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Attorneys investigating harassment or discrimination claims need to take precautionary steps before, during and after the investigation to avoid claims for negligent misrepresentation based on comments made during the investigation.

## East Coast Edition

*A Littler Mendelson East Coast-specific Newsletter*

### Attorneys Hired By Employers in New Jersey To Investigate Complaints Of Workplace Harassment May Be Sued By Complainant

*By Eric A. Savage*

In a case of great significance to attorneys hired by employers to investigate claims of workplace harassment and the employers that hire them, the United States District Court for the District of New Jersey has held in *Spagnola v. Town of Morristown* (Civ. Action No. 05-577, Dec. 7, 2006), that a plaintiff may sue the investigating attorney for negligent misrepresentation even where there is no attorney-client relationship between the complainant and the attorney. This ruling is consistent with state Supreme Court precedent, which holds that the absence of an express assent to enter into an attorney-client relationship will not by itself preclude a finding that such a relationship existed. The ruling warrants careful conduct of investigations by counsel and mandates that employers and investigating counsel take certain precautions before, during and after such activities.

#### Factual Background

Plaintiff Spagnola worked for a municipality and her position entailed various information technology responsibilities. She reported to both the Township's Business Administrator and the mayor. She asserted that she had suffered severe sexual harassment by the Administrator over a prolonged period, which took the form of repeated exposure to sexually offensive materials, including: (1) finding sexually explicit stories in the Administrator's office laptop satchel; (2) being called to his office to remove a sexually explicit screen saver from his office computer; (3) being exposed to sexually explicit materials, including sexual stories and links to a pornographic website when Spagnola accessed his computer as part of her job-related duties; and (4) being exposed to sexually explicit stories

contained on two disks located in his office, which was in response to a complaint raised by a female subordinate.

Spagnola complained to both the Administrator and the mayor about the sexually explicit materials and her exposure to them. Her complaints triggered an investigation conducted by an attorney from an outside law firm hired by the Township for that purpose. After Spagnola met with the attorney and handed over the sexually explicit materials in her possession, she claimed that the attorney tried to intimidate her by stating that "no real action" would be taken against the Administrator.

She also claimed that the attorney informed her that the Administrator had not violated any Township policy and that the Township had no duty to protect her. In addition, she alleged that counsel affirmatively misled her about her rights with respect to the alleged sexual harassment by stating, in part, that she had not been sexually harassed because no sexual touching or language was directed personally at her. Spagnola claimed that the sexually offensive conduct continued even after her meeting with counsel and that although she continued to make complaints to the officials involved, the conduct did not stop. Ultimately, she resigned and filed suit against the Township, the officials and the attorney who had conducted the investigation.

#### The Court's Ruling

The Court denied the motion filed on behalf of investigating counsel that sought to dismiss the claim of negligent misrepresentation. Investigating counsel had contended that

he did not owe Spagnola a duty of care because there was no attorney-client relationship between him and Spagnola and that he took no affirmative actions to justify her reliance on any suggestions or advice that he had allegedly given her. After reviewing the New Jersey common law standard for negligent misrepresentation, the Court concluded that Spagnola was required only to establish that counsel had negligently made an incorrect statement of a past or existing fact, that she justifiably relied on it, and that her reliance resulted in a loss or injury. The Court went on to hold that the allegation that counsel had deliberately misled and misinformed plaintiff about her rights regarding sexual harassment, if true, satisfied the first element, namely, that he had negligently made an incorrect statement of a past or existing fact.

Similarly, the Court found that Spagnola had satisfied the second prong of the test by demonstrating, at least for purposes of the motion, that she had relied on counsel's statements that the Township had no duty to protect her, which caused her to remain in her position and continue to be exposed to sexually explicit materials. As to the third element, that Spagnola's reliance caused a loss or injury, the Court determined that plaintiff had satisfied this prong by alleging that her continued exposure to the explicit materials caused her emotional distress, psychological injury, pain and suffering, humiliation, damage to reputation, and economic loss.

Ultimately, the Court concluded that although the investigating counsel was not Spagnola's attorney, and despite the absence of an express agreement to enter into an attorney-client relationship, an attorney could owe a duty of care to a non-client if the attorney knew, or should have known, that the non-client would rely on the attorney's representations and if the alleged client was not too remote from the attorney to be entitled to some measure of protection.

## The Impact of the Court's Decision

As a result of this decision and the ability of courts to infer the existence of an attorney-client relationship where the surrounding circumstances warrant such an assumption, it is now essential that attorneys hired by employers to investigate employee claims of

discrimination or harassment in New Jersey exercise caution when gathering facts and, particularly, when interviewing the complainant. To minimize potential legal exposure, attorney-investigators should consider providing a written disclaimer to be signed by the complainant before the interview. The disclaimer, which the complainant should sign, should confirm that by interviewing the employee, the attorney is not entering into an attorney-client relationship or providing advice to the employee, which can only come from the complainant's own counsel.

It is clear from the decision that counsel should limit interactions with the complainant strictly to investigating the allegations and collecting facts and documents. Although it is inevitable that an interviewer will assess the credibility of the complainant, it is essential that counsel not share his or her views of the facts, the law, or the merits of the claim with the interviewee. Instead, counsel should make explicit that the sole purpose of the interview is to gather facts which will enable the employer to assess the claim and decide how to proceed. Moreover, the attorney-investigator must refrain from rendering legal opinions or advice to the complainant, which might enable the complainant to claim that he or she justifiably relied on such statements to their detriment.

After the interview, the attorney should consider sending a letter to the complainant confirming that he or she did not provide any legal advice or give any employment guidance to the employee. This letter can also confirm that the complainant remains free to consult his or her own counsel and should do so for the purpose of assessing his or her rights. Any findings or conclusions that the attorney reaches should be presented to the employer for review, and not disclosed to the complainant. This step will help shield the attorney-investigator from claims that an attorney-client relationship existed with the complainant.

The *Spagnola* decision has important implications for employers as well as investigating attorneys. Since principals can, in certain circumstances, be held liable for the acts of their agents, *Spagnola* leaves open the possibility that an employer that retains outside investigating counsel might face a claim based on the alleged misconduct of the attorney.

Thus, a plaintiff could make a claim against the attorney and also claim that his or her conduct was part of the discriminatory or retaliatory conduct. Employers retaining outside counsel should make sure to clarify what they do and do not expect counsel to do or say in the course of an interview with the claimant, and might be well advised to review in advance whatever disclaimers or other written material the investigator proposes to give to the claimant.

There is no way for investigating counsel and the employers that retain them to prevent the filing of an action such as that in *Spagnola*, but properly done protective measures, both before, during and after the investigative interview should give counsel and employers protection against such claims and keep the investigator out of the lawsuit for the underlying discrimination or harassment.

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