$300,000 Sanctions Award in Title VII Case Reignites Rule 3.7 Discussion

By Lorene F. Schaefer – January 15, 2014

Due to the importance of conducting legally sound investigations of harassment and discrimination complaints and given the increasing sophistication of plaintiffs' counsel in attacking an employer's assertion of the *Faragher/Ellerth* affirmative defense, many employers use attorneys to conduct these types of investigations. Often, they will also, as a matter of course, use their regular counsel (in-house or outside) to do the investigation, with minimal to no strategic consideration of that selection decision or evaluation of the potential conflict issues.

A recent $300,000 sanction in a Title VII case against an employer and its counsel by a federal court in Ohio serves as a cautionary tale for employers and their counsel on the importance of making strategic, thoughtful selection decisions when selecting legal counsel to conduct an investigation into an internal complaint covered by Title VII. The case has also reignited the discussion about whether the professional rules of conduct should be amended to clarify that the roles of Title VII litigation counsel and Title VII investigation counsel are inherently incompatible.

In the recent case, *EEOC v. Spitzer*, No. 1:06CV2337 (N.D. Ohio 2013), the court declared a mistrial seven days into the jury trial after it was discovered that the employer had failed to produce the investigation notes of the attorney who conducted the internal workplace investigation into the plaintiff employees' complaints of discrimination, harassment, and retaliation. Following the mistrial, the Equal Employment Opportunity Commission (EEOC) filed a motion seeking attorney fees and costs. In a sternly written 18-page order, the trial judge granted the EEOC's motion and held the employer and its counsel jointly and severally liable for over $300,000.

In his opinion, the trial judge also hinted at the potential conflict of interest that lurks in the background anytime an employer asserts the *Faragher/Ellerth* affirmative defense and then uses the same investigating attorney as litigation counsel. He noted that because the employer had "relied heavily on the *Faragher-Ellerth* defense in this matter," the "heart of the defense would necessarily center around how [the employer] responded to and investigated complaints of harassment and discrimination." For that reason, once the *Faragher/Ellerth* affirmative defense has been asserted, the investigation itself often becomes a matter of factual dispute and the attorney who investigated the employee complaint will very likely be called as a fact witness at trial.

In the *Spitzer* case, Rule 3.7 of the Ohio Rules of Professional Conduct applies. It provides, in pertinent part:

RULE 3.7: LAWYER AS WITNESS

(a) A lawyer shall not act as an advocate at a trial in which the lawyer is likely to be a necessary witness unless one or more of the following applies:

(1) the testimony relates to an uncontested issue;
(2) the testimony relates to the nature and value of legal services rendered in the case;
(3) the disqualification of the lawyer would work substantial hardship on the client.

(b) A lawyer may act as an advocate in a trial in which another lawyer in the lawyer's firm is likely to be called as a witness unless precluded from doing so by Rule 1.7 or 1.9.

Although neither of the attorneys who conducted the underlying investigation was listed as defense counsel, another attorney from the same law firm continued as trial counsel. Presumably, the parties and the trial judge had determined that subsection (b) to Rule 3.7 applied. It is also quite possible, however, that the EEOC had strategically refrained from raising this issue, concluding that it could use this fact to attack at trial the lack of impartiality in the underlying internal investigation. If it were successful in this line of attack, the employer's *Faragher/Ellerth* affirmative defense could fail.

One other aspect of the order particularly relevant for company counsel is the judge's discussion of the attorney's handwritten witness interview notes. The judge's analysis highlights the tension that can be created when an employer's regular counsel is used to conduct the investigation. The EEOC's *Enforcement Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors* (issued 1999) and most subsequent court decisions require an employer to demonstrate, as a part of its *Faragher/Ellerth* affirmative defense, that its investigation into the employee's complaint was not only prompt and thorough but also *impartial*.

Evidently, the attorney investigator's practice was to take handwritten notes during witness interviews and then to prepare typed witness statements that were signed by the witness. The attorney's typed witness statements were produced in discovery, but the handwritten notes were not produced until after the trial had started. In comparing the handwritten notes with the typed witness statement, the judge was rightfully troubled by the attorney investigator's statement in her handwritten notes "BAD for US" to refer to a statement by the witness that he had heard a coworker use a Nairobi accent when paging the plaintiff in the workplace. Neither the comment "BAD for US" nor the report of the use of a Nairobi accent was included in the typed witness statement.

Plaintiffs' counsel will often attempt to defeat an employer's *Faragher/Ellerth* affirmative defense by demonstrating that the employer's investigation was not impartial. It seems likely that the above-described handwritten notes of the attorney investigator will be plaintiffs' counsel's exhibit 1 should this case be retried.

Insights and Guiding Principles for Employers' Counsel
It is common and appropriate in some circumstances for employers to use their regular counsel (in-house or outside) to conduct internal workplace investigations of employee claims of harassment, discrimination, or retaliation. Indeed, I have done so as both in-house counsel and as an employer's regular outside counsel.

In writing this article, I am in no way arguing for a bright-line prohibition against the use of an employer's regular counsel or even arguing that an employer should always use an attorney to conduct these types of internal workplace investigations. What I am urging, however, is for employers and their regular counsel to make these decisions in a more thoughtful and strategic way. I also acknowledge that my own thinking on this topic has evolved and grown sharper over the years.

For employers and their regular counsel faced with the need to conduct a prompt, thorough, and impartial investigation that they may subsequently use to assert the *Faragher/Ellerth* affirmative defense, my general practice is to suggest that the employer's regular counsel retain a separate employment attorney who specializes in conducting these types of impartial fact-finding investigations. Under this type of retention agreement, the retained attorney-workplace investigator works at the direction of the employer's regular

counsel and conducts an independent investigation and provides the employer's counsel with relevant factual findings so that the regular counsel can provide legal advice to the employer.

Structuring the retention agreement in this manner provides the employer with all of the benefits of having an experienced employment attorney conduct the investigation while at the same time avoiding the problems that can arise if the same attorney conducts an internal investigation and is called on to represent the client in a continuing dispute with the employee, as discussed above. Such structuring also provides the employer and its regular counsel the flexibility of deciding at a later point whether to use the investigation and its findings should litigation ensue. Should litigation ensue, the expert attorney-workplace investigator would also be available to assist in the litigation by serving as a witness to testify at trial about the investigation.

In conclusion, there are two guiding principles for company counsel faced with an internal complaint of discrimination or harassment:

- When selecting counsel to conduct an internal investigation of claims implicating Title VII, anticipate the conflict of interest presented if the company subsequently decides to assert the *Faragher/Ellerth* affirmative defense.
- If the company anticipates asserting the *Faragher/Ellerth* affirmative defense and using the underlying workplace investigation as evidence, retain separate defense counsel at a separate law firm.

Keywords: litigation, employment law, labor relations, internal investigations, *Faragher/Ellerth*, attorney as witness, harassment investigations.

Lorene F. Schaefer is with Schaefer & Associates, LLC, in Atlanta, Georgia.

More Information
» Employment & Labor Relations Home
» News & Developments
» Articles
» Programs & Materials
» Related Resources
» Employment & Labor Relations Committee
- About
- Join

Publications
Employment & Labor Relations Law E-Newsletter
» Winter 2014

Sound Advice
Recent Sound Advice »
Evidentiary Impact of EEOC Reasonable-Cause Determinations on Employment-Discrimination Cases
Pitfalls of the Fair Labor Standards Act for Law Firms
10 Tips for Securing Summary Judgment—From the Defense Perspective

SUBSCRIBE RSS