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The attorney-client privilege and workplace investigations

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A recent court decision illustrates why employers should give careful consideration to the attorney-client privilege before conducting an investigation in the workplace - to avoid unexpectedly having to disclose confidential information.

In *Koss v. Palmer Water Dept.*, a U.S. magistrate judge held that the employer had waived the attorney-client privilege because its outside counsel actively managed another attorney's investigation of a sexual harassment complaint.

Koss should serve as a reminder to employers to consider the boundaries of the attorney-client privilege, at the outset of every investigation, when deciding how to staff and manage the investigation, so as to minimize the risk of having to disclose confidential information.

Background of 'Koss'

Koss involved an administrative assistant who claimed she was subjected to sexual harassment and a hostile work environment by her employer's treasurer. The plaintiff complained, later contending that the treasurer continued to harass her and that the town failed to respond properly.

The town subsequently hired an attorney to conduct an independent investigation of the plaintiff's complaint. While the attorney conducted all of the interviews, the town's regular outside law firm had significant involvement in guiding, advising, and directing the investigating attorney.

The plaintiff then filed a sexual harassment lawsuit in federal court, and the town's regular law firm represented the town in that litigation.

The town's defense was based, in part, on the investigation performed by the investigating attorney. Specifically, the town asserted the *Faragher-Ellerth* affirmative defense, which (as established by the U.S. Supreme Court) allows an employer to avoid vicarious liability for a hostile work environment allegedly created by a supervisor's conduct, if the employer can prove that (1) the employer exercised reasonable care to prevent and promptly correct any harassing behavior, and (2) the employee unreasonably failed to take advantage of any preventative or corrective opportunities provided by the employer.

Thus, the town put its investigation "into issue" in the case.

Motion to compel granted

The plaintiff eventually moved to compel production of documents related to the town's investigation. The town, meanwhile, maintained that documents reflecting its regular law firm's involvement in the investigation were protected from disclosure under the attorney-client privilege.

After reviewing the documents at issue, the judge ordered the town to produce investigation-related documents involving the town's regular firm. The judge found that the law firm had been "part and parcel of the investigation" that formed the basis of the town's *Faragher-Ellerth* affirmative defense.

Thus, the judge concluded that the town had waived the attorney-client privilege "for not only the [investigation] report itself, but for all documents, witness interviews, notes and memoranda created as part of and in furtherance of the investigation."

In sum, because attorneys at the town's law firm "were intimately connected to, if not controlling of, the investigation," and because the town was affirmatively raising the investigation as a defense to the plaintiff's claims, the judge held that the town had waived the attorney-client privilege as to investigation-related documents involving the law firm.

The attorney-client privilege

Against that backdrop, it is worth revisiting the basic principles applicable to the attorney-client privilege, not only to show why the *Koss* judge reached this conclusion, but more importantly as a reminder to help employers avoid similar traps when conducting their own workplace investigations.

In general, the attorney-client privilege shields from disclosure those communications in which an attorney and client communicate confidentially for the purpose of seeking or providing legal advice. *See, e.g.*, *RFF Family Partnership, LP v. Burns & Levinson, LLP*, 465 Mass. 702, 707-08 (2013).

For the privilege to attach, an attorney must be acting in the role of a legal advisor. *See, e.g.*, *In Re: Grand Jury Subpoena*, 662 F.3d 65, 72 (1st Cir. 2011).

In contrast, if an attorney acts in a *non*-legal capacity — for instance, interviewing fact witnesses in an investigation — the attorney-client privilege likely will not apply. *Id.* Similarly, when an in-house attorney provides business, rather than legal, advice, those communications are also unlikely to be privileged. *See, e.g.*, *U.S. v. Windsor Capital Corp.*, 524 F. Supp. 2d 74, 81 (D. Mass. 2007).

Further, the attorney-client privilege can also be waived in a variety of ways, such as disclosure (inadvertent or not) to outside parties, or, as in the *Koss* case, when an employer offers the fact of a thorough investi-

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gation as an affirmative defense to a plaintiff's claims. *See, e.g.*, *Musa-Muaremi v. Florists' Transworld Delivery, Inc.*, 270 F.R.D. 312, 317-19 (N.D. Ill. 2010).

When making such an affirmative defense, the employer will almost certainly waive any claim of privilege as to the *investigator's* report and interview notes, even if the investigator is an attorney. *See, e.g.*, *Walker v. Cnty. of Contra Costa*, 227 F.R.D. 529, 535 (N.D. Cal. 2005).

However, *Koss* goes beyond the mere waiver of the attorney-client privilege as to the investigator's report and interview notes. Rather, *Koss* also reflects the waiver of the privilege as to communications involving the town's regular outside counsel (in effect, its general counsel).

In that regard, the *Koss* decision may well have shocked and dismayed both the town and its law firm. Without reflecting upon the precise boundaries of the attorney-client privilege, they might well have assumed that outside counsel's communications would be privileged.

Indeed, in general, an employer's communications with its outside attorney (and not involving the investigating attorney) about how the employer might direct the investigation and/or respond to information learned during the investigation typically *would* be protected by the attorney-client privilege. *See, e.g.*, *Waugh v. Pathmark Stores, Inc.*, 191 F.R.D. 427, 431-32 (D.N.J. 2000).

Specifically, so long as those communications are kept confidential, involve the provision of legal advice, and do not spill over into the actual conduct of the investigation, then the employer should be able to protect those communications under the privilege. *Id.*

Implications of 'Koss'

In *Koss*, the privilege did not protect communications from the town's regular outside law firm to the investigating attorney. This should not come as a surprise, given not only the parameters of the attorney-client privilege, but also the likelihood that the town would need to disclose the details of its investigation to defend against the sexual harassment claim (in light of the town's assertion of the *Faragher-Ellerth* defense).

Of course, if the town's outside firm anticipated the waiver of the attorney-client privilege, then there would be no surprise for the firm or the town and, thus (presumably) no problem.

On the other hand, if the town and the firm expected that all of the firm's communications would be protected as privileged, then the court-ordered disclosure would likely be truly damaging.

In short, the employer and the law firm acting as counsel in connection with an investigation should discuss whether the law firm should (a) entirely avoid communicating with the investigator, or (b) limit its communications with the investigator to (i) listening to (or receiving) the investigator's report(s) and (ii) asking follow-up questions of the investigator.

Counsel should not be giving legal advice to the investigator, and counsel should not be giving legal advice to its client while the investigator is listening on the phone or sitting in the room. If counsel limits its communications with the investigator accordingly, then counsel should not be disclosing to the investigator any legal advice that counsel provided to its clients.

Thus, the *Koss* decision suggests that when an attorney conducts a factual investigation that may be raised as a defense to a legal claim, that lawyer should not *also* act as legal counsel. Likewise, that investigating attorney should not participate in communications between the employer and its regular counsel regarding matters of legal advice.

In the end, *Koss* is an important reminder to employers to understand the scope of the attorney-client privilege, and to take appropriate steps to avoid unintended waivers of the privilege in connection with workplace investigations.

Recommendations

An employer should give careful consideration to the *attorney-client privilege* — and any potential waiver issues — before commencing an investigation of a workplace complaint.

The employer should carefully evaluate *the nature of the complaint*: For example, is the *Faragher-Ellerth* defense likely to be asserted in response to that type of complaint? If so, outside counsel should consider whether to manage its communications with the investigating attorney on the assumption that those communications will not be protected by the attorney-client privilege.

The employer should carefully evaluate *the likelihood that litigation will occur*. This "big picture" analysis will help the employer determine whether an inadvertent waiver of the attorney-client privilege may be a significant danger and, if so, how that hazard can best be minimized or avoided.

The employer should consider what roles outside counsel and/or an investigating attorney should play in advising the employer and/or conducting the investigation.

The employer may want to create, at the outset, a formal investigation document, to clearly differentiate the role of the investigator (who will be performing the fact-gathering) from the role of the outside attorney (who will be advising the employer on its response to the results of the investigation).

Throughout the investigation, the employer should take appropriate precautions to ensure that the investigator and outside counsel do not go beyond their assigned roles.

Taking those steps, both before and during an investigation, will help an employer maximize its chances of avoiding an unintentional disclosure of confidential information. MLW

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