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Investigations Can Capsize Attorney-Client Privilege

Law360, New York (December 11, 2013, 6:29 PM ET) -- Most employers understand the basics about sexual harassment claims. They know that an employee's sexual harassment allegations have to be investigated, that a reasonable investigation can be a defense for the employer, that legal advice related to an employer's investigation and follow-up actions can be crucial and that the privileged nature of advice from the employer's lawyer generally should be protected. It is in that context that a recent federal court decision sends a chilling reminder that the attorney-client privilege can be waived inadvertently when the employer's legal adviser becomes overly involved in the employer's investigation.

The case is Koss v. Palmer Water Department, which was decided on Oct. 7, 2013, by the United States District Court for the District of Massachusetts.

When the plaintiff in Koss sued on a claim of sexual harassment, her employer tried to defend itself, at least in part, by asserting that (a) it had exercised reasonable care to prevent and promptly correct the alleged harassing behavior, and (b) the plaintiff had failed to take advantage of available preventive or corrective opportunities to avoid harm. (This is the so-called Faragher-Ellerth defense, which can apply to a claim of vicarious liability by an employer for a supervisor's harassment of a subordinate if no tangible, adverse employment action was inflicted on the subordinate.) The employer also claimed, however, that it did not have to produce all of its documents relating to its investigation of the sexual harassment complaint because some of them were protected by the attorney-client privilege and work product doctrine.

The federal district court disagreed.

Relying on opinions from other federal districts, the Koss court held that attorney-client privilege and work product protection had been waived not only for the employer's investigation report but also for "all documents, witness interviews, notes and memoranda created as part of and in furtherance of the investigation," including direct communications between the investigator and the attorneys who were advising the investigator. The court's reasoning was that, "although not personally conducting interviews, [the advising attorneys] not only directed and collaborated with [the investigator] but exercised significant control and influence over him throughout the investigation." Thus, from the standpoint of the court, the attorney-investigator communications were "part and parcel of the investigation which goes to the heart of the defendants' affirmative defense."

While the Koss court's description of the waiver of privilege is broad, some limits on the ruling are discernible. Koss does not say that attorney client privilege and work product protections are waived whenever an employer's lawyer communicates with his or her client about a sexual harassment

investigation. Rather, the court in Koss distinguishes from its own facts a situation in a case from another district (McKenna v. Nestle Purina PetCare Co.) in which waiver did not occur because the attorney in that case had communicated solely with his client, the employer, and did not conduct interviews, make disciplinary decisions, or otherwise participate in the investigation itself.

Also, Koss does not say that a waiver of privilege occurs when the employer's lawyer communicates with the investigator in a way that merely furthers the investigation without the lawyer also becoming part of the investigation. Instead, Koss explicitly distinguishes the facts of a second case (Waugh v. Pathmark Stores Inc.), as well, in which the only contacts between the employer's attorney and the investigator were a request by the lawyer for an update on "the status of the matter" and the lawyer's presence in a meeting in which the investigator reported her findings. According to the Koss court, waiver did not occur in those circumstances because "the attorney's two brief contacts were reflective of his role as a legal advisor only."

Koss thus provides lessons for employers and their lawyers, even though it leaves some questions unanswered. The lessons include the following:

- If an employer's attorney becomes overly involved in a sexual harassment investigation, a waiver of attorney client privilege and work product protection will result if the investigation is offered as a defense to the sexual harassment claim. However, the exact point at which such over-involvement will occur is unclear.

- If an employer's lawyer has any contact at all with the employer's investigator, the contact should be "reflective" of the lawyer's role as "a legal adviser only." But again, the precise point at which an attorney's contact might become reflective of something else, sufficient to cause waiver, is unclear.

- Attorney-client privilege and work product protection almost certainly are waived if the lawyer conducts interviews or exercises significant control and influence over the investigator. As a result, the best practice is to ensure that a sexual harassment investigator receives appropriate guidance about how to investigate and report before the investigation starts.

- Once the investigation has commenced, the employer's lawyer generally should leave the investigator alone to investigate and report according to his or her own judgment and discretion.

- If questions arise for the investigator during the course of the investigation, the investigator should direct them to the manager who assigned the investigation, rather than to the employer's lawyer. The manager who assigned the investigation then can have a privileged conversation with the employer's lawyer, if the manager needs a lawyer's advice to answer the investigator's questions.

The Koss case is a strong reminder that, when defending a sexual harassment claim, employers and their legal counsel need to tread carefully to avoid inadvertently waiving the privileged nature of their communications. And when investigating such a claim, employers often would do well to build a "firewall" between their investigator and lawyer.

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