ALFA International
THE GLOBAL LEGAL NETWORK

2022 Labor & Employment Seminar

February 2-4, 2022

INVESTIGATIONS

The Good, the Bad and the Ugly

Paul G. Klockenbrink
Co-Moderator
GENTRY LOCKE
Roanoke, Virginia
klockenbrink@gentrylocke.com

Byrona J. Maule[1]
Co-Moderator
PHILLIPS MURRAH
Oklahoma City, Oklahoma
bjmaule@phillipsmurrah.com

[1] With assistance from Phoebe B. Mitchell, Associate Attorney, Phillips Murrah.

INVESTIGATIONS: THE GOOD, THE BAD AND THE UGLY

Effective investigations of alleged misconduct – including allegations of discrimination, harassment or a hostile work environment – are of the utmost importance in minimizing potential liability for employers in employment litigation. A thorough investigation leads to accurate fact finding and opportunities to correct employee behavior, prevent further harm, and enforce an employer's policies and procedures. Because a comprehensive investigation into employee misconduct can shield an employer from liability for its employee's discriminatory actions, employers should implement robust policies and procedures regarding how to handle employee complaints, including investigations of those complaints, and implementation of subsequent disciplinary action based on the outcome of an investigation.

A. An Employer's Liability for an Employee's Discriminatory Acts and the *Faragher-Ellerth* Defense

Until 1998, the standards for employer liability for a hostile work environment created by an employee were unclear. In companion cases, *Faragher v. City of Boca Raton* and *Burlington Industries, Inc. v. Ellerth*[2], the Supreme Court of the United States defined the circumstances in which an employer could be held liable for its employee's creation of a hostile work environment that did not culminate in a tangible employment action such as hiring, firing, or promotion.

In both *Faragher* and *Ellerth*, the plaintiffs who alleged harassment received no negative employment action – in fact, the plaintiff in *Ellerth* was promoted during her tenure with the employer. The plaintiffs in both cases voluntarily resigned, stating the alleged harassment as the reason for their resignation. Because neither plaintiff was terminated or denied a tangible employment benefit, the Supreme Court analyzed both as claims of hostile work environment, which requires a showing of severe or pervasive conduct.

The Court noted that, traditionally, where the harassment or hostile work environment did not result in a tangible employment action against the aggrieved employee, courts looked to agency law principles in deciding whether to impute such liability on an employer. Thus, if an employee or supervisor was acting as the employer's agent in creating the hostile work environment, the employer would most likely be held liable for the employee's actions.

However, to offset the possibility of automatic liability under agency law principles, the Court carved out an important defense for employers, holding:

> An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages…The defense necessarily comprises two necessary elements: (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.[3]

[2] 118 S.Ct. 2257 (1998).

[3] *Id*. at 2270.

This affirmative defense is now known as the *Faragher-Ellerth* Defense.

Under this new standard, the Court found the employer in *Faragher* did not comply with the elements of the defense and was thus liable for its supervisors' harassment of the plaintiff. The Court cited several reasons for this determination: (1) while the employer had a policy on sexual harassment, it failed to circulate the policy to supervisors or employees; (2) the employer failed to keep records of the supervisors' conduct; and (3) the employer's sexual harassment policy did not state that, in the circumstance that the alleged harasser is the direct supervisor of the employee alleging harassment, the employee could bypass the alleged harasser when submitting a complaint. Likewise, the Court in *Ellerth* reversed the grant of summary judgment in favor of the employer, remanding the case to the district court for a trial based on this new standard.

Thus, in order to limit liability for a hostile work environment under the *Faragher-Ellerth* Defense, an employer should create and implement a robust anti-harassment policy, that:

- Clearly explains prohibited conduct;
- Provides a mechanism for reporting complaints, including reporting through more than one avenue;
- Requires a prompt, thorough and impartial investigation into complaints made;
- Ensures that the employer will protect the confidentiality of harassment complaints to the extent possible;
- Ensures that the complainant will be protected from retaliation for making the complaint; and
- Ensures that appropriate corrective action will be taken pending the results of the investigation.

Employers should also provide supervisors with training on the policy, so that the policy will be properly implemented and followed in practice. Complying with the anti-harassment policy can demonstrate that the employer "exercised reasonable care to prevent and correct promptly" the alleged harassing or discriminatory behavior under *Faragher-Ellerth*, thus potentially limiting an employer's liability for a hostile work environment.

B. The Equal Employment Opportunity Commission's Guidance

Following the Supreme Court's decision in *Faragher* and *Ellerth*, the EEOC released a guidance for employers regarding how to handle alleged harassment by supervisors, including how employers can perform effective investigations of complaints regarding harassment based on any protected class.

Based on the EEOC's guidance, the first step for an employer after learning of alleged harassment is determining whether a detailed fact-finding investigation is necessary. "For example, if the alleged harasser does not deny the accusation, there would be no need to interview witnesses, and the employer could immediately determine appropriate corrective action."[4] If the employer determines that a fact-finding investigation is necessary, it should begin immediately.

Depending on the initial facts presented to management, it may be necessary to implement interim measures to prevent further harassment from occurring. For example, the employer may transfer the alleged harasser, make scheduling changes so that the alleged harasser and complainant avoid contact at work, or place the alleged harasser on non-disciplinary, paid leave pending the outcome of the investigation. To avoid retaliating against the complainant, the employer should not involuntarily transfer or otherwise burden the complaining employee.

The employer should also assure the complainant that they will not be retaliated against for making the

[4] https://www.eeoc.gov/laws/guidance/enforcement-guidance-vicarious-liability-unlawful-harassment-supervisors.

complaint. To effectuate this protection, the investigator should remind each individual interviewed during the investigation of the prohibition against retaliation of the complainant. Further, the employer should monitor employment decisions affecting both the complainant and any witnesses during and after the investigation to ensure that no adverse employment decision was made in retaliation for participating in the investigation. Protection against retaliation is imperative, because without it, an anti-harassment policy and complaint procedure will not be effective.

Importantly, the employer should ensure that the person conducting the investigation will do so thoroughly and objectively. "The alleged harasser should not have supervisory authority over the individual who conducts the investigation and should not have any direct or indirect control over the investigation."[5] A variety of employees may be appropriate to perform the investigation, such as the supervisor to whom the allegations were originally alleged, a member of human resources, or in-house counsel. However, if more than one employee complains about the same issue, or the allegations are particularly grievous, the employer should consider retaining either its regular outside counsel or separate independent counsel to conduct the investigation.

The investigator should interview the complainant, the alleged harasser, and any third parties who may have relevant information such as witnessing the alleged events. The investigator should also make credibility determinations based on the interviews, considering factors such as the plausibility of the testimony, the interviewee's demeanor, any potential motives to falsify the truth, corroboration of witnesses, and any past record of similar behavior by the alleged harasser.

Based on the information gained from the interviews and the credibility of the parties, management should then make a determination as to whether the alleged harassment occurred. The parties should be informed of the determination. If no determination can be made due to lack of conclusive evidence or conflicting evidence, the employer should still take preventative measures such as training or monitoring.

If management makes a determination that harassment did occur, the employer should make clear that it will undertake immediate and appropriate corrective action, including discipline, to rectify the harassment. The employer should inform both parties of any corrective action. However, the employer should understand that disclosure to the complainant of disciplinary action taken against the harasser could possibly breach the employer's duty of confidentiality to the harasser. In most circumstances, it is appropriate to disclose to the complainant that disciplinary action has been taken against the harasser, but not disclose the exact details of the disciplinary action.

Any action taken should be designed to stop the harassment, correct any adverse effects it had on the complainant, and ensure that the harassment does not resume. In choosing the discipline, the employer must balance competing concerns: the discipline must be severe enough to stop the harassment, as the employer could be liable if its chosen discipline fails to stop the harassment. However, the discipline should not be overly punitive as to open the employer to liability from the harasser for wrongful discharge. Thus, any discipline should be proportional to the severity of the offense.

The guidance outlines several examples of measures that can be implemented to stop the harassment and ensure it does not resume:

- Oral or written warning or reprimand;
- Transfer or reassignment;
- Demotion;

[5] *Id*.

- Reduction of wages;
- Suspension;
- Discharge;
- Training or counseling of harasser to ensure that they understand why their conduct violated the employer's anti-harassment policy; and
- Monitoring of harasser to ensure that harassment stops.[6]

Additionally, the guidance includes the following examples of measures to correct the effects of the harassment:

- Restoration of leave taken because of the harassment;
- Expungement of negative evaluation(s) in employee's personnel file that arose from the harassment;
- Reinstatement;
- Apology by the harasser;
- Monitoring treatment of employee to ensure that they are not subjected to retaliation by the harasser or others in the work place because of the complaint; and
- Correction of any other harm caused by the harassment (*e.g.*, compensation for losses).[7]

C. Internal Investigations Checklist

In addition to robust policies and procedures outlining a company's commitment to anti-harassment, in-house or outside counsel should review and follow the below checklist, which outlines best practices for internal investigations:

Planning & Preparation

- Identify the issue(s) to be investigated. What triggered the need for an investigation?
- Will law enforcement have to be involved at any stage?
- Take steps to identify, collect, preserve and safeguard relevant electronic data.
- Do you need to engage forensic specialist to retrieve electronic data?
- Gather and safeguard all other relevant documentation (personnel files, supervisor files, voicemail, payroll records, surveillance tapes).
- Who is the right person to conduct the investigation (for example, Human Resources, manager, etc.)? Is special expertise required? Maintaining objectivity and neutrality is important (appearances matter).
- Evaluate the necessity of removing any employees from their current position while the investigation is underway.
- Prepare a list of individuals to interview (for example, complainant, accused, witnesses).
- Identify any potential witnesses who might already be subject to disciplinary action. Consider imposing necessary discipline before any interviews begin, or at least before the problem employee is questioned.
- Identify and review all applicable company policies pertaining to the allegations.
- Formulate questions to be asked of interviewees.
- Begin the investigation as soon as possible. A good rule of thumb is to begin the investigation within two business days after receiving the complaint, but you may want or need to begin quicker, depending upon the circumstances.

[6] *Id.*

[7] *Id.*

Interviews

- Determine the order of interviews. In most instances, the order will be complainant, accused, witnesses or other involved parties.
- For serious issues (anything that could result in discharge), use two interviewers – one to ask questions and one to take notes.
- Conduct a separate interview with each person and hold interview in a location with privacy.
- Keep all interviews as confidential as possible, under the circumstances.
- Create a written record of each interview that includes those present, the date, and starting and ending times.
- Begin with being open – thank the person for time and cooperation. Assure them that the company takes the investigation seriously. Need to be accurate and purpose is to get all the facts. Stress importance of confidentiality and assure no retaliation.
- Ask complainant and accused whether they have any reason to believe you will not be fair and objective in conducting the investigation.

Documentation

- Ask the complainant to put the complaint in writing. (Note: Regardless whether the complainant does so, you likely have the obligation to continue with the investigation.)
- If complainant is reluctant to provide complaint in writing, ask the complainant to sign a summary of the complaint prepared and verify the information is accurate and complete.
- Keep detailed notes of the investigation and interviews with the applicable parties.
- Take notes on separate sheets of paper. Do not take notes in a planner or other bound document that may contain irrelevant information.
- Make sure to capture key administrative information (name, job title, job connection to complainant, years with company).
- Review key points of interview with interviewee at end and get agreement that you have accurately summarized position.
- Do not discard handwritten notes once typed.
- Have witnesses sign a written statement of their knowledge (or lack thereof) of specific incident(s).
- Make notes about behavioral expressions (for example, crying, no eye contact, etc.).
- Document only factual information (who, what, where, when, why, how).
- All conclusions, analysis and recommendations must be put on a separate page after witness interviews.
- Maintain a separate, confidential file for each investigation.
- Retain all documents related to investigation for at least two years, or longer as required by state law.

Questions

- Prepare questions in advance but don't be limited by your pre-set list.
- Provide a short opening that explains purpose.
- Find out "who, what, where, when, why, and how" to each incident, event or situation.
- Use words that can be easily understood. Make sure that you understand how the witness is using a term – don't just make assumptions.
- Ask only one question at a time and be patient.
- Ask questions that require events to be stated chronologically. This will help you compare versions of the story.
- Begin with broad, open-ended questions, then transition into more detailed, specific questions.
- Do not start with the "toughest" questions as they may cause the interviewee to become defensive.

- Ask follow-up and clarifying questions as necessary.
- Ask for personal knowledge.
- Ask the person to give specific examples.
- Clarify what is hearsay (what someone told them) vs. speculation or opinion (a person's conclusion), and clearly make note of this distinction.
- Don't omit the tough questions, despite the interviewee's discomfort.
- Ask about the existence of documents, computer information, mobile devices or social media sites that may have information that relate to the issue.
- Ensure you are getting information about all alleged misconduct.
- Remind each person interviewed not to delete any emails, voice messages or destroy any other records or documents that involve this issue without getting prior permission.
- Endeavor to remain neutral throughout the investigation; don't formulate an opinion without all the facts.
- With the "accused" or subject of the investigation, be sure to ask:
    - Confirm familiarity with company policies at issue and ask them to explain them.
    - If conduct denied, ask why they think the complaint was brought - is there any reason or problem with the person involved in this issue?
    - Any issues or problems involving complainant.
    - When applicable, ask if employee uses home computer or mobile devices for work or to communicate with complainant.
    - Request all documents, including home computer records, if applicable.
    - Remind accused not to destroy/discard documents or delete electronic data.
    - Counsel not to interfere with or take actions that might be viewed as a threat or intimidation.

<u>Concluding Interviews (following interview with complainant)</u>

- Ask complainant what resolution they would like to see.
- Let complainant know approximately when you hope to complete the investigation and tell them that you will inform them about the resolution of their complaint.

<u>Concluding Interviews (following all interviews)</u>

- Ask if there is anything else they need to tell you. Document if they say "no."
- Ask if there is anyone else they think you should talk to, and why. Document if they say "no."
- Encourage the interviewee to come forward with any additional information or documentation they may remember or learn of after the interview.
- Remind each person that information regarding the discussion of the complaint and investigation are confidential and should not be discussed with anyone.
- Caution each person that it's not a good idea to speak to others about the investigation because it could look like they are trying to influence the outcome, which would be a bad idea.
- Remind each person that retaliation is prohibited. If any person believes any acts of retaliation have occurred or are about to occur, the person must report the situation immediately to HR, and if HR is not available, go to a senior officer. Be specific.

<u>Analyzing Facts and Making a Determination</u>

- It is important to reach a conclusion. All that is required is a reasonably informed judgment, not perfection. Few issues are black and white; use your logic.
- Did the complainant raise the issue in a timely manner? If not, is there a logical reason why? What other events have occurred or are scheduled to occur within the month of the report being made? Why might

this complaint have been raised now? (Note: Even if the issue was not raised in a timely manner, you may have the obligation to take remedial action.)

- Were there any similar occurrences in the past where complaints were made? If so, what occurred? If not previously raised, why not?
- Does the story of what occurred appear to be consistent with email and other available documentation?
- Are there facts, events or documentation missing that should exist or have occurred if certain things actually occurred as alleged?
- Does the complainant have any reason or motivation for fabricating the allegations or facts?
- Does the accused have adequate justification for their actions?
- Is the testimony of each person interviewed credible? If not, why not?
- Does any person seem to have an agenda or was one or more of the witnesses uncooperative?
- Did anyone interviewed say anything that you later found to be untrue?
- What was the demeanor of each witness, and does it suggest credibility or not?
- Are you confident that you have enough Information to reasonably make a determination?
- Can you summarize the reasons for your conclusion, and support it with objective information?

What is Appropriate Corrective Action

- Were any company polices violated?
- Was the accused familiar with the policy? Were they trained on this policy?
- How serious is the violation?
- How have similar situations in the past been addressed?
- How long have the employees involved worked for company?
- What is the accused employee's work history and performance?
- Has the accused employee been disciplined in the past for this same issue?
- Has the accused employee or complaining employee violated any other company policy?
- Are there any federal, state or local laws that require you to take certain actions in this particular case (for example, industry specific regulations)?
- Are there any other mitigating or aggravating circumstances that may affect your recommendation?
- Draft the investigation summary, consider reviewing with counsel verbally first, and then reduce to writing.
- Document the conclusion with analysis in a separate report and action taken.

Close Investigation and Follow Up

- Inform complainant that the investigation is completed and the conclusion.
- If a violation is found, let the complainant know that disciplinary action will be taken, without disclosing the nature of the corrective action.
- Ensure complainant that retaliation will not be permitted and to report any retaliation or recurrence of similar incidents immediately. Important to document you giving this notice.
- Follow up with the complainant after one week, then at least monthly for 3-4 months to ensure there have been no further incidents of misconduct or acts of retaliation, and document.
- Retain documents related to the investigation in a separate, confidential file.

D. Investigations Gone Wrong

But what happens when an employer (or its agent) fails to properly carry out an investigation? What liability can an employer face when an investigation goes in an unexpected direction? Several cases, including the recent

jury verdict in *Diaz v. Tesla, Inc.*[8], are instructive. Employers should be wary of the pitfalls of a botched investigation – which could injure an employer both in its pocketbook and in the court of public opinion.

1. *Diaz v. Tesla*

In October of 2021, after only four hours of deliberation, a jury from the United States District Court for the Northern District of California awarded a $136,900,000.00 verdict in favor of an African American former Tesla subcontractor, Mr. Diaz. Mr. Diaz worked as an elevator operator at a Tesla factory and claimed that Tesla had subjected him to a racially hostile work environment. The jury overwhelmingly agreed. The jury awarded $6.9 million to Mr. Diaz to compensate him for lost earnings, and pain and suffering. The additional $130 million was awarded as punitive damages.

Diaz is a cautionary tale for employers. Even though Tesla had anti-harassment policies, trainings, internal complaint procedures and investigation procedures, the evidence demonstrated that Tesla did not adequately comply with the policy or procedures to limit its liability under the *Faragher-Ellerth* Defense. For example, evidence was presented to the jury that these policies were found in Tesla's "Anti-Handbook Handbook" under the section entitled "Stupid Stuff." Importantly, although the relevant policies existed, Tesla's supervisors who received Mr. Diaz's complaints were not properly trained on the policies. Thus, while the supervisors should have immediately notified upper management or Tesla's human resources department of Mr. Diaz's complaints, they took no action.

Mr. Diaz complained multiple times about Tesla's racially insensitive work environment, including complaining about a racially offensive cartoon drawn by another subcontractor and left for Mr. Diaz to find. The other subcontractor admitted to drawing the cartoon but was only suspended and given a final warning. Other complaints made by Mr. Diaz, such as allegations of use of the N-word, were not properly investigated or properly resolved. In fact, witnesses testified that despite Mr. Diaz's continued complaints, other subcontractors continued to use the N-word daily. Tesla blamed its failure to correct the harassment on a "bungled investigation."[9]

Further, when questioned about Tesla's procedures for investigating harassment allegations among subcontractors, Tesla's representative told the jury that despite its procedures in the "Anti-Handbook Handbook," there is not one fixed method for conducting investigations. Additional evidence demonstrated that Tesla had no written procedure for coordinating investigations involving subcontractors and did not provide supervisors with training regarding performing investigations.

After Mr. Diaz filed his lawsuit, Tesla made the following changes: adding an Employee Relations team dedicated to investigating employee complaints; adding a Diversity, Equity & Inclusion team dedicated to ensuring equal opportunity for all employees; and implementing a comprehensive Employee Handbook (to replace the "Anti-Handbook Handbook") with online access for all employees.

In addition to highlighting the importance of performing thorough investigations into complaints of misconduct, *Diaz* is instructive to employers by showing that a jury may still hold an employer liable even for harassment aimed toward a subcontractor. Thus, employers should develop training that is tailored both to their employees and their subcontractors, as well as policies and procedures that outline how to handle complaints and perform investigations regarding misconduct at the subcontractor level.

[8] 2021 WL 4595023, at *1 (N.D. Ca. Oct. 6, 2021).

[9] https://www.jdsupra.com/legalnews/137-million-verdict-illustrates-1856568/

2. *Menaker v. Hofstra University*[10]

A botched investigation can bring more than just a hefty jury verdict: it can also bring a flurry of additional litigation. In *Menaker v. Hofstra University*, Mr. Menaker, the former head coach of the university's men's and women's varsity tennis teams, brought an action against the university alleging sex-discrimination after he was terminated. The university had terminated him based on allegations of sexual harassment by a female student who was a member of the tennis team. The trial court granted the university's motion to dismiss, and Mr. Menaker appealed to the Second Circuit Court of Appeals.

In holding that Mr. Menaker had sufficiently pled facts to support a prima facie case of sex discrimination, the court focused on the university's "irregular" investigation of the female tennis player's complaint against him. When first made aware of the allegations against him, Mr. Menaker verbally denied all allegations. Further, he was told that the university would be conducting an investigation into the matter, and that the results would soon be shared with him.[11]

The university's anti-harassment policy contained many of the necessary ingredients: it outlined proper procedures for investigating and resolving harassment claims; it required that the investigator interview potential witnesses; it gave the accused parties an opportunity to submit a written response; and it required the investigator to produce a written determination.[12]

Mr. Menaker provided the university with the information it requested, such as all his communications with the complainant and a list of potential witnesses. However, two months after Mr. Menaker was first informed of the allegations against him, he was summoned to the university's Human Resources Department, where he was informed that although "none of the stated allegations was independently sufficient for termination, he was nevertheless being fired for the 'totality' of the allegations."[13]

The court noted the following "irregularities" in the university's "investigation":

- The university's failure to interview relevant witnesses Mr. Menaker had identified as sources of information favorable to him;
- The university's failure to properly determine credibility issues on the part of the complainant, such as whether or not her frustration regarding not receiving a scholarship was a potential motive for her initial complaint of sexual harassment;
- The university's failure to provide Mr. Menaker with the results of the investigation;
- The university's failure to act in accordance with its own procedures designed to protect the accused.[14]

Thus, based on the "clearly irregular investigative and adjudicative process," the court vacated the trial court's

[10] 935 F.3d 20 (2d Cir. 2019).

[11] *Id*. at 28.

[12] *Id*. at 28-29.

[13] *Id*. at 29.

[14] *Id*. at 34-35.

findings and remanded Mr. Menaker's claim for sexual discrimination.

Menaker v. Hofstra demonstrates that the alleged harasser, the initial target of an investigation that ultimately goes sideways, can bring a "reverse discrimination" lawsuit against their employer following the botched investigation. Thus, it is of the utmost importance that an employer follows its own policies and procedures to provide the accused employee of a fair investigation.

3. *Doe v. University of Denver*[15]

Doe v. University of Denver is another example of how a botched investigation can lead to additional litigation. In *Doe*, a female student, Jane Roe, filed a report with the university's Title IX office claiming John Doe had sexually assaulted her. The university investigated the complaint, eventually finding that Doe had more likely than not engaged in non-consensual sexual contact with Roe. After reviewing the investigation report, the university disciplinary review committee expelled Doe from the university.[16]

Doe then sued the university after being expelled, claiming that the university violated Title IX by conducting an investigation that was pervaded by anti-male bias. Further, he claimed that the botched investigation resulted in a disciplinary decision that was against the weight of the evidence.[17] The Court of Appeals for the Tenth Circuit reversed the district court's grant of summary judgment for the university, concluding that Doe "provided sufficient evidence for a jury to decide whether the investigation into the allegations and subsequent disciplinary action discriminated against him because of his sex."[18]

Key to the court's reversal of the trial court's grant of summary judgment in favor of the university were the "procedural deficiencies" in the investigation of Doe's alleged actions. For example, while the university investigators interviewed eleven witnesses proposed by Roe, they initially refused to interview all five witnesses suggested by Doe. Eventually, investigators interviewed Doe's psychologist, but did not consider most of the psychologist's testimony as they considered it to be "character testimony" and "expert opinion."[19]

Additionally, although the investigators' summary indicated that six of Roe's witnesses told them the same version of the events, the Court of Appeals for the Tenth Circuit found that the record actually revealed that only three of Roe's witnesses told Roe's same version of the story. Further, even though none of the witness accounts completely aligned with the story Roe told investigators, none of those inconsistencies were mentioned in the investigators' final report.[20] The final report also failed to discuss any potential motive Roe may have had for making a false report, such as Roe's hurt feelings over Doe not wanting to date her.

Thus, the Court of Appeals for the Tenth Circuit stated: "In sum, we agree the University's investigation and treatment of [Doe] raises a plausible inference that it discriminated against [Doe] on the basis of his sex."[21]

[15] 1 F.4th 822 (10th Cir. 2021).
[16] *Id*. at 827-28.
[17] *Id*. at 824.
[18] *Id*. at 825.
[19] *Id*. at 832.
[20] *Id*. at 833.
[21] *Id*. at 834.

4. *Ibrahim v. Alliance for Sustainable Energy, LLC*[22]

In *Ibrahim v. Alliance for Sustainable Energy, LLC*, the Court of Appeals for the Tenth Circuit held that pretext can be inferred from shortcomings in an employer's investigation into employee misconduct. Dr. Ibrahim, a Muslim man of Pakistani descent, was terminated from Alliance due to his inappropriate comments toward two women. Dr. Ibrahim then sued Alliance, claiming discrimination under Title VII. Dr. Ibrahim presented a prima facie case of discrimination. However, because Alliance also proved a legitimate, non-discriminatory reason for his termination, the burden shifted to Mr. Ibrahim to show a pretextual reason for his termination.[23]

Dr. Ibrahim claimed that the inadequacy of the investigation into his misconduct showed pretext, and the Court of Appeals for the Tenth Circuit agreed, stating: "A factfinder can reasonably infer pretext not only from greater leniency to similarly situated employees but also from shortcomings in the employer's investigation."[24] The whole of Alliance's investigation into Dr. Ibrahim's misconduct consisted of asking Dr. Ibrahim what he had said to one female. This, coupled with the fact that Alliance had conducted a more thorough investigation regarding alleged similar misconduct by a white male, allowed the Court to infer a pretextual reason for Dr. Ibrahim's termination.[25]

D. Conclusion

Employers should conduct comprehensive investigations for a variety of reasons – of course to limit potential liability in employment litigation, but also to accurately fact-find and protect employees from harassing or discriminatory conduct. Thus, thorough investigations are beneficial for employers and employees alike.

[22] 994 F.3d 1193 (10th Cir. 2021).
[23] *Id*. at 1196.
[24] *Id*. at 1199.
[25] *Id*. at 1200.