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Professional Malpractice

Watch What You Say

Misstating the law to a third party can land counsel in hot water

By Michael D. Homans

Blurring the line between investigator and defense advocate can lead to disastrous consequences — and liability — for employment counsel.

That's among the important lessons of *Spagnola v. Morristown*, 05-CV-577, an unpublished decision issued Dec. 7, 2006, from the federal district court of New Jersey. More generally, the case is a cautionary tale about what can happen when defense counsel, acting as an aggressive advocate for his client, goes too far in stating — or overstating — the law and his client's position to an unrepresented, unsophisticated third party.

From November 1991 through August 2004, Ann Marie Spagnola worked as a management specialist for the town of morristown. Despite her excellent work, Spagnola alleged that she was forced to endure "severe sexual harassment" by one of her supervisors. This included being forced to access and deal with sexually explicit stories, screensavers and images on her supervisor's office computers.

Spagnola said she frequently complained to her supervisor and to the mayor of Morristown. They initially responded in anger, and refused to remedy the situation or draft a policy to prohibit such misconduct, she alleged. As a result, Spagnola resigned. Then — in an action that the town and its counsel may be regretting now — the mayor arranged a meeting with the town's outside counsel, presumably to investigate the situation and determine whether any remedial actions could be taken. Spagnola turned over the sexually explicit materials to the outside counsel, a partner at a Morristown law firm.

After reviewing the materials, the defense counsel, Michael Rich, told Spagnola that the "Town of Morristown had no policy which had been violated by [the supervisor's] conduct," according to the opinion (quoting from the complaint).

Defense counsel, however, did not stop there. He "tried to intimidate Plaintiff and stated that 'no real action' would be taken against" her supervisor, Spagnola alleged. Furthermore — and this is key — defense counsel "affirmatively misled her about her rights relating to sexual harassment and stated that since [her supervisor] did not touch or speak to her in a sexual way, there was no sexual harassment." Thereafter, her supervisor's sexually offensive conduct continued, including sexually explicit e-mails to other employees. When Spagnola reported these incidents, defense counsel again tried to intimidate her, she alleged, and "told her 'off the record' that 'it might be time for [her] to find a new job.'"

Compounding this overly aggressive conduct by defense counsel, the same counsel followed up with an opinion letter to Spagnola, which she claimed was written to mislead and misinform her regarding her legal rights. The opinion does not contain any detail as to what the opinion letter stated.

In response to a motion for summary judgment by defense counsel and his law firm, the court dismissed Section 1983 (deprivation of rights under color of state law) and Section 1985 (conspiracy) claims because it determined that the defense counsel was not a "state actor," among other reasons.

However, on the issue of whether defense counsel engaged in negligent misrepresentation under New Jersey common law, the court found in favor of plaintiff and denied the motion.

To prevail on a negligent misrepresentation claim, a plaintiff must establish "that the defendant negligently made an incorrect statement of a past or existing fact, that the plaintiff justifiably relied on it and that his reliance caused a loss or injury." *Masone v. Levine*, 382 N.J. Super. 181, 187 (N.J. App. Div. 2005).

On the first element, whether defendant negligently made an incorrect statement of fact, the court found that plaintiff could meet this burden with her claim that defense counsel had "deliberately

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misled and misinformed" her about her rights regarding sexual harassment, including statements that no policy had been violated, that Morristown had no duty to protect her and that she had not been subject to sexual harassment because there had been no sexual touching or sexual language directed at her personally.

On the second element, whether plaintiff could show justifiable reliance on the misrepresentation, the court revealed little analysis, but did note that plaintiff alleged she remained in her position and continued to suffer exposure to sexually offensive materials because of defense counsel's alleged misrepresentation that Morristown had no duty to protect her or stop such misconduct. Reading between the lines, one can assume that the court found defense counsel's position as an expert in the law, brought in to investigate the situation (almost as if a neutral), was a sufficient basis for plaintiff, a layperson, to rely on his legal opinion.

As for the third element, that such reliance caused a loss or injury, plaintiff met this burden by claiming that as a result of relying on defense counsel's misrepresentations she continued to suffer emotional distress, psychological injury, pain, suffering, economic loss, etc.

Defense counsel also tried to avoid liability by arguing that he owed no duty of care to Spagnola, because she was not his client. However, Judge Jose Linares cited precedent that "attorneys may owe a duty of care to non-clients when the attorneys know, or should know, that non-clients will rely on the attorneys representations and the non-clients are not too remote from the attorneys to be entitled to protection." *Petrillo v. Bachenberg*, 139 N.J. 472, 483-84 (1995).

The court noted further that even with nonclients an "attorney is bound by his fiduciary obligations, and may be liable to non-clients for breach of his fiduciary obligations, when he knows, or has reason to know, that they rely on him and representations he makes in his professional capacity."

So what lessons can employment lawyers take from this unusual case? Some are obvious, some are not:

Investigate or advocate, don't do both. Due primarily to concerns about disqualification from later representation of the defense client in litigation, it has long been advised that defense counsel should consider abstaining from acting as a so-called neutral investigator of a claim of sexual harassment by a client employee. This case gives one more reason to avoid such dual roles — if you misrepresent the facts or the law (arguably or actually), you may be subject to individual and firm liability to the plaintiff. Defense counsel in this case would have been much better off to have referred the investigation out, or had a town employee conduct the investigation, with counsel advising, so that counsel could continue in his role, unconflicted, of representing the town. Once counsel became the investigator, he took on the role of a neutral. The plaintiff — being an unsophisticated layperson — had a reasonable claim that she relied on his comments as those of fact, and not of an advocate for the town.

Be careful in what you say about the law to unrepresented third parties. If plaintiff's allegations are true, defense counsel overstated the law in representing to her that she did not have any claim for sexual harassment because her supervisor had not directed his sexually explicit conduct at her. "Hostile work environment" sexual harassment claims have been recognized for nearly 20 years, and courts frequently recognize claims where the sexual conduct was not directed at the plaintiff. Although the defense counsel's position certainly could prevail as a defense, it would be incorrect to make a blanket statement to the employee that her claim could not prevail under the law. Counsel should avoid statements of the law to potentially adverse employees, and limit any such statements to black letter law, and not aggressive advocacy positions. Sexual harassment investigators are on much safer ground to limit their communications to the lay employee to findings of fact and ultimate conclusion (we find insufficient evidence to establish that sexual harassment occurred), rather than stating rules of law and legal rationales.

Document the investigation and communications. The opinion is almost devoid of any mention of any documentation of the defense counsel's role. This lack of documentation, presumably, allowed plaintiff to create issues of fact with her recollection of the conversations. In these types of investigations and employee dealings, counsel should always document conversations and have a witness (usually a manager or human resources employee) present.

Do not retaliate or give advice to third party. Reading between the lines, the defendants appear to have lost their motion, in part, because of the evidence of their disregard for Spagnola's rights when she complained, and the subsequent, alleged retaliation. Defense counsel is alleged to have joined in this retaliation, intimidating her and advising Spagnola to "find a new job" elsewhere. If this occurred, it certainly would have been improper.

In light of *Spagnola*, employment counsel in New Jersey can expect additional claims of negligent misrepresentation against in-house counsel, defense counsel and their law firms (if outside counsel). The best ways to avoid such claims are: 1) limit direct communications by counsel with employees on their claims against the employer; and 2) be very careful, neutral and factual — with supporting documentation of same — when such communications and dealings are necessary. ■