

CLEAR DIRECTION IN
COMPLEX CASES

Attorneys

Jason W. Crotty

Internal Investigation Can Lead To Waiver of Attorney-Client Privilege

Internal Investigation Can Lead To Waiver of Attorney-Client Privilege: [Koss v. Palmer Water District](#), 2013 WL 5564474 (U.S.D.C., D. Mass., October 7, 2013).

In a case of first impression, U.S. Magistrate Judge Kenneth P. Neiman recently ruled that the attorney-client privilege did not prevent a municipal employee from obtaining the municipality's internal investigation file into the employee's allegations of sexual harassment. In [Koss v. Palmer Water Department](#), the plaintiff, Ms. Koss, an administrative assistant employed with the Palmer Water Department, claimed to have been the victim of sexual harassment by a co-worker from 2008 through 2012. She alleged she was subjected to sexual harassment and a hostile work environment, claiming that a co-worker made sexually suggestive comments to her, made inappropriate remarks about her relationship with her husband and, on at least one occasion, touched her in an inappropriate fashion. Plaintiff complained to a supervisor, who took steps to separate her from the co-worker in question. When she made additional complaints, the plaintiff claims her employer did not adequately address her concerns. Thereafter, plaintiff's schedule was reduced from full-time (40 hours) to part-time (16 hours), and she was ultimately terminated three months later. Subsequently, the plaintiff sued the Water Department and two of its employees for both sexual harassment and retaliation.

As part of its defense to plaintiff's action brought under Title VII, the Water Department asserted that it exercised reasonable care to prevent/correct any alleged harassment and that Koss had failed to avail herself of opportunities to avoid the harm she allegedly suffered. The Water Department also claimed, however, that it did not have to produce all 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. Plaintiff sought production of the Department's investigative material, arguing that, by raising the defense of reasonable care, the Department placed the investigation of plaintiff's claims at issue in the litigation.

The federal district court sided with the plaintiff. Relying on opinions from other federal districts, the Magistrate 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. First, [Koss](#) does not stand for the proposition that the attorney-client privilege and work product protections are waived whenever an employer's outside counsel communicates

with his or her client about a sexual harassment investigation. Rather, the Koss court distinguished the Water Department's investigation from those in which an attorney communicated only with his client, the employer, and did not conduct interviews, make disciplinary decisions, or otherwise participate in the investigation itself. In those instances, no waiver of the privilege should be found.

Second, Koss does not hold that a waiver of privilege occurs whenever the employer's attorney communicates with the supervisor or employee conducting an internal investigation in a way that merely furthers the investigation, without the lawyer also becoming "part of" the investigation. Such potential scenarios include communications where the only contacts between the employer's attorney and the investigator were requests by the lawyer for an update on "the status of the matter," or where the lawyer was merely present in a meeting in which the investigator reported her findings. According to the Koss court, no waiver could be found in such circumstances because the attorney's brief contacts are "reflective of his role as a legal advisor only."

This decision should not dissuade employers and municipalities from conducting internal investigations where warranted. However, attorneys who are involved in the investigation and related litigation should be cognizant of their level of involvement and whether they exercise "significant control and influence" over the investigation. If an employer's attorney becomes overly-involved in a sexual harassment investigation (or any internal investigation), a waiver of attorney client-privilege and work product protection may occur if the investigation is offered as a defense to the sexual harassment claim. If an employer's lawyer has any contact with the employer's investigator, such contact should be "reflective" of the lawyer's role as "a legal advisor only" in order to maintain the attorney-client privilege. If a lawyer's investigative role is more active or hands-on, an employer may wish to think twice about raising the reasonable care defense in response to a claim of employee harassment or discrimination. Based on the Koss rationale, that defense may open up more than information than the employer planned.

Published in *Developments in Municipal Law* [Winter 2014 Newsletter](#).