

CLIENT ALERT

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Attorney Investigating Harassment Allegations Faces Potential Liability

An employer must respond quickly to an employee complaint of sexual harassment. Among the steps that the employer should take is to launch an investigation. Doing so can help limit the employer's liability and may even permit it to assert a successful affirmative defense in the event of litigation. Mishandled investigations, however, may create more problems than they solve. In one recent decision, *Spagnola v. Town of Morristown*, a federal judge held that an investigator could be liable for negligent misrepresentation based upon statements that he allegedly made to the complaining employee.

The Facts

The facts set forth in the decision were based entirely upon the allegations that plaintiff Ann Marie Spagnola ("Spagnola") asserted in the Amended Complaint. According to Spagnola, she was employed by defendant Town of Morristown ("Morristown") as a Management Specialist for thirteen years. In this position, she was responsible for performing various information technology duties. She reported to Morristown Mayor John DeLaney ("DeLaney") and Business Administrator Eric Maurer ("Maurer").

Spagnola alleged that she was subjected to "severe sexual harassment" by Maurer for a period of four years. The harassment took the form of "repeated exposure" to Maurer's "sexually offensive materials," including:

1. "[S]exually explicit stories" that she found in his laptop computer case;
2. A "sexual-screen saver" that she was asked to remove from his office computer;

3. "[S]exual stories," links to a "sexual website," and other "sexually explicit materials" that she discovered when required to access his computer as part of her job-related duties; and
4. "[S]exually explicit stories" saved on disks in his office, which she was "exposed to" when responding to a complaint by another female employee.

Spagnola complained frequently to Maurer and DeLaney about Maurer's "sexually explicit materials." According to Spagnola, however, both men responded with "anger and protests" and refused to correct the problem. Spagnola attempted to research and draft a personnel policy for Morristown that would bar "this type of conduct," but Maurer and DeLaney disregarded her efforts and the "sexually offensive conduct" continued.

Spagnola ultimately tendered her resignation, but DeLaney persuaded her to withdraw it. DeLaney subsequently arranged a meeting between Spagnola and defendant Michael Rich ("Rich"), an attorney from a local law firm. DeLaney instructed Spagnola not to speak with anyone other than Rich about her allegations regarding Maurer.

Rich informed Spagnola that Maurer had admitted that the materials she had complained about belonged to him. Rich further informed her, however, that Maurer's conduct did not violate any Morristown personnel policy. According to Spagnola, Rich then tried to intimidate her. He told her that no action would be taken against Maurer. He also "affirmatively misled her about her rights relating to sexual harassment" and, in particular, stated that, because Maurer did not speak to or touch her in a sexual way, "there was no sexual harassment." Meanwhile, Maurer's

“sexually offensive conduct” persisted and Spagnola continued complaining to Maurer and DeLaney.

According to Spagnola, after she provided DeLaney with a printout of a “sexually-explicit e-mail,” she was “subjected to renewed efforts” by DeLaney and Rich to “intimidate her.” On one occasion, Rich told her “off the record” that “it might be time for [her] to find a new job.” Spagnola then received a letter from Rich, which she contends was intended to “mislead and misinform her regarding her legal rights.” As a result of the conduct of Rich, Maurer, and DeLaney, Spagnola resigned from her job.

The Lawsuit

Spagnola filed a lawsuit in the U.S. District Court for the District of New Jersey against Morristown, DeLaney, Maurer, and Rich. Her Amended Complaint included a claim against Rich for negligent misrepresentation under New Jersey common law. Rich filed a motion to dismiss this claim, which was decided by the Honorable Jose L. Linares, U.S.D.J.

The Court’s Decision

The court began its analysis by explaining that, in order to establish a negligent misrepresentation claim, a plaintiff must demonstrate: (1) that the defendant negligently made an incorrect statement of past or existing fact; (2) that the plaintiff justifiably relied on the statement; and (3) that the plaintiff’s reliance caused loss or injury.

The court determined that Spagnola’s allegations were sufficient to satisfy the first element of a negligent misrepresentation claim, because she alleged that Rich deliberately misled and misinformed her regarding her rights relating to sexual harassment. In particular, according to the Amended Complaint, Rich: (1) told Spagnola “that Morristown had no policy which had been violated by Maurer’s conduct”; (2) “misled

[Spagnola] into believing that defendant Morristown had no duty to protect her”; and (3) “affirmatively misled [Spagnola] about her rights against sexual harassment, stating in part that there had been no sexual harassment because there had been no sexual touching or sexual language directed at her personally.”

The court then considered the second element of a negligent misrepresentation claim, whether the plaintiff justifiably relied on the defendant’s statements. The court found that, based upon the allegations in the Amended Complaint, Spagnola sufficiently alleged justifiable reliance upon Rich’s statements to state a claim for negligent misrepresentation. The court focused on the allegation that Rich had told her that Morristown had no duty to protect her, causing her to remain in her position and continue being “exposed to sexually offensive materials.”

The court also determined that the allegations in the Amended Complaint sufficiently established the third element of a negligent misrepresentation claim – resulting loss or injury. Spagnola alleged that her repeated exposure to the sexual materials caused her “economic loss, emotional distress, psychological injury, pain and suffering, humiliation and damage to her reputation.”

Rich argued that Spagnola could not establish that he acted with negligence, because he did not owe her a duty of care. He argued that he owed her no duty because: (1) there was no attorney-client relationship; and (2) he did not take any affirmative action to justify her reliance on any statement that he made. The court rejected these arguments.

The court explained that the absence of an express agreement to enter into an attorney-client relationship does not preclude a finding that such a relationship exists. Indeed, the court

explained, courts infer an attorney-client relationship when merited by the “surrounding circumstances.” Moreover, according to the court, an attorney may not only owe a duty of care to clients. An attorney has fiduciary obligations and may be liable to non-clients for breaching them when the attorney knows, or has reason to know, that the non-clients will rely upon the representations that he makes in his professional capacity. The court concluded that the issue of whether Rich owed Spagnola a duty of care could not be decided without discovery. Accordingly, the court denied Rich’s motion to dismiss the negligent misrepresentation claim.

Conclusion

In order to limit potential liability, employers must act quickly to investigate employee complaints of harassment. As *Spagnola v. Town of Morristown* makes clear, the manner in which the investigation is conducted is also critical. In particular, investigators should focus only on determining what happened and reporting their conclusions to the employer. Investigators must also be particularly careful about the statements that they make to the complaining employee.

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