Wisconsin Civil Trial Journal

Summer 2023 • Volume 21 • Number 2

What Real Estate Agents Must Disclose When Representing a Seller of Property

Patricia Epstein Putney and William D. Bolte

Also In This Issue

Wisconsin Defense Counsel
Defending Individuals And Businesses In Civil Litigation

Columnists

William D. Bolte
Bell, Moore & Richter, S.C.

Blayne Nicole Christy
von Briesen & Roper, S.C.

David J. Corr, Ph.D., P.E.
CTLGroup

Daniel Finerty
Lindner & Marsack, S.C.

Erik M. Gustafson
Borgelt, Powell, Peterson & Frauen, S.C.

Adam Jordahl
The Hamilton Consulting Group, LLC

Mollie T. Kugler
von Briesen & Roper, S.C.

Nicole Marklein
Wisconsin Defense Counsel

Patricia Epstein Putney
Bell, Moore & Richter, S.C.

Editor

Vincent J. Scipior
Coyne, Schultz, Becker & Bauer, S.C.
vscipior@cnsbb.com

Amicus Curiae Committee
Chair: Brian Anderson
Everson, Whitney, Everson & Brehm, S.C.
BAnderson@eversonlaw.com

Diversity, Equity & Inclusion Committee
Chair: Morgan Stippel
Bell, Moore & Richter, S.C.
mstippel@bmrlawyers.com

Employment Law Committee
Chair: Storm Larson
Boardman & Clark LLP
slarson@boardmanclark.com

Insurance Law Committee
Co-Chair: Joshua Cronin
von Briesen & Roper, S.C.
jcronin@vonbriesen.com

Co Chair: Mollie Kugler
von Briesen & Roper, S.C.
mkugler@vonbriesen.com

Law School Committee
Co-Chair: John Pinzl
von Briesen & Roper, S.C.
jpinzl@vonbriesen.com

Co-Chair: Monte Weiss
Weiss Law Office, S.C.
mweiss@mweisslaw.net

Ad Hoc Litigation Skills Committee
Chair: Andrew Hebl
Boardman & Clark LLP
hebl@boardmanclark.com

Membership Committee
Chair: John Shull
Klinner Kramer & Shull
jrs@zkklaw.com

Vice Chair: Megan McKenzie
American Family Mutual Insurance Co.
mmckenzi@amfam.com

Website and Social Media Committee
Chair: William Brookley
Cross Jenks Mercer & Maffei, LLP
WBrookley@cjmmlaw.com

Wisconsin Civil Jury Instructions Committee
Representative: Amy Freiman
Hills Legal Group, Ltd.
freiman@hillslegal.com

Women in the Law Committee
Chair: Grace Kulkoski
Wisconsin Mutual Insurance
gkulkoski@wiins.com

Vice Chair: Megan McKenzie
American Family Mutual Insurance Co.
mmckenzi@amfam.com

Young Lawyer Committee
Charles Polk III
Amundsen Davis, LLC
cpolk@amundsendavislaw.com

DRI Representative
Andrew Hebl
Boardman & Clark LLP
hebl@boardmanclark.com

Executive Director
Jenni Kilpatrick, CAE
jenni@wdc-online.org

Legislative Advisors
Rebecca Hogan
Hamilton Consulting Group
hogan@hamilton-consulting.com

Adam Jordahl
Hamilton Consulting Group
Jordahl@hamilton-consulting.com

Wisconsin Defense Counsel

Defending Individuals And Businesses In Civil Litigation

In This Issue…

Journal Policy

WDC Members and other readers are encouraged to submit articles for possible publication in the *Wisconsin Civil Trial Journal*, particularly articles of use to defense trial attorneys. No compensation is made for articles published and all articles may be subjected to editing.

Statements and expression of opinions in this publication are those of the authors and not necessarily those of the WDC or Editor. Letters to the Editor are encouraged and should be sent to the WDC office at 6737 W. Washington St., Suite 4210, Milwaukee, WI 53214. The Editor reserves the right to publish and edit all such letters received and to reply to them.

Employment Law for Defense Attorneys and Insurance Professionals: A Process-Oriented Approach

by: Daniel Finerty, Lindner & Marsack, S.C.

For those defense attorneys and insurance professionals who are new to Employment Practice Liability Insurance (EPLI) claims, new to commercial claims, or new to claims in general, employment law can present a maze of seemingly conflicting obligations upon an insured employer under federal statutory and regulatory authorities, state and local law and other mandates. However, for those that employ a process-oriented approach, a better understanding of those obligations can be easily understood, harmonized, and applied when assessing EPLI claims.

One way that defense attorneys and insurance professionals can best understand employment law to better assess EPLI claims is that, in many ways, it is oriented around processes designed to bring an employer and employee *together* to solve a problem. That process is designed to keep them *together* instead of pushing them apart and, thus, toward a judicial or administrative remedy. Likewise, the quality of the employer's efforts, as well as those of an employee, to solve a problem is often a key factor in determining the strength or weakness of the employer's defenses in litigation that follows a breakdown in the process and the strength of those defenses. In addition, defense attorneys and insurance professionals better oriented with this process-based approach and an understanding of employment law can more thoughtfully engage with employment defense counsel, consider whether to settle a claim and how much effort and capital should be put toward that effort and the strengths and weaknesses of various defenses to the claim.

I. The Process-Oriented Approach

To explain this process-oriented approach, federal statutory obligations are used as examples. Their state law and local law cousins are often similarly formatted so this approach may have a broader appeal. However, defense counsel should be generally consulted before concluding how to proceed on state or local issues, as those laws may vary.

a. Title VII of the Civil Rights Act of 1964

Title VII[1] prohibits discrimination based upon sex, race, national origin, and other protected categories. Interpretations of Title VII's prohibitions on sex, race and other categories yielded a more detailed interpretation that prohibited an employer from creating or permitting a hostile work environment based upon any protected category. However, in 1998, the United States Supreme Court recognized that an employer had an affirmative defense to a hostile work environment claim where the conduct of a supervisor was at issue in the *Faragher* and *Ellerth* cases.[2]

Assuming no tangible adverse employment action was taken against an employee, such as a discharge, demotion, pay cut or other adverse action,[3] an employer may assert the *Faragher*/*Ellerth* affirmative defense where two elements can be shown. *First*, if the employer can show it exercised reasonable care[4] to prevent and promptly correct any harassing behavior through a harassment policy, annual training, and prompt action to investigate and remediate any potential harm to a complainant,

it can establish the first element of the defense. *Second*, if the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities offered by the employer or to otherwise avoid harm by failing to report alleged harassment as outlined in an anti-harassment policy, by not accepting an employer's remedial offer to return to work, or other opportunity to continue the work relationship, the employer may establish the second element.

In this way, the *Faragher*/*Ellerth* defense is dependent upon the fact that an employer had an anti-harassment policy in place, that it performed regular annual harassment training (showing the employee attended regularly is also helpful), and that the employer promptly acted to correct any untoward behavior and prevent any further harassment after it learned of the alleged harassment. This evidence is key to establishing a firm *Faragher*/*Ellerth* defense. Like above, the quality of the harassment policy, the training, the investigation, and attempts to remedy issues that may have been discovered during an investigation all go a long way to establishing a firm defense. By contrast, where one or more of these processes are lacking or missing entirely, the employer's defense may not be strong, especially if that missing element played a role in the employee's decision not to return to work.

b. The Americans with Disabilities Act

The Americans with Disabilities Act of 1990[5] and its amendments prohibit discrimination based on disability. In order to adhere to the prohibition, the ADA requires an employer to provide reasonable accommodation to qualified applicants for work and employees. Reasonable accommodation may include an employee's request that an employer adjust the job application process so a qualified applicant with a disability can be considered for a position, that an employer modify the physical work environment, or change the way a job is usually performed or the work schedule, so an individual with a disability can perform the essential functions of that position. In that way, one or more changes made by the employer can enable a disabled employee to enjoy equal benefits and privileges of employment like non-disabled employees.[6]

While the process typically starts with an employee's request for accommodation, an employer may be obligated to proactively offer accommodation where the need for reasonable accommodation is obvious. As an example, consider an employee in a wheelchair who is assigned to work in a tight space, has a comparatively lower desk than others or is assigned to a thinner desk under which the wheelchair cannot fit.

Regardless, the quality of the interactive process between the employer and employee may not only determine whether the process will succeed (and the employee remains employed) but also will determine if litigation may follow and the possible outcome of that litigation. Where an employer has not meaningfully participated in the interactive process, is at fault for allowing the interactive process to break down, or is otherwise at fault for the failure to mutually agree to a reasonable accommodation, the employer's position in subsequent litigation is comparatively weak, especially where the employer bears responsibility for the breakdown in the interactive process. Where an employer meaningfully participates, offers reasonable suggestions, does not disregard reasonable suggestions from the employee or the employee's doctor, and is persistent and reasonable in its discussions to find a reasonable accommodation, that employer is more likely to have solved the reasonable accommodation question and prevented any dispute. In addition, it will be in a comparably better strategic position should the process break down. Where the employer fully documents the process and is the last one to genuinely communicate a "we are open to reasonable options" message, so much the better.

One legal limitation on an employer's obligation to provide reasonable accommodation is that the job-related modifications may not cause the employer "undue hardship," which can include significant difficulty, expense or disruption which interfere with the employer's ability to conduct its

business. This defense can be difficult to assert. However, after having conducted the interactive process, the employer should be able to quantify why it concluded that a specific accommodation caused an "undue hardship" in terms of money, lost work time, disrupted workflow or other production hiccups that the accommodation would cause. Better documentation and articulation of the reasons the employer concluded there was an undue hardship, the better the defense. The same applies to a "direct threat" defense. If the employer concluded the plaintiff or the requirements of the job posed a direct threat to the health and safety of himself, herself or others, a direct threat defense may be asserted. To assert the defense, many courts will require that a health or safety risk must be a significant risk of substantial harm based on valid and objective evidence and not speculation.

II. The Family and Medical Leave Act

If an employee or someone in that employee's immediately family experiences a serious health condition, or the employee's performance or attendance dramatically dip, the employer may be obligated to proactively offer job-protected leave under the Family and Medical Leave Act, 29 U.S.C. 2601 *et seq*. The quality of the process will often determine the outcome of any subsequent dispute. Any subsequent solicitation, review and/or approval of medical certification or refusal to approve medial leave or family leave to care for another member of the family, will play a large role in determining the ultimate outcome of the process and how to assess the risks going forward.

In sum, the better the quality of the process, the better the potential litigation outcome will be, as the employer can obtain strategic high ground to negotiate from a position of strength or, if necessary, assert solid defenses to liability if the matter cannot be resolved.

III. Best Practices

For defense attorneys and industry processionals, the critical questions to ask in a process-oriented case are both open-ended and closed-ended:

- Response. How did the employer initially respond to the employee's complaint, request for accommodation, or request for medical leave? With empathy or with disdain? By documenting the complaint or by directing the employee to put it in writing or speak to other members of the management team?
- Investigation. What steps, if any, were undertaken to investigate the alleged harassment, discrimination or retaliation, the request for accommodation or the communication of the need for leave? How quickly did the next steps take place?
- Questions. If the employer or its investigator had questions regarding the alleged harassment, was a reasonable follow up performed? What questions were asked regarding possible accommodation that would work in the situation? What questions were asked about the likely timing and/or duration of the accommodation and/or the need for leave? Did the employer ask whether the employee requested continuous or intermittent leave? Were all logical questions asked of the employee, witnesses, the employee's doctor, and any other source cited by the employee?
- Responses. Did the employee's responses to the employer's inquiries make sense? If not, was clarity sought through an additional request? If not, why not? If logical questions were asked, what next steps were taken based upon the responses by the employee and/or his or her doctor to attempt to determine what reasonable accommodation was possible and/or the nature, extent, and duration of the employee's need for leave?
- Clarifications. If the story did not make sense at any other point, were clarifying questions asked to achieve an understanding of the situation? If not, why not? Were assumptions made? If questions were asked, were genuine answers received that made sense? Did the answers help the employer to resolve the dispute, decide on a reasonable accommodation and/or certify the leave requested

by the employee? If not, what questions should have been asked to do so? Or did the questions not matter to the conclusion?

- Return-To-Work. If the employee did not come back to work, why? Was a return-to-work option offered? Did the employee have reasonable objections to that offer? Were the employee's objections disregarded or addressed? Did the employee refuse to return under any circumstances, regardless of what the employer did or may have done? Or did the employee raise a legitimate dispute, such as not wanting to work in the same area as the alleged harasser, not being able to work with the accommodation provided by the employer or needing additional time off due to, for example, an infection post-surgery?

Defense attorneys and industry professionals who can spot trouble in a new claim may be better empowered to rectify any errors through quick action to improve the ultimate result for the carrier and the insured. For example, a sex harassment complaint by a current employee has not been addressed or investigated by the employer is a good example.[7] In such a case, a knowledgeable attorney or industry professional can quickly realize the need for a proactive investigation into harassment allegations, assign employment defense counsel to begin the investigation process by engaging a third-party investigator under the protection of the work product privilege or guide an internal investigation so facts can be gathered for a decision on how to proceed. In this example, the employer may assert a *Faragher*/*Ellerth* defense that, despite a later investigation than should have taken place, will go a long way to either heading off a dispute or achieving a successful or better result than would have occurred without the proactive measures. Again, all should bear in mind that the ultimate goal of all such measures is dispute resolution and continuing the employer-employee relationship such that all measures taken toward achieving those goals will provide a more defensible case, should it come to that.

IV. Conclusion

Defense attorneys and industry professionals armed with the ability to spot employment issues such as these when handling EPLI claims will quickly become indispensable and essential to their respective operations by thoughtfully managing the risk presented by EPLI claims and, when necessary, effectively litigating them to a successful conclusion.

A version of this article originally appeared in the Summer 2023 edition of the Employment Practices Liability Consultant (EPLic), which provides leading-edge risk management and insurance solutions for employment-related loss exposures. Subscription information available at: https://subscribe.irmi.com/employment-practices-liability-consultant.

Author Biography:

Daniel Finerty (dfinerty@lindner-marsack.com) (Marquette University Law School, 1998) practices employment law with Lindner & Marsack, SC, in Milwaukee, Wisconsin, where he defends EPLI claims for national and regional, public-sector carriers and their third-party administrators (TPA). He regularly counsels and trains claim professionals on best practices in handling EPLI claims. For over 23 years, Daniel has partnered with EPLI carriers, TPAs, and their respective claims professionals to defend EPLI claims in litigation, arbitration, mediation and during pre-filing, post-tender stage. Daniel is admitted to the State Bar of Wisconsin, the State Bar of Illinois (pending), and he is admitted to practice in several federal district courts as well as numerous Native American tribal courts in Wisconsin and Michigan. Daniel is an active member of the Wisconsin Defense Counsel, an active member of The Gavel, Your Claims Defense Network© (www.thegavel.net) and its Workplace Matters Group, and is a member of the Defense Research Institute's Native Nations Law Task Force.

References

1 Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e *et seq*., provided remedies upon proof of a successful claim including back pay, reinstatement, and injunctions against future acts of discrimination in a trial to the court, has been amended several times since passage. Two examples include the Pregnancy Discrimination Act of 1978, which amended Title VII to prohibit discrimination on the basis of pregnancy, childbirth, or related medical conditions, and the Civil Rights Act of 1991, which amended Title VII to provide a right to trial by jury, authorized recovery of emotional distress and punitive damages, authorized an award of attorney's fees and expert fees to a prevailing party and limited the emotional distress and punitive damages to a capped number based upon the number of employees. As to the number of employees, Title VII only applies to "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year…" 42 U.S.C. § 2000e(b).

2 *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998); *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998). This affirmative defense generally applies only where the conduct of a "supervisor" is at issue, when the conduct of fellow employees or a third party is at issue, the employer may be liable if it knew or should have known of the harassment and failed to respond. *See* 29 U.S.C. §§ 1604.11(d) ("With respect to conduct between fellow employees, an employer is responsible for acts of sexual harassment in the workplace where the employer (or its agents or supervisory employees) knows or should have known of the conduct, unless it can show that it took immediate and appropriate corrective action."), 1604.11(e) ("An employer may also be responsible for the acts of non-employees, with respect to sexual harassment of employees in the workplace, where the employer (or its agents or supervisory employees) knows or should have known of the conduct and fails to take immediate and appropriate corrective action. In reviewing these cases the Commission will consider the extent of the employer's control and any other legal responsibility which the employer may have with respect to the conduct of such non-employees.").

3 Alleged harassment claims against a supervisor initially turn on the question of whether or not the supervisor's behavior culminated in a tangible employment action against the employee, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits. *Ellerth*, 524 U.S. at 765. If the harassment resulted in an adverse employment action, the employer will be vicariously liable. *Id*. In such a case, this affirmative defense is not available.

4 Upon receipt, any attorney or insurance professional should immediately determine two things. First, is there any harassment that may be ongoing? If so, immediate action should be taken to ensure that any potential harm is reduced, mitigated, or eliminated based upon the circumstances, as doing so supports the *Faragher*/*Ellerth* defense. Second, has any investigation been conducted into the allegations to assess whether an employer rule has been violated and whether any preventative or corrective actions need to be taken regarding, for example, a victim and an aggressor. Undertaking both these steps not only supports the employer's defense but also goes a long way toward addressing any existing issues in the workplace that may lead toward potential liability.

5 The Disabilities Act of 1990, 42 U.S.C. § 12101 *et seq*., was passed in order "to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities" by requiring employers to provide reasonable accommodation to allow qualified employees to work. The ADA applies to all employers that are "engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person." 42 U.S.C. § 12111(5)(a).

6 *See* https://www.dol.gov/general/topic/disability/jobaccommodations (last visited Mar. 13, 2023).

7 *See* n. 3, *supra*.