

## INVESTIGATIONS GONE WILD: Potential Claims By Employees

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### INTRODUCTION

When can the investigation which may provide an employer with an affirmative defense under the *Ellerth/Faragher* decisions be used by an employee as an offensive weapon? The answer: when the employer and/or the investigator misuses or mishandles the investigation. Creative plaintiffs' attorneys may assert claims ranging from retaliation to violation of public policy to negligent or intentional misrepresentation.

### RETALIATION FOR COOPERATING WITH AN INVESTIGATION

In *Crawford v. Metropolitan Government of Nashville and Davidson County, Tennessee*, \_\_\_ U.S. \_\_\_ (Jan. 26, 2009), the United States Supreme Court held that an employee is protected from retaliation under Title VII of the Civil Rights Act of 1964 for answers she gave the defendant's investigator's questions about an alleged harasser, even where she did not initiate the complaint. The Sixth Circuit had held that she was not entitled to protection from retaliation because she had not engaged in "active, consistent" opposition to the harassment, but had merely answered questions during the investigation. However, the Supreme Court reversed, and in a (perhaps surprising) pro-employee opinion, noted that the plaintiff's answers were criticisms of the person being investigated, and thus were identical in content to complaints that are undoubtedly protected by Title VII's opposition clause. In other words, her comments were meant to be, and were perceived by the employer as, opposition to the discriminatory conduct. Therefore, her cooperation in the investigation was protected activity under Title VII's opposition clause.

## INVESTIGATOR MISCONDUCT: WHEN IS IT ACTIONABLE?

In *Peterson v. Ballard*, 292 N.J. Super. 575 (App. Div. 1996), an interviewee brought an action against the employer and employer's attorney for the attorney's actions during an investigation of a co-employee's sexual harassment suit against the employer. (Note that New Jersey imposed a duty to investigate sexual harassment claims long before *Farragher/Ellerth*, and this case arose in that context). The plaintiff alleged that the employer's attorney had so abused and demeaned her in an interview that his conduct created claims under the New Jersey Law Against Discrimination (LAD) for retaliation and under the common law regarding intentional infliction of emotional distress. In that case, the appellate court decided that the attorney could not be held liable because of the litigation privilege. The Court did not rule, however, on whether such actions could render the company liable under the LAD .

Thus, in *Peterson*, the individual investigator—although not the employer for whom he was acting as agent, avoided liability. However, more recently, in *Spagnola v. Town of Morristown*, 2006 U. S. Dist. LEXIS 88431 (D. N.J.), the District Court for the District of New Jersey held that an attorney/investigator hired by the Town of Morristown to conduct an investigation of an internal sexual harassment complaint could be held liable to the complainant for negligent misrepresentation. The plaintiff's attorney creatively pleaded, and argued persuasively on the attorney's motion to dismiss, that the investigator had deliberately misled her as to the legal significance of her complaints. The attorney argued that he owed no duty to her because there was no attorney/client relationship between them. The Court determined that

dismissal at the motion to dismiss stage was inappropriate. It further determined that, if the allegations made by plaintiff about his conduct proved to be true, she could state a claim for negligent misrepresentation.

The attorney had informed the plaintiff that, since she was not spoken to or touched in a sexual way, she did not have a claim for sexual harassment, which clearly was incorrect legal advice. The investigator allegedly also advised her to seek a new job “off the record” and instead of helping to investigate her complaints, served the harasser’s and employer’s interests over hers by continually giving her knowingly false information and trying to intimidate her. Furthermore, the investigator allegedly told her that the employer had no policy that was violated by the supervisor’s conduct and that the employer had no duty to protect her from the misconduct. The plaintiff alleged that it was thus foreseeable that she would remain in her job and be further exposed to sexual harassment.

The Court found that a jury could reasonably find that plaintiff relied on this information and that she was harmed by it, including continued exposure to sexual materials, thus causing emotional distress. In other words, the three elements of a negligent misrepresentation claim could be shown: (1) negligent misstatements of a past or existing fact; (2) justifiable reliance on the misrepresentation; and (3) reliance caused a loss or injury. Thus, this novel theory was utilized to potentially hold an attorney/investigator personally responsible for his conduct during the investigatory process.

In a different vein, in *Grasser v. United Health Corporation*, (unpublished opinion) (N.J. Law Div. 2002), the trial court recognized another novel claim arising out of an employer’s abuse of the obligation imposed upon employers to investigate sexual harassment complaints. In *Grasser*, the male plaintiff was terminated for allegedly sexually harassing a female employee.

The female employee, who quit voluntarily, made it clear that her relationship with plaintiff was completely consensual. In fact, she stated that she was quitting because her boyfriend had discovered the affair. Despite the fact that there was no complaint of sexual harassment—indeed, the “victim” made it clear that no such harassment was involved—the employer conducted an “investigation” of the plaintiff/supervisor, purportedly under the case law requiring such investigations of sexual harassment complaints. They then fired the plaintiff for sexual harassment.

Grasser sued, alleging claims under the common law for wrongful discharge in violation of public policy. The Court held that since employers are required to investigate complaints of sexual harassment to avoid liability, they also are required to ensure that the investigation is fair to everyone involved, including the accused. The employer there allegedly conducted a bad faith investigation which it used as a pretest to fire the plaintiff. While the Court did not go so far as to state that mere negligence in conducting an investigation could give rise to a claim, it made it clear that misusing the law which requires such investigations to be conducted may result in liability. Thus, a wrongfully accused harasser may have a legal remedy if the investigation is conducted in bad faith or in a manner that is antithetical to a full, fair and impartial review of the alleged complaints. Although this rationale was applied to a state law claim, this case may be utilized for similar arguments under *Farragher/Ellerth*.

#### EMPLOYER RELIANCE UPON INVESTIGATOR DETERMINATIONS

In *Gilooly v. Missouri Department of Human and Senior Services*, 421 F.3d 734 (8<sup>th</sup> Cir. 2005), the Eighth Circuit Court of Appeals held that there was an issue of material fact suitable for determination by a jury in a case where a male employee had made a sexual harassment complaint against two female employees. In the ensuing investigation, the investigator found

that there was no sexual harassment, and that the plaintiff had filed a false claim and lied during the investigation. In reliance upon that determination, the employer fired the plaintiff. The plaintiff that his termination constituted retaliation.

The Court held that summary judgment on that claim was improper, as the termination letter stated that his termination was based on conduct and deception during the sexual harassment investigation, and that that statement gave rise to a necessary inference of retaliatory motive. This conclusion was drawn because the belief that the employee was lying was founded solely upon the statements of other employees and witnesses, which the investigator credited, but for which there was no independently verifiable evidence that contradicted the plaintiff's allegations. Clearly, investigators should guard against recommending punishment for persons who make protected complaints, resulting in investigations, where there is little evidence, if any, that the complaining employee is lying or acting in bad faith.

## CONCLUSION

As the importance and frequency of workplace investigations increases, the potential for liability for the improper conduct of such investigations is magnified. Not only abuse and misuse of the investigatory process, but also the negligent conduct of same, may very well result in creative claims by employees and their attorneys. Employers must be vigilant in ensuring that all workplace investigations are conducted impartially, fairly, and thoroughly, and that the investigators they utilize not only are fully conversant with the law, but have the ability to deal with the myriad of credibility and interpersonal issues which arise during the course of their work.

