert this defense because they fail to conduct an investigation in the first instance. Too often, employers don't conduct an investigation because someone has prematurely concluded that the complaint is not a valid one. For example, an employer might think, "I know him. He would never engage in that type of behavior," or "She complains all the time," or worse yet, "That's nothing, you should just learn to deal with it." Regardless of how improbable an allegation might seem, or how trite a complaint might be, an employer should conduct an investigation. Often, especially when the facts are bad, it may be the only defense that the employer has or the best way to limit its exposure.

There are certain important consequences of relying on this affirmative defense when it stems from the results of an internal investigation, however, and it is incumbent upon in-house counsel and defense counsel to understand these consequences.

By asserting a *Faragher-Ellerth* affirmative defense that is premised on the results of an internal investigation, employers may waive the attorney-client privilege and work product protections that might otherwise apply. This waiver may occur not only for any report that is prepared, but also for any document or communication considered, prepared, reviewed, or relied on by the company in creating or issuing the investigatory report.

Two recent cases highlight that if an employer intends to assert this defense, it has to be prepared to disclose all communications, witness interviews, notes, and memoranda in addition to any report that an investigation generates.

In *Koumoulis et al. v. Independent Financial Marketing Group, Inc., et al.,* 2013 WL 5934032 (E.D.N.Y. Nov. 1, 2013), the plaintiffs alleged discrimination and retaliation and sought production of documents containing communications between the defendants' vice president of Human Resources and the defendants' outside counsel concerning internal investigations of the plaintiffs' initial harassment complaints. Although the defendants' vice president of Human Resources conducted the investigation, the company's outside counsel assisted with the investigation.

The magistrate judge ordered the defendants to provide all the communications between their outside counsel and the defendants and ordered the defendants' outside counsel to appear to testify in a deposition.

The defendants objected to the magistrate's order. They argued that their outside counsel had no role in the investigation other than to render legal advice for the purpose of preventing retaliation claims and mounting a legal defense, and thus, the magistrate erroneously ruled that any privilege was waived by the defendants' assertion of the *Faragher-Ellerth* defense.

Judge Pamela Chen of the Eastern District of New York, affirmed the magistrate's ruling, reasoning, "[The magistrate judge] specifically found that defendants' outside counsel, Ms. Bradley, 'was not a consultant primarily on legal issues, but instead… helped supervise and direct the internal investigations as a primary adjunct member of defendant's human resources team.'" *Koumoulis et al. v. Independent Financial Marketing Group, Inc., et al.,* 10 -cv -0887, 2014 WL 223173, at *2 (E.D.N.Y. Jan. 21, 2014).

The court further instructed, "[E]ven if these communications were covered by the attorney-client privilege, by asserting a *Faragher-Ellerth* defense, defendants waived that privilege with respect to any documents relating to the reasonableness of defendants' efforts to correct the allegedly discriminatory behavior and the reasonableness of its investigative policies and practices." *Id.* at 8. *See Angelone v. Xerox Corp.,* No. 09 Civ. 6019 (CJS) (JWF), 2011 WL 4473534, at *2–3 (W.D.N.Y. Sept. 26, 2012), *reconsideration denied,* No. 09 Civ. 6019 (CJS)(JWF), 2012 WL 537492 (W.D.N.Y. Feb. 17, 2012).

In *Koss v. Palmer Water Department, et al.,* 2013 WL 5564474 (D. Mass. October 7, 2013), when the plaintiff, Lisa Koss, reported sexual harassment by a co-worker, the water department hired its long-time outside counsel, Henry Rigali, to investigate and report on her claims. After Koss was terminated, she filed a sexual harassment and retaliation complaint against the company. Understanding that Rigali's report and notes would not be privileged, the water department hired another law firm, Royall LLP, to represent it in the legal proceedings.

The court, also relying on *Angelone v. Xerox Corp*, 2011 WL 4473534 (W.D.N.Y. Sept. 26, 2012), granted the plaintiff's motion to compel documents relating to the investigation. The court explained:

> When a Title VII defendant affirmatively invokes a *Faragher/Ellerth* defense that is premised… on the results of an internal investigation, the defendant waives the attorney-client privilege and work product protections for not only the report itself, but for all documents, witness interviews, notes and memoranda created as part of and in furtherance of the investigation.

Koss, 2013 WL 5564474, at *2–3 (citing *Angelone,* 2011 WL 4473534, at *2).

The court, moreover, ordered production of documents from both Rigali, who conducted the investigation, and Royall LLP, the company's outside attorney firm. The court ordered communications and notes of the outside law firm, because it determined that although not personally conducting interviews, Royall LLP attorneys not only directed and collaborated with the investigator, Rigali, but exercised significant control and influence over Rigali throughout the investigation. The court found that Royal LLP attorneys actively participated in an ongoing way in the investigation; they offered guidance, advice, and direction.

Regardless of how improbable an allegation might seem, or how trite a complaint might be, an employer should conduct an investigation.

These cases demonstrate that the simple act of hiring outside or separate counsel to investigate discrimination allegations may not be enough to protect the privileges. Too often counsel are lulled into believing that by designating a specific person to be the "investigator," they will be able to freely communicate with that investigator and protect the communications from disclosure. Before an investigation begins, counsel should determine who will conduct it, who will direct it, and who will be privy to communications regarding the investigation.

Before an investigation begins, counsel should determine who will conduct it, who will direct it, and who will be privy to communications regarding the investigation.

Not only are employers losing the defense, courts are sanctioning employers for asserting the defense and then not disclosing or not providing information relating to an investigation.

A recent case demonstrates just how damaging these sanctions can be. In *EEOC v. Spitzer Management, Inc., et al.*, 2013 WL 2250757 (N.D. Ohio 2013)(1:06CV2337, 1:08CV1326, 1:08CV1542, and 1:09CV255), the defendant failed to produce several notes related to investigations conducted by the defendant's general counsel, who was at one time the company's chief operating officer and trial counsel of record, and one of the associates at his former law firm. When the general counsel was deposed, he referred to his notes and said that they should be in the company's files. Despite relying on the *Faragher-Ellerth* defense, trial counsel never produced these notes. During trial, when the issue of the notes arose, the court ordered the defendants to produce them within 24 hours. The notes were found.

Due to the defendants' failure to produce the notes earlier, the court declared a mistrial and awarded fees and costs to the plaintiff in the amount of $300,000. The court levied the award against all defense counsel, including the general counsel and the current trial counsel, and the court made the award joint and several with each of the corporate defendants, reasoning, "as [general counsel] initially wore both hats, as management for Spitzer and its attorney of record, the court cannot draw a firm line between the conduct of counsel and the parties."

Even when employers provide all their notes, communications, and reports relating to their investigation to the complainant, they can still lose their defense or the ability to proffer certain evidence at trial when their investigation is challenged as improper, defective, biased, or inadequate. Although the Supreme Court did not define the elements of a proper investigation in the *Burlington* and *Ellerth* decisions, courts are beginning to identify what a bad investigation looks like. For example, in *Castelluccio v. IBM,* 2013 WL 6842895 (U.S. D. Conn. Dec. 23, 2013), the plaintiff, James Castelluccio, who was 60 years old and had worked for IBM for 40 years, filed a report of age discrimination with IBM when he was given a separation agreement but before he was terminated. Russell Mandel, a human resources consultant conducted an "open door" investigation of Castelluccio's claims. Mandel concluded that IBM had treated Castelluccio fairly with regard to his termination and informed Castelluccio of his findings, although a year later.

During litigation, IBM asserted the *Ellerth-Faragher* defense and relied heavily on Mandel's investigation. Castelluccio filed a motion to preclude IBM from introducing certain evidence, including (1) Mandel's report, which summarized his findings of the "open door" investigation; (2) hand-written notes prepared by Mandel during interviews with IBM employees; and (3) Mandel's testimony regarding the findings of the open door investigation.

The court granted Castelluccio's motion and excluded the evidence due to its prejudicial effect. The court reasoned that

> [a]lthough the open door investigation purports to have determined whether Mr. Castelluccio was treated fairly, it represents only the findings and conclusions of IBM, as opposed to Mr. Castelluccio's account of the circumstances surrounding his termination. This was not an investigation conducted by a neutral party; rather, one conducted by Mr. Mandel, who selected whom to interview and what evidence to consider… Moreover, the open door investigation focuses more on Mr. Castelluccio's job performance than his claim of age discrimination.

Id. at 5–6.

The court also noted that there was "reason to suspect that the purpose of the investigation was more to exonerate IBM than to determine if Mr. Castelluccio was treated fairly. By Mr. Mandel's own admission, had Mr. Castelluccio signed the separation agreement releasing IBM from all legal liability, he would have discontinued his investigation." *Id.*

The court later determined that IBM should be allowed to present some evidence to demonstrate that it did not act in a willful manner and modified its earlier order, allowing Mandel to testify for the limited purpose that he conducted a thorough investigation into Castelluccio's claim of age discrimination. After a nine-day trial, Castelluccio was awarded close to $3,500,000 in damages and attorneys' fees.

It appears that this trend will continue, as evidenced by *Jonathan Waters v. Michael Drake, et al.*, Case 2:14-cv-01704-JLG–TPK Doc #1 (filed Sept. 26, 2104), yet one more example of a case in which a plaintiff has alleged a bad investigation into his or her claims. On September 29, 2014, Jonathan Waters, the award-winning band director of the Ohio State University (OSU) Marching Band, filed a wrongful termination lawsuit after an investigation conducted by the university's in-house compliance department uncovered "a sexualized culture" among the band members.

In his lawsuit, Waters has claimed that there were defects in the investigatory report and that the school made a rush to judgment based on the inaccurate report. He has claimed that the investigators interviewed only a tiny sample of current and former band members in the course of the investigation. He further

Investigation, continued on page 77

Investigation, from page 44
has asserted that several of those individuals have since come forward to state that they were misquoted in the report, information that they provided to the investigators that reflected positively on Waters was ignored, and he was not allowed to provide his own witnesses in the course of the investigation. Shortly after filing its answer, the university filed a motion to dismiss. It will be interesting to follow the case and see how the court will scrutinize the investigation.

Investigating is clearly one of the most important things that an employer can do to reduce its exposure to retaliation and whistleblower claims. However, it is incumbent upon counsel to avoid the common mistakes that employers often make, especially if an employer intends to rely on the *Faragher-Ellerth* affirmative defense. As demonstrated by the cases mentioned above, stopping an investigation too early can have unintended or negative consequences. An employer may stop an investigation if the complainant signs a separation agreement, leaves employment, files an agency charge, or sues. If a company is interested in a good workplace for its employees, it should investigate fully any complaint regardless of whether the complainant has signed a release, is still employed, and regardless of whether he or she files an agency charge. A full investigation will not only provide the facts relative to the subject complaint, but it is a good vehicle to learn of problems that could be departmentwide or companywide.

Another common mistake is to discontinue an investigation if a complainant requests that nothing be done, or even worse, if the complainant is not cooperative. These complaints should be investigated. The complainant may have a sinister motive for requesting that nothing be done.

- The take away from these cases is clear.
- Don't make a premature conclusion and fail to investigate;
- Don't end an investigation too early;
- Gather the facts from all necessary individuals and relevant sources;
- Choose wisely who will conduct the investigation;
- Choose also who will control the investigation;
- If you use an outside independent investigator, allow your investigator complete control of the investigation;
- Understand that if the *Faragher-Ellerth* defense is asserted, the attorney-client and work product privileges may be waived;
- Be mindful at all times that communications with investigators, even if they are outside counsel, may not be protected and may have to be disclosed;
- The more you have your hands on an investigation, the more likely you will be found to have waived the attorney-client privilege; and
- If certain requested communication and documents are not provided, you may run the risk of being sanctioned. FD