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EMPLOYMENT LAW

Employers turn to internal public-relations departments, outside public-relations consulting firms and, increasingly, their in-house and outside counsel to handle media inquiries that arise with employee disputes. In this Bloomberg Law Insights article, attorney Todd Presnell examines whether attorney-client privilege protects PR-related communications to employment lawyers.

Privilege Protections for Media Strategies in Employee-Related Claims

BY TODD PRESNELL

The 24-hour news cycle combined with the multitude of social-media sites, internet blogs, and similar non-traditional media outlets creates concerns for employers that go well beyond acute, crisis-management concerns. The internet media can exploit issues in what employers would beforehand consider routine employee disputes that they would handle internally and confidentially. And to complicate matters, traditional media such as newspapers and local television stations peruse these sites for content they can repurpose and sensationalize for even larger audiences.

Employers turn to internal public-relations departments, outside public-relations consulting firms, and, increasingly, their in-house and outside counsel to handle media inquiries that arise with employee disputes. A question arises whether the attorney–client privilege protects PR-related communications to employment lawyers, and the Sixth Circuit's recent opinion in *Alomari v. Ohio Dep't of Pub. Safety*, 2015 BL 292552, 626 Fed. App'x 558 (6th Cir. 2015), provides employers with good authority that it does.

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Privilege Issue

The heightened non-traditional media interest in employee disputes, at both the administrative-charge and litigation levels, causes employers to increasingly call upon their in-house and outside corporate counsel to craft a media strategy. In addition to investigating the claim, preparing a response to the EEOC charge, or answering the complaint, employers' lawyers must now work with in-house public-relations departments, draft press releases, prepare spokespersons and higher-level employees for media interviews, and retain and work with external public-relations firms.

To accomplish these media-related tasks, employment lawyers often communicate with internal employees and exchange press-release drafts with public-relations firms. These communications almost by necessity include relevant, candid information that the employer wishes to keep confidential and protect from disclosure to the EEOC, state administrative agencies, and the employee. The question thus arises whether the attorney–client privilege protects the employer's public-relations-related communications.

Federal common law governs privilege questions arising in EEOC charges and lawsuits brought under federal anti-discrimination statutes, even where the lawsuit includes supplemental state-law claims. Federal law holds that the attorney–client privilege generally applies to communications between a corporation's employees and its lawyers, both in-house and outside counsel. *Upjohn Co. v. U.S.*, 449 U.S. 383 (1981). The

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privilege applies where the employee communicates with the employer's lawyer in confidence and for the purpose of the lawyer rendering legal advice to the employer. *See, e.g.*, *Reed v. Baxter*, 134 F.3d 351 (6th Cir. 1998).

Federal courts applying federal privilege law generally presume that the privilege protects communications between an employer's outside counsel and its employee. *U.S. v. Chen*, 99 F.3d 1495 (9th Cir. 1996). The same presumption does not apply, however, when a corporate employee communicates with in-house attorneys. *U.S. v. ChevronTexaco Corp.*, 241 F. Supp. 2d 1065 (N.D. Cal. 2002). Citing in-house counsel's dual business and legal concerns, many courts presume that an employee's communication with an in-house lawyer is more likely business-related than legal-related. *Lindley v. Life Investors Ins. Co. of Am.*, 2010 BL 32541, 267 F.R.D. 382 (N.D. Okla. 2010).

This mind-set effectively imposes a ''heightened scrutiny'' on in-house lawyers claiming that the employee communications were for legal-advice purposes. It is therefore incumbent upon the in-house attorney to document and ultimately prove that her employee communications arose for legal purposes, and this can become particularly difficult when the communications pertain to public-relations strategies necessitated by an employee-related dispute.

Matter of First Impression

In a matter of first impression, the Sixth Circuit, in an employment-discrimination case, ruled that the attorney–client privilege protected media-related communications between the employer's in-house lawyer and an employee. *Alomari v. Ohio Dep't of Public Safety*, 2015 BL 292552, 626 Fed. App'x 558 (6th Cir. 2015), *cert. denied*, 136 S. Ct. 1228 (2016). The facts of this case reveal how internet news sites can provoke traditional media interest in what would otherwise be routine employee disputes, and the ruling illustrates how employers' lawyers may work on media responses under privilege protection.

Omar Alomari worked for the Ohio Department of Public Safety (ODPS), and specifically its Office of Homeland Security division, as Multicultural Liaison Officer. His duties included building relationships between Ohio's law-enforcement agencies and Arab and Muslim communities, authoring publications on Arab and Muslim communities, and conducting training sessions for law-enforcement agencies.

Alomari's views on dealing with Ohio's Arab and Muslim communities ultimately conflicted with certain training provided to local law-enforcement agencies. In one training session, Alomari gave a presentation on Muslims, and an officer with the Columbus Police Department followed with a presentation that significantly differed from Alomari's views.

Alomari attended another training session and complained to superiors that the presenters gave their personal opinion rather than facts about a centuries-old conflict between Islam and Christianity. And at still another session, a law-enforcement officer claimed that Alomari ''met with terrorists'' after showing a photo of him with a representative of the Council on American-Islamic Relations (CAIR).

Alomari later provided testimony on Islamic radicalism to the United States House Committee on Homeland Security and produced a report titled ''A Guide to Arab and Islamic Culture.'' And it was at this point that internet media began reporting on Alomari's activities. An internet blog site called *The Jawa Report* published an article about Alomari titled ''Muslim Leader: Ohio Homeland Security Publishing 'Classic Islamist Propaganda.' '' Subsequent blog posts criticized Alomari for interacting with CAIR and reported that Alomari's employer had destroyed thousands of brochures titled ''Agents of Radicalization.''

The Jawa Report apparently dug into Alomari's employment history, for its next blog post contained information regarding his prior employment with Columbus State Community College. The post claimed that Columbus State fired Alomari, a former professor at the institution, for engaging in a sexual relationship with a student. And another blog post described that the student sued Alomari for sexual harassment, which the parties settled, and that Alomari sued the student for emotional distress, which the student won on summary judgment.

Other media outlets took notice of *The Jawa Report*'s blog posts. A conservative-leaning daily internet publication, *American Thinker*, and WBNS-10TV, a Columbus television news station, contacted ODPS about a story pertaining to Alomari's background and his ODPS employment.

An ODPS director believed these additional media inquiries were significant enough to warrant legal consultation and contacted an ODPS in-house lawyer. This lawyer met with Alomari to discuss matters related to his Columbus State tenure so that she could advise ODPS on how to respond to the media inquiries.

ODPS terminated Alomari and, during the ensuing lawsuit, he moved to compel communications from his media-related meeting with ODPS's in-house attorney. ODPS claimed that the attorney–client privilege protected these discussions, but Alomari countered that the meeting's purpose was to prepare a media response and not so the in-house lawyer could render legal advice.

Alomari particularly challenged the concept that a court should ever consider an in-house attorney's advice for responding to media inquiries the equivalent of legal advice. Conceding that the Sixth Circuit had not addressed this issue, he cited to several district-court cases holding that the privilege does not cover attorney communications related to public-relations advice. In re *Chevron Corp.*, 749 F. Supp. 2d 141, 167 (S.D.N.Y. 2010); *City of Springfield v. Rexnord Corp.*, 196 F.R.D. 7, 9 (D. Mass. 2000).

The Sixth Circuit distinguished these cases by noting that the ODPS lawyer was not providing general public-relations advice, but rather was advising her client on how to respond to media inquiries. The court found important that the employer and its in-house lawyer sensed oncoming legal problems related to Alomari's employment and that responding to these new media inquiries was ''an act with great legal ramifications.''

The potential for legal liability arising from Alomari's Columbus State employment formed the foundation for the Court's ultimate opinion. The Court noted that the privilege applies where one seeks legal advice of any kind, but also recognized that an in-house attorney's communications with employees can involve legal and non-legal topics. When assessing the legal-advice component in such dual-purpose communications, courts

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analyze whether the communication's predominant purpose is to ''render or solicit legal advice.''

Despite many courts holding that developing a media strategy is not the same as developing a legal strategy, the Court easily found that addressing media concerns regarding an employee dispute fell within the legal-advice realm. The Court found that the in-house lawyer was not making a media decision, but rather gathering information to provide legal advice to ODPS on how to respond to media inquiries related to Alomari's Columbus State employment.

The Court held that ''[a]dvising a client on how to respond to media inquiries has important legal ramifications when that client will issue a public statement about an employee.'' In other words, where a client intends to make a public statement in response to media inquiries on a subject that is likely to develop into litigation, a lawyer's input into the media statement concerns legal-related themes. Here, ''given the potential for legal liability,'' the in-house lawyer's ''input on how to draft a media response was essential.''

Other Considerations

The Sixth Circuit's opinion provides authority for employment lawyers, both in-house and outside counsel, to argue that the attorney–client privilege protects their media-related advice when dealing with employee disputes, EEOC charges, and employment-discrimination lawsuits. The decision also highlights the potential pressure that internet media sites can exert on any particular employment relationship and the importance that employers and their lawyers must place on addressing media-related concerns. But while *Alomari* is helpful to employers and their counsel, they should also consider other options to protect media-related communications and documents from discovery.

When employers outsource media-related problems to public-relations firms, the question arises whether the attorney–client privilege protects communications between these outside consulting firms and employment attorneys. Although the public-relations firms employ the consultants communicating with lawyers, the privilege may nevertheless apply under the functional equivalent doctrine. This doctrine provides that the privilege covers a consultant's communications with the employer's lawyers if she is the functional equivalent of an employee. *In re Bieter Co.*, 16 F.3d 929 (8th Cir. 1994); *FTC v. GlaxoSmithKline*, 294 F.3d 141 (D.C. Cir. 2002).

Of course, proving that a public-relations consultant is the functional equivalent of an employee is half the battle. The employer must still prove that the consultant's communications to its lawyer was for the purpose of the lawyer rendering legal advice. *Schaeffer v. Gregory Village Partners, L.P.*, 2015 BL 389955, 78 F. Supp. 2d 1198 (N.D. Cal. 2015).

Some courts also find that the work-product doctrine protects an attorney's media-related work even where the attorney–client privilege does not. This doctrine protects from discovery documents prepared in anticipation of litigation by an attorney or an attorney's representative. Fed. R. Civ. P. 26(b)(3). An employment lawyer has a good argument, therefore, that the work-product doctrine protects her memorandum regarding media-related topics arising from an employee dispute.

Employers and their counsel should also consider work-product protection when they seek media-relations advice from outside consulting firms. The work-product doctrine applies to consultants as well as lawyers, and some courts have found that the doctrine protects documents prepared by outside public-relations firms. *Pemberton v. Republic Servs., Inc.*, 2015 BL 199512, 308 F.R.D. 195 (E.D. Mo. 2015); In re *Copper Mkt. Antitrust Litig.*, 200 F.R.D. 213 (S.D.N.Y. 2001).

So, in sum, the *Alomari* decision provides new, good authority for employers and their counsel to assert the attorney–client privilege over their media-related communications. But employers and their lawyers must recognize that opposing authority exists and remember that they may obtain protection by asserting the work-product doctrine or arguing the functional-equivalent-employee test, particularly when engaging outside public-relations firms.