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Second Circuit Issues Significant Rulings Regarding Internal Investigations and the Faragher/Ellerth Defense

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In a recent opinion, *Townsend v. Benjamin Enterprises, Inc.*, 09-CV-0197 (2d Cir. May 9, 2012), the Second Circuit addressed two issues of first impression in the Circuit: (1) whether there is a viable claim for retaliation under Title VII for participating in an internal investigation *prior to* any proceeding before the Equal Employment Opportunity Commission ("EEOC") and (2) whether the *Faragher/Ellerth* affirmative defense is available to an employer when a senior executive, proxy or alter ego has committed sexual harassment in violation of Title VII. On the first issue, the court held that the participation clause of Title VII's anti-retaliation provision *does not* protect an employee who participates in an internal employer investigation that is not connected to any formal charge; and on the second issue, the court held that the *Faragher/Ellerth* affirmative defense *is not* available to an employer if the harasser is the employer's proxy or alter ego.

Background

Plaintiff Martha Townsend, an employee of Benjamin Enterprises, Inc. ("BEI"), alleged that she was sexually harassed by the husband of BEI's president. The alleged harasser was also the sole corporate Vice-President of BEI and a shareholder of the company.

Karlean Victoria Grey–Allen, the former Human Resources Director at BEI, also sued BEI alleging that she was fired in retaliation for her participation in BEI's internal investigation of Townsend's allegations.

The District Court dismissed Grey–Allen's Title VII retaliation claim on summary judgment and Grey–Allen appealed.

Townsend’s harassment claim proceeded to trial and a jury returned a verdict for Townsend. The District Court denied Defendants’ post-trial motion for judgment as a matter of law or, in the alternative, for a new trial and awarded Townsend $141,308.80 in attorney’s fees and costs. Defendants appealed and argued that the District Court erred in rejecting various arguments asserted by Defendants, including their argument that there is no "proxy" or "alter ego" exception to the *Faragher/Ellerth* affirmative defense.

Second Circuit’s Holding and Reasoning

The Second Circuit found no error in the District Court’s opinions.

1. **Title VII’s Anti-Retaliation Provision Does Not Protect Participation in an Internal Investigation Not Connected to an EEOC Charge.**

Title VII contains a participation clause that makes it illegal for an employer to retaliate against an employee because the employee participated in an investigation or proceeding "under this subchapter." Much of the court’s reasoning hinged on the scope of the phrase "under this subchapter."

According to the court, because much of the subchapter at issue relates to the enforcement and investigative powers and procedures of the EEOC, the participation clause only encompasses investigations or proceedings that are in conjunction with or occur after filing a formal charge with the EEOC and does not refer to an employer’s internal investigation not conducted in conjunction with a formal EEOC charge. Thus, the court found that the plain language of the statute does extend protection to those who participate in an internal investigation not otherwise connected to an EEOC charge. In reaching this conclusion, the court noted that every Court of Appeals that has considered this question has reached the same result.

Furthermore, the court found that the *Faragher/Ellerth* affirmative defense does not bring internal investigations within the "under this subchapter" phrase of the participation clause. This affirmative defense provides a defense to an employer’s vicarious liability for a hostile work environment that was created by an employee’s supervisor. In order to invoke the defense, the employer must show that no tangible employment action (such as, termination) has taken place, and that "(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 otherwise."

Although this affirmative defense encourages employers to conduct in-house investigations, it does not require employees to participate in these investigations before bringing a Title VII claim. Thus, this defense does not bring internal investigations not done in conjunction with a formal EEOC charge within the "under this subchapter" phrase of the participation clause.

2. **The *Faragher/Ellerth* Affirmative Defense Does Not Apply When the Harasser Is the Employer's Proxy or Alter Ego.**

In holding that the *Faragher/Ellerth* affirmative defense does not apply if the harasser at issue is the employer's proxy or alter ego, the court considered Supreme Court opinions, including *Faragher* and *Ellerth*, which established that the harassing actions of an agent are directly imputed to an employer, rather than the employer being held vicariously liable.

The court also noted that every Court of Appeals that has considered the issue has held that the *Faragher/Ellerth* affirmative defense does not apply if the supervisor is the employer's proxy or alter ego. Finally, the court also looked to the EEOC for guidance on this issue and noted that under the EEOC's interpretation, the *Faragher/Ellerth* affirmative defense should not apply when the harasser is the employer's proxy.

Implications for Employers

The Second Circuit's holding regarding Title VII's participation clause is notable because it seemingly permits employers to fire an employee due to the employee's participation in an internal investigation as long as the investigation is not connected to a formal EEOC charge. Even though the Second Circuit and other Courts of Appeals have ruled that participation in such investigations is not necessarily protected under the "participation clause," it should be noted that under the Supreme Court's 2009 decision in *Crawford v. Metropolitan Gov't. of Nashville*, 555 U.S. 271 (2009), employees who answer questions during internal company investigations *are* protected from retaliation under Title VII's "opposition clause" (prohibiting retaliation against anyone who "has opposed any practice made an unlawful employment practice by this subchapter.") Therefore, under *Crawford* and other cases applying the anti-retaliation provisions of federal, state and local law, it is always important for employers to encourage participation in internal investigations and not retaliate against employees for doing so.

Additionally, in *Townsend*, the internal investigation and retaliation occurred before a charge was filed with the EEOC. The court noted that it did not express an opinion as to whether participation in an internal investigation that begins after an EEOC charge is filed will be protected by the participation clause. The court cited other Courts of Appeals opinions where such activity was protected. Moreover, as pointed out in Judge Lohier's concurring opinion, Congress could in the future expressly provide that these internal investigations must be covered by the participation clause.

Employers also should note that this opinion eliminates the availability of the *Faragher/Ellerth* affirmative defense if the harasser is a proxy or alter ego of the employer. Although this defense is unavailable, employers should continue to provide employees with a way to report harassing behavior and employers should attempt to discover and remedy any potential problems as these steps can prevent or minimize harassing behavior and employer liability.

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