

Christopher J. Petrini
cpetrini@petrinilaw.com

Barbara J. Saint André
bsaintandre@petrinilaw.com

372 Union Avenue | Framingham, MA 01702
(Tel) 508-665-4310 | (Fax) 508-665-4313
www.petrinilaw.com

Peter L. Mello
pmello@petrinilaw.com

Heather C. White
hwhite@petrinilaw.com

Christopher L. Brown
cbrown@petrinilaw.com

February, 2014

RE: *P&A CLIENT ADVISORY (2014:02)*
Koss v. Palmer Water Dept., -- F. Supp. 2d – (D. Mass. 2013)

We are writing to advise our clients of Koss v. Palmer Water Dept., -- F. Supp. 2d --, 2013 WL 5564474 (D. Mass. 2013), a recent federal court decision regarding the boundaries of the attorney-client privilege in relation to workplace investigations. In Koss, a U.S. magistrate judge in Massachusetts held that the employer had waived the attorney-client privilege because its outside counsel actively managed and controlled another attorney's investigation of a sexual harassment complaint. This decision is a cautionary tale for employers to carefully consider at the outset of each investigation how to staff and manage the investigation to mitigate the risk of having to later disclose confidential information in any resulting litigation.

This case concerned an administrative assistant who claimed she was subjected to sexual harassment and a hostile work environment by the 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 then hired an attorney to conduct an investigation of Koss' complaint. While the attorney conducted all of the interviews, the town counsel also was actively involved, giving the attorney guidance, advice and direction.

The plaintiff subsequently filed suit against the town in federal court. The town's defense relied in part on the fact that an investigation was conducted. The town asserted, relying on two U.S. Supreme Court decisions, Faragher v. City of Boca Raton, 524 U.S. 775, 807 (1998) and Burlington Industries, Inc. v. Ellerth, 524 U.S. 742, 765 (1998), that it exercised reasonable care to prevent and promptly correct any alleged harassing behavior and that the plaintiff unreasonably failed to take advantage of any preventing or corrective opportunities to avoid harm (also known as a Faragher-Ellerth affirmative defense). The town therefore put the investigation into issue in the case.

Through discovery, the plaintiff sought to obtain documents related to the investigation. The town objected to producing investigation-related documents involving the town's regular town counsel under the attorney-client and work product privileges. The plaintiff moved to

February, 2014

P&A Client Advisory (2014: 02)

Page 2

compel production of the records. The judge ordered the records to be produced, finding that Palmer's regular town counsel had been "part and parcel of the investigation" that formed the basis of the town's Faragher-Ellerth affirmative defense, and therefore the attorney-client privilege had been waived "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."

The Koss decision illustrates 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 the client's legal counsel. On the same note, the investigating attorney should not participate in communications between the employer and its regular legal counsel regarding matters of legal advice. A client's regular legal counsel also should not give legal advice to the investigating attorney. Otherwise there is a strong likelihood that the client's communications with its regular counsel pertaining to the investigation will not be protected from disclosure in discovery. Clients should consider at the outset of an investigation whether the client's regular legal counsel should entirely avoid communications with the investigator or limit such communications to receiving the investigator's report and perhaps asking follow-up questions.

Please contact Christopher Petrini or any of the other attorneys at P&A should you have any questions regarding the Koss decision or workplace investigations generally.

Thank you.