The Legal Intelligencer

Ruling Highlights Narrow Path in Defending Sexual Harassment Complaints

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By **Jeffrey Campolongo and Alisha L. McCarthy** | May 24, 2019

The #MeToo era has prompted employers across the country to review their internal mechanisms for screening and investigating complaints of sexual harassment in the workplace. Federal, state, and local laws—and more recently, cultural mandates—require companies to implement prophylactic

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and remedial procedures to address or mitigate sexual misconduct in the first place.

Those procedures often require in-house counsel to participate in crafting defensible measures to address employee complaints, perhaps with the assumption that involvement by counsel will provide a cloak of privilege surrounding internal investigations. However, a recent decision from the Southern District of New York, *Barbini v. First Niagara Bank,* No. 16-cv-7887, highlights the challenges companies can face in protecting attorney-client privilege when defending claims that arise from or turn in some way upon internal investigations involving in-house counsel.

'Barbini v. First Niagara Bank'

The *Barbini* case centers upon employment discrimination and retaliation claims brought against a bank by two former employees, both of whom had filed sexual harassment complaints with the bank and both of whom were terminated a short time later. The bank had conducted an internal investigation in response to plaintiffs' complaints and had issued a final written warning to a third employee, Hugh Lawless, who was alleged to have harassed the plaintiffs. The bank claimed that the plaintiffs' terminations were not prompted by their sexual harassment complaints, but rather were triggered by unrelated violations of New York's notary laws.

U.S. District Judge Nelson S. Román for the Southern District of New York, reviewing a determination by Magistrate Judge Judith C. McCarthy, was asked to decide whether, in the course of defending the *Barbini* case, the defendant bank had waived attorney-client privilege with respect to the internal investigation of the plaintiffs' sexual harassment complaints, and deliberations relating to the claimed violations of the New York notary laws. Román agreed with McCarthy that both

areas of inquiry were covered by attorney-client privilege in the first instance because both types of communications involved legal advice provided by the bank's in-house counsel, Lura Bechtel.

The question, therefore, was whether the bank had waived its privilege.
The plaintiffs argued that the bank had done so through the substance of its answer and testimonial evidence; specifically, by invoking the *Farragher/Elleth* and advice of counsel defenses.

In its analysis, the court noted that there was no explicit invocation of the advice of counsel defense: that defense was not included in the bank's answer to the complaint, and in fact the bank "expressly disclaimed reliance on counsel in a subsequent letter." However, the court reasoned that "courts have found waivers if the evidence implies that defendants relied on counsel's advice." Román then found that, "although a close call," the waiver occurred in part through testimony of the bank's human resources representative Robert McMichael:

Q: So you made the decision to issue [Lawless] a final warning. Why did you choose to issue him a final warning instead of terminate?

A: We thoroughly discussed it internally through our process and talked—

Q: Who is we?

A: We being our in-house counsel …

Based on this testimony, the court affirmed McCarthy's finding that McMichael's decision to issue the final written warning was at least partially the result of "thoroughly discussing it" with the bank's in-house counsel. The court reasoned:

The bank's defense that its reason for terminating the plaintiffs was not discrimination or retaliation and was solely due to the plaintiffs' violating the notary policy hinges on the two investigations being truly separate. But the only way to assess their separateness is by accepting McMichael's testimony that he relied on [counsel]'s advice and handled the first one appropriately and independently of the second … this argument opens the door [o waiver as the bank indirectly asserts reliance on Bechtel's legal advice as a defense to the plaintiffs' employment discrimination claims.

The court also agreed with the plaintiffs and with McCarthy that the bank had waived its privilege by invoking "the quintessential *Faragher/Ellerth* defense" in its answer. The *Faragher/Ellerth* defense can protect an employer from a hostile work environment claim if the employer shows that "the employer exercised reasonable care to prevent and correct any harassing behavior and that the plaintiff unreasonably failed to take advantage of the preventative or corrective opportunities that the employer provided."

Román determined that the bank had raised this defense twice in the answer. First, the bank asserted that it "undertook good faith efforts to prevent and remedy any alleged discrimination or retaliation and that the plaintiffs unreasonably failed to avail themselves of the bank's internal procedures for remedying any such discrimination or retaliation." Second, the bank alleged that "any employment actions taken by the bank toward the plaintiffs was for reasons that were job-related and consistent with business necessity." By "implying that the sexual harassment investigation was handled according to protocol and had nothing to do with their subsequently firing Plaintiffs for violating the notary policy … the bank is unilaterally relying on the confidential and privileged sexual harassment investigation, which it

suggests was handled appropriately." It would be unfair, the court concluded, to allow the bank to invoke this defense while also using attorney-client privilege to prevent the plaintiffs from testing the veracity of the defense.

Conclusions

The *Barbini* case is a timely reminder that employers must proceed with caution when responding to employees' sexual harassment claims. While a careful internal investigation may mitigate the risk of litigation, it cannot eliminate that risk entirely —particularly when a complaining employee is terminated in close temporal proximity to the harassment complaint and subsequent investigation. And when litigation does arise, a plaintiff will be entitled to conduct a thorough exploration of the underlying facts and the employer's contentions relating to the case. Employers therefore should approach investigations with the expectation that all related communications in the course of investigation—including communications with counsel —might eventually become discoverable in litigation, especially where the investigation itself forms a component of an employer's defense.

Employers' outside counsel should also be mindful of *Barbini* in developing litigation strategies for cases involving underlying investigations. Counsel and clients should be fully aware of the contours of the *Faragher/Ellert* defense when drafting responsive pleadings, especially when it's in the client's best interests to preserve the attorney-client privilege notwithstanding the availability of the defense. Additionally, witnesses should be well-prepared for their depositions and specifically coached to steer clear of testimony that might inadvertently hint at reliance on the advice of counsel when reliance is not an intended defense.

On the plaintiffs' side, counsel need not accept a defendant's assertion of privilege as a given. For instance, the bank's lawyer in *Barbini* repeatedly objected to questioning of McMichael on the ground of attorney-client privilege. Nevertheless,

the court determined that even McMichael's relatively vague testimony about in-house decision-making was enough to constitute a waiver of the privilege based on the advice of counsel defense. *Barbini* shows that it can pay to test the privilege multiple ways, and savvy plaintiffs attorneys should not just take "objection!" for an answer.

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