

# Employment & Labor Relations Law



AMERICAN BAR ASSOCIATION

Section of Litigation

Summer 2009

Vol. 7 No. 4

## Beyond 50 Employees and 33 Percent: Advanced WARN Issues

By William J. Simmons

In this economic environment, employers and their counsel likely know the basic principle underlying the Worker Adjustment and Reemployment Notification Act (WARN)—if an employer with 100 or more employees effects a plant closing or mass layoff, as defined by the act, affected employees and certain governmental entities are entitled to 60 days' notice prior to the layoff. Generally, WARN defines a plant closing as a permanent or temporary shutdown of a single site of employment

that results in an employment loss for 50 or more employees. A mass layoff, in contrast, is defined as a reduction in force that is not the result of a plant closing and results in a layoff of 50 or more employees, which encompasses at least 33 percent of the workforce, or a layoff of at least 500 employees regardless of the percentage of the workforce affected. Of course, the devil is in the details, and with WARN, the details are far from clear.<sup>1</sup>

Labor and employment practitioners should be aware of the ambiguities

contained within WARN's provision and strive to proactively address such concerns as part and parcel of any mass layoff or plant closing strategy.

### A Plant Closing Without the Plant Actually Closing

Although WARN's mass layoff provision typically gets more attention, employers and their counsel must remember that WARN also applies if at least 50 employees are laid off due to a "plant closing,"

*Continued on page 3*

## Employment Investigations: Selecting an In-House or Outside Investigator

By Cherie L. Silberman

Most prudent employers are aware that when their company is faced with a harassment or other workplace complaint, the company must conduct a prompt and thorough investigation. What is less obvious, however, is that developing a strategy on how to proceed in the investigation is one of the most important parts of the investigation process. Once the company is aware that it must conduct an investigation, the first decision is whether an outside firm should conduct

the investigation or whether the company should investigate the complaint itself. This decision may ultimately determine whether the employer may be found liable if the complaint later develops into a lawsuit.

In determining who will investigate an employee complaint or other allegation of wrongdoing, an employer must weigh several factors. The employer should consider the necessity of conducting a prompt, thorough, and independent investigation, and the need to ensure the investigation is

perceived as such. In addition, the employer must evaluate the need for confidentiality, cost-effectiveness, and time efficiency. Of course, the individual or team conducting the investigation must possess the ability to bring specialized expertise and credibility to the investigation, as well as to gain the respect and trust of the accused, accuser, and witnesses involved in the alleged incident. Further, the concerns of attorney-client privilege and compliance with the

*Continued on page 21*

## Employment Investigations

*continued from front cover*

Fair Credit Reporting Act of 1970 (FCRA) and the Fair and Accurate Credit Transactions (FACT) Act must be considered. Although either an internal or external investigation team may be appropriate in various circumstances, the employer should weigh all relevant factors before deciding whether to proceed with an in-house investigation or use an outside investigator.

### Selecting an Experienced Investigator

Selecting an investigator who is qualified to conduct the type of investigation at issue is critical. An inexperienced or untrained investigator can make mistakes, which could yield an inadequate or improper investigation. Further, an inexperienced investigator may share information or engage in commentary that could compromise employee confidence in management and/or affect the results of the investigation.

If the employer does not use a qualified investigator and therefore fails to take appropriate remedial measures following an investigation, the company may be faced with significant legal consequences.<sup>1</sup> Under the *Faragher/Ellerth* doctrine, a company may be shielded from liability in a claim for harassment if it can establish that it exercised reasonable care to prevent and correct any sexually harassing behavior.<sup>2</sup> However, even if the employer promptly conducts an investigation in good faith, a court may still determine that the investigation was inadequate, thereby eliminating the availability of this affirmative defense. For example, in *Ogden v. Wax Works, Inc.*, the court found that the employer did not conduct a thorough investigation because it focused on an individual's performance issues rather than thoroughly exploring the underlying harassment claims.<sup>3</sup> Similarly, in *Endres v. Techneglas, Inc.*, the court denied summary judgment on the plaintiff's hostile work environment claims after the

plaintiff submitted evidence that the investigation was limited to one interview of the alleged harasser.<sup>4</sup>

On the other hand, a qualified and experienced investigator is more likely to handle sensitive issues properly, identify necessary information, and focus on the relevant facts. Employers can help themselves by assuring that there are competent individuals available in house who have received sufficient training in conducting investigations. This means that sufficient training is required not only of human resources personnel, but also of any managers or other individuals who may be called upon to assist with investigations. If an employer does not have a qualified individual in house who is available to conduct an investigation in a timely manner, the employer should select an outside investigator rather than an untrained company employee. While the cost of using a third party to conduct an investigation is a factor that employers should consider, the risk of using an inexperienced internal investigator in an effort to reduce costs could end up costing substantially more if the investigation is not done properly.

### Choosing an Investigator with Actual and Perceived Objectivity

An investigator's capability does not rest solely upon that person's experience or training. When an employer uses an internal investigator to conduct an investigation, the employer must closely examine the perception of the investigator's credibility. This is especially true when a general perception exists that the investigator is biased, or if there are certain individuals involved who might appear to influence the investigations.

If the employer uses an apparently biased investigator, the judge or jury may conclude that the investigation was unfair and therefore insufficient. This decision might affect the employer's ability to successfully assert a *Faragher/Ellerth* affirmative defense, because a proper investigation must be a legitimate fact-finding mission, not just an exercise in evidence gathering to confirm a preconceived conclusion. The investigator(s) must not only be impartial, but also should be perceived

by those affected to be competent, objective, and fair.

If an interviewee doubts the neutrality of the investigation, he or she may be guarded with the investigator, which may prevent the investigator from determining the accuracy of information he or she collects. One possible method for assessing the perceived neutrality of an investigator at the beginning of an investigation is to have the investigator ask both the com-

**Even if the employer conducts an investigation in good faith, a court may still determine that it was inadequate.**

plaining party and the alleged harasser whether they doubt his or her objectivity in the investigation. The company should promptly address any issues concerning an investigator's perceived neutrality on the part of either the complaining party or the alleged harasser, which may inevitably require that the company select a different person to conduct the investigation.

Similarly, where a senior manager or company executive is the alleged harasser, a company should consider the retention of an external investigator. This choice will not only add more credence to the investigation, but also it may eliminate an awkward situation, even though an employee of the company would otherwise be qualified to conduct the investigation.

### Implications of the FACT Act

If an employer retains an outside party to conduct an investigation instead of using its human resources personnel, the employer should be aware of another

Cherie L. Silberman is an attorney with Constangy, Brooks & Smith, LLP in Tampa, Florida.

potential source of liability. The FCRA applies to all employers who obtain “consumer reports” from a consumer reporting agency that “regularly engages in whole or in part in the practice of assembling or evaluating consumer credit information, or other information on consumers, for the purpose of furnishing consumer reports to third parties.”<sup>5</sup>

Under the FCRA, an employer must provide the accused employee with a

**In an abundance of caution, employers should have the interviews conducted with no expectation of privilege.**

proper disclosure and obtain the employee’s consent to use an investigative consumer report.<sup>6</sup> In the context of a harassment investigation, the employer is required to take the following steps:

- (1) inform the alleged harasser that it is requesting the investigation report
- (2) obtain the alleged harasser’s consent to obtain the report
- (3) If the employer decides to take an adverse employment action against the alleged harasser based on information contained in the report, the employer must provide a copy of the report to the employee before taking the action.
- (4) After the adverse employment action is taken, the employer must identify the third party who prepared the investigation report to give the employee an opportunity to rebut any information therein.

However, the FACT Act, which

amended the FCRA in 2004, provides that an employer who uses a third party to conduct a workplace investigation is not required to comply with the consent and disclosure requirements of the FCRA if the investigation involves suspected misconduct, a violation of law or regulations, or a violation of the employer’s preexisting written policies.<sup>7</sup> To be excluded from the disclosure requirement prior to disciplinary action, the report from the third party conducting the investigation may be communicated only to the employer or an agent of the employer.<sup>8</sup> In the event that the employer takes adverse action against an employee based on the third party’s investigation, the employer is still required to provide the employee a summary of the report. Nonetheless, the implications of the FCRA can be avoided altogether if the investigation is conducted by a company employee instead of outside third parties, because these requirements do not apply to internal investigations conducted by the company’s employees.

#### Preserving the Attorney-Client Privilege

A company’s outside investigator may be a consultant, an attorney, or another professional who is qualified to conduct a particular investigation. If an employer selects an attorney to conduct an investigation, the attorney-client privilege would ordinarily attach to the type of communications that occur during the course of the investigation.<sup>9</sup> However, employers must be aware that such discussions may become discoverable during a subsequent lawsuit.<sup>10</sup> This issue arises when the company directs its outside counsel to investigate allegations of impropriety, and then, based on the investigation, the company argues that it has taken appropriate remedial measures. When employers assert the *Faragher/Elleerth* affirmative defense and base their “reasonable response” argument on an attorney-directed internal investigation, the information underlying this investigation may require waiver of the attorney-client privilege, as the sufficiency of the employer’s investigation becomes critical in determining liability.<sup>11</sup> Indeed, the only way the employer can show that it properly investigated the allegations, considered the facts, and took proper

action to prevent a reoccurrence is to fully disclose the investigative report. The court adopted this position in *McGrath v. Nassau County Health Care Corp.*, where the court held that it was proper to require the investigating attorney to produce her unfinished report, notes, and any sections of her reports that were deleted or redacted, because the employer had put those materials at issue by claiming that its remedial response was sufficient in light of its investigation.<sup>12</sup>

Additionally, if the terminated perpetrator challenges his or her discharge, the defendant employer likewise will often find it necessary to waive the privilege to establish good cause or a legitimate nondiscriminatory reason for its decision. Accordingly, the employer may need to disclose the investigation process, the notes and investigative report, and possibly the legal advice rendered by counsel, even if such information would otherwise be privileged or protected as work product. In an abundance of caution, employers should have the interviews conducted with no expectation of privilege, although the interviewees should nonetheless be asked to maintain confidentiality.

In some cases, the attorney and the company may decide to try to keep the entire investigation privileged, but by doing so, the company may have to waive its *Faragher/Elleerth* defense. This is a heavy price to pay and should be given careful consideration in advance. The attorney and client should decide at the beginning of the investigation whether they will seek to protect the investigation, and some document should be generated stating the basis for such a privileged investigation. For the attorney-client privilege to apply to an investigation, whether conducted by an in-house attorney or outside counsel, the corporation must consult with an investigating attorney in his or her professional capacity. Additionally, the attorney must be authorized by management to inquire into the subject under investigation, and must seek information to assist in: 1) evaluating whether an employee’s conduct has bound or would bind the corporation; 2) assessing the legal consequences, if any, of an employee’s conduct; or 3) formulating appropriate responses to actions that

have been or may be taken by others with regard to that conduct.<sup>13</sup>

Another consideration is the possibility that an attorney conducting the investigation may be disqualified from later representing that employer in the course of the litigation. According to the ABA Model Rules of Professional Conduct, an attorney is prohibited from accepting employment in contemplated or pending litigation when it is obvious that he or she will be called as a witness in the case.<sup>14</sup> This requirement does not apply where the testimony will relate solely to an uncontested or formal matter, or where there is no reason to believe disqualification would work a “substantial hardship” on the client.

### Conducting a Prompt Investigation

Regardless of who is chosen to conduct an investigation, an investigation is effective only if performed promptly.<sup>15</sup> The time between the first reported incident of harassment and the time it takes the employer to respond is critical, and failing to promptly address an employee complaint may create the very lawsuit an investigation is designed to prevent. This is particularly true in harassment cases where an essential element of the case is whether and when the employer investigated the complaint. Indeed, courts have acknowledged that employers who have immediately taken effective remedial action when confronted with a problem should not be liable. For example, in *Walton v. Johnson & Johnson Services, Inc.*,<sup>16</sup> an employee first contacted human resources regarding a complaint on September 3. By September 13, the employer’s investigators had met with the complainant and had also met with and suspended the accused. The court held that such remedial measures were timely and reasonably designed to

stop the harassment as required to assert the *Faragher/Elleerth* affirmative defense.

Timeliness involves not only making sure the investigation begins promptly after the issues were made known, but also the time it takes to complete an investigation from start to finish.<sup>17</sup> Timeliness is essential to obtain accurate and relevant data while memories are fresh and information is most likely to be available. While start times can be affected by practical considerations that will vary from one case to the next, it is safe to assume that an employer should be able to show a legitimate reason for any delay.

With respect to the duration of an investigation, lengthy investigations may raise questions about an employer’s priority in addressing its employees’ complaints and immediately stopping any harassment. On the other hand, very brief investigations may imply that the employer has more interest in placating the complainant and limiting liability than adequate fact-finding and resolution. Either implication could lead to a determination that the employer’s efforts were inadequate. Therefore, the employer must keep this in mind and select an investigator who is available to begin the investigation within a reasonable amount of time. If an internal investigator is preoccupied with other company-related matters, it may be beneficial to use a third party to complete the investigation in a timely manner.

### Conclusion

Although some employers may have a practice of automatically selecting either outside investigators or in-house personnel to conduct their investigations, several factors illustrate that this should be a calculated decision made on a case-by-case basis. Planning in advance may help

an employer avoid some of the possible issues, such as compliance with the FACT Act and issues of attorney disqualification. Ultimately, while there are many scenarios in which an investigation may be completed as effectively by an in-house investigator or an external investigator, the employer should weigh all relevant factors before making a selection for this important decision.

### Endnotes

1. EEOC Enforcement Guidance: Vicarious Employer Liability for Unlawful Harassment by Supervisors, Part V(C)(i)(e).
2. *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998).
3. 214 F.3d 999, 1007 (8th Cir. 2000).
4. 139 F.Supp.2d 624, 632 (M.D. Pa. 2001).
5. 15 U.S.C. § 1681(a).
6. A consumer report includes any communication of any information by a consumer reporting agency bearing on a consumer’s character, reputation, or personal characteristics. 15 U.S.C. § 1681(a)(d)(1).
7. 15 U.S.C. § 1681(a).
8. 15 U.S.C. § 1681(a)(x)(1).
9. *Upjohn Co. v. U. S.*, 449 U.S. 383 (1981); *In re Copper Mkt. Antitrust Litig.*, 200 FR.D. 213, 217 (S.D.N.Y. 2001).
10. *See Pray v. N.Y. City Ballet Co.*, 1998 WL 558796 (S.D.N.Y. Feb. 13, 1998).
11. *Brownell v. Roadway Package Sys., Inc.*, 185 FR.D. 19, 25 (N.D.N.Y. 1999).
12. 204 FR.D. 240, 248 (E.D.N.Y. 2001).
13. *NXIVM Corp. v. O’Hara*, 241 FR.D. 109, 126 (N.D.N.Y. 2007).
14. MODEL RULES OF PROF’L CONDUCT R. 3.7.
15. *Cerros v. Steel Techs., Inc.*, 398 F.3d 944, 954 (7th Cir. 2005).
16. 347 F.3d 1272, 1288 (11th Cir. 2003), cert. denied, 541 U.S. 959 (2004).
17. *Saxton v. Am. Tel. & Tel. Co.*, 10 F.3d 526 (7th Cir. 1993).

# LITIGATION ON THE WEB

Articles • Case Notes • Newsletter Archive • Program Information

[www.abanet.org/litigation](http://www.abanet.org/litigation)