IN THE SUPREME COURT OF IOWA

No. 16-0775

OLIVER FENCEROY, Plaintiff-Appellee

v.

GELITA USA, INC., TOM HAIRE, AND JEFF TOLSMA, Defendants-Appellants

and

BOB KERSBERGEN and JEREMY KNEIP, Defendants.

On Appeal from the District Court of Woodbury County, Iowa

Honorable Jeffrey A. Neary

APPELLANTS' FINAL REPLY BRIEF

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I. REPLY ARGUMENT

A. Standard and Scope of Review.

Plaintiff first presents a disingenuous argument relating to the disqualification of defense counsel. On the one hand, Plaintiff argues that defense counsel is not necessarily disqualified due to a conflict of interest. (Appellee's Brief, Pg. 8). On the other hand, Plaintiff asserts several arguments which demonstrate an inherent conflict of interest present in this case. Plaintiff contends that defense counsel conducted an "inadequate and biased" investigation while defending Plaintiff's charge of discrimination before the Iowa Civil Rights Commission ("ICRC"), (Appellee's Brief, Pg. 33), and claims that defense counsel was not an "independent, qualified" investigator, (Appellee's Brief, Pg. 39). These allegations place defense counsel in a position where counsel will be defending a client at trial while at the same time, defending accusations of "biased" conduct by defense counsel.

Plaintiff points to Rule 32:3:7 of the Iowa Rules of Professional Conduct. This Rule specifically states that a "lawyer shall not act as an advocate at a trial in which the lawyer is likely to be a necessary witness." Iowa Rule of Professional Conduct, 32:3:7. The Comments to Rule 32:3:7 emphasize that a trier of fact "may be confused or mislead by a lawyer

serving as both advocate and witness." *Id.* at Comment 2. The Comments also confirm that a determination as to "whether or not such a conflict exists is primarily the responsibility of the lawyer involved." *Id.* at Comment 6. Plaintiff has clearly interjected issues in this case concerning the disqualification of counsel, reviewed under the abuse of discretion standard. *Bottoms v. Stapleton*, 706 N.W.2d 411, 415 (Iowa 2005).

B. Defendants Did Not Waive the Privilege by Asserting the *Faragher-Ellerth* Defense.

Plaintiff next blatantly misconstrues Defendants' *Faragher-Ellerth* defense and appears to contend that any assertion of the *Faragher-Ellerth* defense necessarily places a pre-litigation investigation at issue and, therefore, results in waiver of the attorney client privilege. That is simply not the case. *See McGrath v. Nassau Cnty. Health Care Corp.*, 204 F.R.D. 240, 244-45 (E.D.N.Y. 2001) (expressly holding that mere assertion of *Faragher-Ellerth* defense does not place investigation at issue unless defense hinges on the adequacy of the investigation and subsequent remedial response).

Solely relating to Plaintiff's complaints alleged for the first time in his ICRC charge, Defendants' *Faragher-Ellerth* defense is not that it conducted a reasonable investigation after receiving the ICRC charge, but that Plaintiff failed to report the alleged conduct during his employment and thus failed to

take advantage of the Company's policies on reporting harassment and discrimination. Any investigation and remedial response undertaken after Complainant left his employment and filed his ICRC charge is simply not necessary to Defendant's *Faragher-Ellerth* defense and, as such, is not at issue.

Under the *Faragher-Ellerth* affirmative defense, an employer may defend a harassment claim by proving: (1) that it exercised reasonable care to prevent and correct any harassing behavior; and (2) that the employee unreasonably failed to take advantage of the preventative or corrective opportunities that the employer provided. *Vance v. Ball State University*, 133 S. Ct. 2434, 2439 (2013). Where the Plaintiff does not report discrimination and harassment during his employment, the Defendant satisfies the first prong of the defense by showing that it exercised reasonable care in preventing harassment by promulgating anti-discrimination and anti-harassment policies and establishing avenues through which employees can report discrimination and harassment. *Shaw v. AutoZone, Inc.*, 180 F.3d 806, 812-13 (7th Cir. 1999). These preventative measures alone satisfy the first prong of the defense because there is nothing for the employer to investigate, respond to, or correct when the employee fails to report discrimination and harassment during his employment. *Id.*;

see also Treat v. Tom Kelly Buick Pontiac GMC, Inc., No. 1:08-cv-173, 2009 WL 1543651, at *13 (N.D. Ind. June 2, 2009) (holding that investigation is not at issue because there is nothing to investigate where employee fails to report discrimination and harassment during employment); *City of Petaluma v. Superior Court*, 248 Cal. App. 4th 1023, 1036-37 (Cal. Ct. App. 2016) (holding that investigation is not at issue where employee fails to report discrimination and harassment during employment because the "employee necessarily could not have taken advantage of any corrective measures adopted in response to [the] investigation"). Accordingly, with regard to the Plaintiff's complaints alleged for the first time in his ICRC charge, Defendants may satisfy the first prong of the *Faragher-Ellerth* defense by proving that the Company exercised reasonable care in preventing harassment. Any subsequent investigation and remedial response is simply not necessary to the defense and, therefore, is not at issue.

Furthermore, it is uncontroverted that Plaintiff did not report any racial jokes or comments from coworkers during his employment. Establishing that the Plaintiff failed to report his complaints and failed to avail himself of a proper complaint procedure during employment "normally suffice[s] to satisfy the employer's burden under the second element of the defense." *Faragher v. City of Boca Raton*, 524 U.S. 775, 807-08, 118 S. Ct.

2275 (1998). Complaining after resigning does not defeat the second prong of the defense because filing a complaint "upon or after, resigning does not mitigate any of the damage, because it does not allow the employer to remediate the situation." *Lauderdale v. Texas Dept. of Criminal Justice Institutional Div.*, 512 F.3d 157, 165 (5th Cir. 2007); *see also McCurdy v. Arkansas State Police*, 375 F.3d 762, 772 (8th Cir. 2004) (stating that the *Faragher-Ellerth* affirmative defense "protects employers in harassment cases in which an employee fails to stop the harassment by using the employer's effective anti-harassment policy") (emphasis added). Accordingly, with regard to Plaintiff's complaints alleged for the first time in his ICRC charge, Defendants may satisfy the second prong of the *Faragher-Ellerth* defense by showing that Plaintiff failed to report the incidents of discrimination and harassment during his employment. Where the employee fails to complain during his employment, any subsequent investigation necessarily cannot be at issue because the employer has no opportunity to remediate the situation. *City of Petaluma*, 248 Cal. App. 4th at 1036-37. Again, where the complaints are not made during employment, there is simply nothing for the Company to investigate, respond to, or correct, rendering any subsequent investigation and remedial response unnecessary to Defendant's *Faragher-Ellerth* defense.

Plaintiff makes no attempt to address the above legal authority which clearly draws the line between investigations conducted by counsel during the Complainant's employment versus investigations conducted post-employment in connection with the defense of a charge of discrimination.

Plaintiff heavily relies upon Defendants' position statement submitted to the ICRC in arguing that Defendant waived the attorney-client privilege by asserting the *Faragher-Ellerth* defense. As noted above, Defendants' *Faragher-Ellerth* defense relating solely to Plaintiff's complaints alleged for the first time in his ICRC charge is that he failed to report these complaints—not that the Company conducted a reasonable investigation in response to Plaintiff's ICRC charge. As noted in the position statement, however, Plaintiff did report one incident of alleged harassment *during his employment* (2 years prior to his voluntary retirement) and it *is* part of the Company's defense that that investigation conducted by the Company was "prompt and remedial" relating to the one reported incident of alleged harassment *during Plaintiff's employment*.[1]

[1]/ In 2011, during the Plaintiff's employment, he did complain about a rope that he thought looked like a noose. (App. pgs. 42-43). This rope was attached to a scale and was tied in a loop so that employees using the scale could easily pull the rope to add weight to the scale. (App. p. 42). The Company submits that it did promptly investigate this complaint in 2011 and found no evidence of harassing conduct based on the rope.

As Plaintiff failed to report any other allegation of harassment during his employment, any "investigation" undertaken after his employment is not relevant to the defense and is not at issue. Additionally, it is clearly stated in the position statement that "During his employment, Complainant only made one report of harassment and unreasonably failed to report any other allegations to management, despite the Company's clear reporting procedures" and that the Company took action relating to Plaintiff's allegations in his ICRC charge "[d]espite the fact that Complainant no longer worked at the Company because of his voluntary retirement." (App. p. 197).

Similarly, Plaintiff heavily relies upon Defendants' mere assertion of the *Faragher-Ellerth* defense in the Answer and Motion for Summary Judgment. (Appellee's Proof Brief, Pg. 17-18). As set forth above, Defendants' *Faragher-Ellerth* defense is based upon Plaintiff's failure to take advantage of the Company's policies on reporting discrimination and harassment. Notwithstanding the fact that the Company took some action relating to Plaintiff's allegations in his ICRC charge after his employment, such action cannot be relied upon to support Defendants' *Faragher-Ellerth* defense. Rather, the Company satisfies both prongs of the defense by showing that it exercised reasonable care in preventing harassment by

promulgating polices and that Plaintiff unreasonably failed to take advantage of the Company's policies by failing to report instances of discrimination and harassment during his employment. Consequently, with respect to Plaintiff's complaints alleged for the first time in his ICRC charge, any subsequent investigation and remedial response by the Company is simply not necessary to its *Faragher-Ellerth* defense and, as such, is not at issue. Accordingly, Defendants did not waive the attorney-client privilege by asserting the *Faragher-Ellerth* defense because Attorney Horvatich's pre-litigation investigation is not at issue. Communications between Horvatich and Gelita representatives, as well as any notes or documents pertaining to the investigation are privileged and protected work-product in anticipation of litigation, and that privilege has not been waived. Defendants' Motion for Protective Order should have been granted on that basis.

However, according to the District Court, any time an employer asserts the *Faragher-Ellerth* defense in a harassment case, the employer is placing "at issue" defense counsel's investigation and work product even in cases where the employee did not report the matter during his or her employment, thereby giving the employer no opportunity to investigate and remediate the situation. Such an untenable holding results in a perverse incentive for employees. Employees will be incentivized to insulate

themselves by purposely failing to complain of discrimination and harassment during their employment only to make such allegations upon separating from employment with full knowledge that the employer will hire counsel in order to respond to the charge. By failing to complain during employment, the employee then gains full advantage of all privileged communications resulting from counsel's investigation conducted in preparation of litigation. Employees cannot be permitted to circumvent the attorney-client privilege in this manner.

Such a perverse incentive also directly contravenes the motivating purpose of Title VII. The Supreme Court has stated that the primary objective of Title VII is not to redress harm, but to avoid harm in the first instance. *Faragher v. City of Boca Raton*, 524 U.S. 775, 806 (1998). Therefore, in order to effectuate this primary objective, employers have an affirmative obligation to prevent discrimination and harassment by promulgating policies and reporting procedures. *Id.* Where an employer makes a reasonable effort to discharge this affirmative duty, the employee has a correlative duty to avoid harm by taking advantage of the employer's policies and reporting procedures by complaining of discrimination and harassment during employment. *Id.* Where an employee wholly fails to discharge this duty, employers must be permitted to assert the employee's

failure to avoid harm as a defense to liability, which is exactly what Gelita has done here. *Id.* (stating that employer cannot be found liable where employee could have avoided harm but unreasonably failed to do so). As stated, the District Court's findings in this case incentivize employees to withhold their harassment complaints during their employment, in direct contravention of the preventative purpose of Title VII. Employees must be held to their affirmative obligation to take advantage of the employer's policies and reporting procedures rather than incentivized to do the exact opposite. Defendants submit that the District Court's findings are untenable and apply a misguided legal analysis that is contrary to the majority of jurisdictions that have addressed this issue.

Contrary to Plaintiff's contention, Defendants have never placed Horvatich's investigation at issue in these proceedings. The documents supporting Defendants' Motion for Summary Judgment clearly demonstrate the arguments which support the *Faragher-Ellerth* defense. (App. pgs. 154-163). Horvatich's investigation of the discrimination charge conducted after Plaintiff's retirement has not been placed at issue with respect to the *Faragher-Ellerth* defense. Accordingly, the *Harding* decision has no application here because Defendants have never claimed to rely upon the adequacy of Horvatich's investigation and any subsequent remedial response

to defend liability. *Harding v. Dana Transport, Inc.*, 914 F.Supp. 1084, 1087-88 (D.N.J. 1996) (finding the privilege waived because the employer specifically admitted that it intended to defend liability based upon counsel's investigation in order to show the adequacy of its remedial response to the employee's complaints of harassment).

Plaintiff's reliance upon the following decisions is similarly misplaced. Plaintiff cites *Pray v. New York City Ballet Co.*, 1997 WL 266980 (S.D.N.Y. 1997) and others for the proposition that the *Faragher-Ellerth* defense operates to waive the attorney-client privilege. Although the *Pray* court did not specifically make clear that the employee complained of harassment during his or her employment, it is inferred because, again, the employer specifically admitted that it asserted the reasonableness of the investigation and adequacy of the subsequent corrective action to defend liability, thereby placing the investigation at issue. *Id.* at *1. Similarly, in *E.E.O.C. v. Outback Steakhouse of FL, Inc.*, 251 F.R.D. 603 (D. Colo. 2008), the court did not overtly state that the employees complained of harassment during their employment; however it is likewise inferred based upon the fact that the employer conceded that it sought to defend liability based upon its investigation and reasonable remedial response. *Id.* at 611. In order for the investigation and remedial response to be necessary and

relevant to the employer's affirmative defense, the employee must complain of harassment during employment to allow the employer an opportunity to remediate the situation. Accordingly, *Pray* and *Outback Steakhouse* are distinguishable and inapplicable to the instant case. *Wellpoint Health Networks, Inc. v. Superior Court*, 59 Cal. App. 4th 110 (Cal. Ct. App. 1997) is similarly inapplicable. In *Wellpoint*, the employee made multiple complaints of discrimination and harassment during his employment prior to filing an administrative charge. *Id.* at 115. Again, the employer specifically asserted the affirmative defense to show that it investigated the employee's complaints and then took appropriate corrective action in response to the findings of the investigation, thereby placing the investigation at issue. *Id.* at 128. Finally, *Musa-Muaremi v. Florists' Transworld Delivery, Inc.*, 270 F.R.D. 312 (N.D. Ill. 2010) is equally inapplicable. Yet again, the employee complained of sexual harassment during her employment. *Id.* at 314. The employer investigated her complaints and later asserted the *Faragher-Ellerth* defense, specifically arguing that its remedial response was reasonable, again placing the adequacy of the investigation at issue. *Id.* at 319. Plaintiff's arguments wholly fail to account for the fact that, unlike all of the case law cited in support of his position, Defendants' *Faragher-Ellerth* defense does not hinge upon the adequacy of any investigation or

subsequent remedial response because, as stated, there was nothing to respond to in light of his failure to complain during his employment.

C. Defendants Did Not Waive the Privilege through Deposition Testimony Regarding Employee Interviews or by Conducting Employee Interviews in the Presence of the Union Representative.

For the first time on Interlocutory Appeal, Plaintiff now asserts that Defendants waived the privilege through deposition testimony. (Appellee's Proof Brief, Pg. 33-36). Also for the first time on Interlocutory Appeal, Plaintiff further asserts that Defendants waived the privilege because Attorney Horvatich conducted employee interviews in the presence of the Union Representative. (Appellee's Proof Brief, Pg. 36-37). These issues were not raised below before the District Court, and the District Court did not rule on these issues. Consequently, these issues were not preserved for appellate review and are not properly before this Court. *State ex rel. Miller v. Vertrue, Inc.*, 834 N.W.2d 12, 20-21 (Iowa 2013) ("Our error preservation rules provide that error is preserved for appellate review when a party raises an issue and the district court rules on it.").

In any event, Defendants did not waive the privilege through the deposition testimony cited by Plaintiff. Plaintiff appears to argue that the privilege has been waived because employee witnesses provided deposition testimony regarding privileged communications. In support of this assertion,

Plaintiff cites to *Miller v. Cont'l Ins. Co.*, 392 N.W.2d 500, 504-05 (Iowa 1986). In that case, the Court held that the plaintiffs had waived the attorney-client privilege because they voluntarily testified as to the substance of their attorney's advice regarding the applicable statute of limitations. *Id.* at 505. In stark contrast, none of the deposition testimony cited by Plaintiff even comes close to revealing the substance of any privileged communications between Gelita Representatives and Attorney Horvatich. (Appellee's Proof Brief, Pg. 20-26). Rather, the employee witnesses merely testified to the fact that Horvatich conducted employee interviews in the presence of Jeff Tolsma and the Union representative and subsequently prepared witness statements for the employees to sign. (*Id.*). Defendants do not maintain that the witness statements are privileged, and the witness statements have been provided to Plaintiff through discovery in this case. The deposition testimony cited by Plaintiff clearly does not reveal the substance of any privileged communications between Horvatich and Gelita representatives, and that privilege has not been waived.

Similarly, Defendants did not waive the privilege due to the employee interviews that were conducted in the presence of the Union representative. Again, Horvatich conducted the employee interviews and prepared witness statements for the employees to sign, which have been provided to Plaintiff.

The employee interviews conducted in the presence of the Union representative are separate and distinct from the substance of any subsequent, privileged communications between Horvatich and Gelita representatives. Accordingly, the mere fact that the employee interviews were conducted in the presence of the Union representative does not operate to waive the privilege attached to subsequent communications between Horvatich and Gelita representatives to which the Union representative was not privy. Communications between Horvatich and Gelita representatives, as well as any notes or documents pertaining to the investigation are privileged and protected work-product in anticipation of litigation, and that privilege has not been waived.

D. The Court Should Consider Whether Other Means Existed to Obtain the Information and Whether it was Crucial to the Preparation of the Case as Set Forth in *Shelton v. Am. Motors Corp.*, 805 F.2d 1323, 1327 (8th Cir. 1986).

Finally, Plaintiff asserts that the test in *Shelton v. Am. Motors Corp.*, 805 F.2d 1323, 1327 (8th Cir. 1986) is contrary to Iowa law as set forth in *Miller*, 392 N.W.2d at 504-05. In *Shelton*, the Eighth Circuit held that opposing counsel's deposition should only be taken where: (1) no other means exist to obtain the information than to depose opposing counsel; (2) the information sought is relevant and non-privileged; and (3) the information is crucial to the preparation of the case. *Shelton*, 805 F.2d at

1327. Most notably, the Iowa Supreme Court decided the *Miller* case before the Eighth Circuit decided the *Shelton* case and, therefore, it cannot be read as rejecting the foregoing three-pronged test articulated in *Shelton*. In fact, *Miller* is easily reconciled with *Shelton*.

As set forth above, the *Miller* court held that the attorney could be deposed because the plaintiffs had waived the attorney-client privilege by voluntarily testifying as to the substance of the attorney's advice regarding the applicable statute of limitations. *Miller*, 392 N.W.2d at 504-05. In that case, the plaintiffs' claim for damages specifically hinged upon the advice given by the attorney. *Id.* at 504. Accordingly, the *Shelton* factors necessarily would have been met in that case. Namely, the advice given by the attorney was crucial to plaintiffs' claim and, clearly, no one other than counsel would be able to testify as to the substance of that advice.

In contrast, none of the factors set forth in the *Shelton* case have been established to warrant the deposition of defense counsel in this case. Information relating to decisions and actions by the Company after Fenceroy filed his charge of discrimination remains available through the testimony of Jeff Tolsma who participated in all employee interviews and made all decisions relating to the disciplinary action rendered after the charge was filed. Mr. Tolsma appeared for a deposition and fully responded to all

questions from Fenceroy's counsel on this topic. *See Scurto v. Commonwealth Edison Co.*, 1999 WL 35311, at *4 (stating that company's investigation after plaintiff's discrimination complaint, including the actions taken as a result of the complaint were "readily available through the ordinary mechanisms of discovery of fact witnesses"). Furthermore, there has never been any showing in this case that information possessed by defense counsel is crucial to the preparation of Fenceroy's case. As stated, Defendants' *Faragher-Ellerth* defense does not hinge upon the adequacy of any investigation or response undertaken after Plaintiff left his employment and, accordingly, is necessary to neither Defendants' case nor Fenceroy's case.

II. CONCLUSION

For the foregoing reasons, Defendants-Appellants respectfully request the Court to reverse the District Court's ruling on Appellant's Motion for Protective Order on the basis that the privilege has not been waived and defense counsel's testimony and documents are privileged and/or protected by the work product doctrine.

DATED this 6th day of December, 2016.

GELITA USA, INC., TOM HAIRE, and JEFF TOLSMA

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COST CERTIFICATE

I hereby certify that the true and actual cost of printing the foregoing Appellant's Final Reply Brief to Appellee's Proof Brief was the sum of $0.00.

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CERTIFICATE OF SERVICE AND FILING

I hereby certify that on the 6th day of December, 2016, the foregoing Appellant's Final Reply Brief to Appellee's Proof Brief was filed electronically with the Clerk of the Court using the CM/ECF system, which sent notification of such filing to the following:

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