

Pitfalls In Citing “Advice Of Counsel” In Decision Making

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A case decided in April underscores the risks and unanticipated consequences of referring to “advice of counsel” in defending adverse employment actions. A former hospital employee sued in federal court for alleged sexual harassment, assault, retaliation and FMLA violations. In discovery, both the hospital’s CEO and its human resources manager testified not only that they sought the advice of the hospital’s employment attorney when considering whether to place the employee on extended probation, but also that the hospital’s counsel recommended the specific action taken. The federal district court ruled that by testifying that the specific recommendations of counsel were the basis of the adverse employment action, the hospital had waived its attorney-client privilege. Their testimony also revealed that the hospital had advised the plaintiff that the adverse employment action was the result of “the advice of counsel,” another fact that supported the waiver. *Whitney v. Franklin General Hospital* (U.S. District Court for the Northern District of Iowa, April 23, 2015). Of course, seeking the advice of experienced employment counsel who are familiar with the company’s policies and operations is a “best practice” that has been proven to reduce claims and litigation risk. Nevertheless, as this case illustrates, employers must be careful not to waive the attorney-client privilege by disclosing (deliberately or inadvertently) the advice received from their attorneys in this process. Further, all parties involved on behalf of the employer must observe the important distinction between the recommendations of counsel and the actual reasons for the employment decision. The recommendations of counsel are not themselves reasons for the action – careless references to making decisions based on “advice of counsel” as if counsel’s advice is in itself a reason for the action risks a waiver of the attorney client privilege and exposure of all the communications with counsel on the subject matter of the decision. In the event of litigation, any discovery, particularly in depositions, directed to eliciting a statement about the advice of counsel must be met with a timely and effective objection based on attorney client privilege or the work product doctrine.

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