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Insurer Must Defend Privacy Invasion Claim

Under 'personal, advertising injury' section of policy

By Eric T. Berkman

An insurance company was obligated to defend a recruiting agency against an invasion-of-privacy complaint brought by a former employee who claimed a supervisor had made explicit comments and inappropriate inquiries about her sex life in front of colleagues, the Appeals Court has ruled.

The agency and its principal, who had allegedly ignored the employee's multiple complaints of the supervisor's conduct, had sought coverage under the "personal and advertising injury" section of the liability policy.

HOLTZMAN
Counsel for policyholder

A Superior Court judge found in a declaratory action that a policy exclusion disclaiming coverage for acts "caused by" or "at the direction of" the insured while knowing that the act would violate someone's rights cleared the insurer of its duty to defend.

But the Appeals Court reversed.

"As other courts have concluded, this exclusion must be understood as applying only to the intentional and knowing infliction of injury, and not to injury resulting from reckless or negligent behavior," Judge Cynthia J. Cohen wrote for the court. "Because [the employee's] allegations leave it possible for [the policyholder] to be found liable based on something less than intentional and knowing infliction of injury upon [the employee], the exclusion does not negate [the insurer's] duty to defend [the policyholder]."

The 24-page decision is Norfolk & Dedham Mutual Life Insurance Company v. Cleary Consultants, Inc., et al., Lawyers Weekly No. 11-225-11. The full text of the ruling can be found at masslawyersweekly.com.

Important tools

Paul Holtzman of Krokidas & Bluestein in Boston, who represented the policyholder, said the ruling provides "very important tools" for insureds when responding to their carrier's initial coverage position.

"Employers often accept at face value a carrier's initial denial of coverage, particularly where they don't have [employment practices liability insurance] coverage," Holtzman said. "This decision highlights the importance of exploring all sections of all policies for coverage. In particular, the standard coverage for invasion of privacy or defamation under a general liability policy's section on personal injury is often triggered in a sexual harassment or discrimination claim."

Accordingly, Holtzman said, it is worthwhile "to push back and compel a carrier to provide coverage where the policy entitles the insured to a defense and indemnification."

Holtzman also called attention to the court's narrow construction of the exclusion for injury "caused by" or "at the direction of" the policyholder.

"By making clear that this exclusion does not apply to merely negligent or even reckless conduct, the decision provides an important tool for employers seeking coverage for a wide range of discrimination or harassment claims," he said.

Nina E. Kallen, a Roslindale attorney who represents both carriers and insureds in coverage cases and authors a blog on insurance-coverage law, said that while the insurer ultimately was found to have a duty to defend, it handled the case as best it could from a procedural standpoint.

“It sought a coverage opinion from counsel, defended the case under a reservation of rights, agreed to counsel chosen by the insured, and waited until after the underlying case was resolved before moving forward with a declaratory judgment action on its duty to defend,” said Kallen, who was not involved in the case.

Kallen also said the case highlights the importance of broad-based legal research when making a coverage determination.

“My first guess would probably have been that sexually harassing comments overheard by co-workers would not come within coverage for violation of a right to privacy because I don’t have experience with the Massachusetts invasion-of-privacy statute or the cases interpreting it,” she said. “Legal research would have been necessary to show that, according to caselaw, such comments can violate the statute and therefore trigger coverage.”

James P. Hoban, who practices insurance-coverage law at Bowditch & Dewey in Worcester, said the result was not surprising, “particularly if you accept that the exclusion [in question] is only applicable to intentional and knowing infliction of injury.”

The principal did not intend to cause the employee’s injuries; she merely failed to prevent them by allegedly permitting the supervisor to run amok and act abusively, he said.

“This has been the analysis forever in intentional acts exclusions,” said Hoban, who was not involved in the case.

He said he also was not surprised that the Appeals Court held that there is a duty to defend even when the plaintiff chooses a forum — in this case, the Massachusetts Commission Against Discrimination — that lacks subject-matter jurisdiction to grant an award on the covered claim (invasion of privacy), which gave rise to the duty to defend.

“That being said, this ruling is new law to Massachusetts as far as I know, and it will be useful guidance to practitioners going forward as a clear rule,” Hoban said.

Kevin M. Truland of Morrison Mahoney in Boston, who represented the insurance company, could not be reached for comment prior to deadline.

Inappropriate behavior

Rebecca A. Towers began working for Cleary Consultants, an employment agency in Boston, as a recruiter in May 2006.

From the time she started at Cleary until she left in March 2007, her immediate supervisor, Jonah Adelman, allegedly subjected her to repeated offensive sexual comments about her appearance and her relationships, questioned her about her sex life during her marriage and after her divorce, and used offensive, derogatory language to question her boyfriend’s sexuality and Towers’ attraction to him.

Adelman also allegedly exposed her to sexually explicit materials when he required her to check his email while he was out of the office.

Towers claimed she complained of Adelman’s conduct to the company’s principal, Mary Cleary, on three separate occasions. Cleary apparently downplayed the alleged harassment and took no action to address the situation.

In March 2007, Towers worked at home for a few days while her daughter was ill. During that time, Adelman told her over the phone that she would have to repay commissions on placements that had fallen through. Towers told him that his conduct was causing her significant distress. In response, he allegedly told her that she could not give full effort to the job because she was a single parent, and she should not bother returning to the office.

She considered herself terminated and did not go back to work.

On Dec. 31, 2007, Towers filed a discrimination charge at the MCAD against the company, Cleary and Adelman. She later added a count of invasion of privacy based on allegations that co-workers had witnessed and overheard Adelman speculating about her sex life.

The company sought coverage for the claim under the personal and advertising injury section of its liability policy with Norfolk & Dedham Mutual Fire Insurance Co. The insurer disclaimed coverage on grounds that the complaint stated a claim for discrimination, which was not covered under the policy, and could not be construed to state a claim for invasion of privacy.

The insurer also filed an action in Superior Court seeking a declaration that it had no duty to defend. Judge Elizabeth B. Donovan found the complaint did state a claim for invasion of privacy. Nonetheless, Donovan ruled that the insurer had

no duty to defend, citing a policy exclusion disclaiming coverage for acts “caused by” or “at the direction of” the insured while knowing that the acts would violate someone’s rights.

The employer appealed.

Unintentional acts

At the outset, the Appeals Court rejected the notion that Towers’ action was simply a discrimination claim outside the intended scope of Cleary’s policy.

“It makes no difference to the analysis of Norfolk’s duty to defend that Tower’s allegations were made in a discrimination charge brought at the MCAD,” Cohen wrote. “Under the terms of the policy, Norfolk had the ‘right and duty to defend the insured against any “suit” seeking … damages [because of, e.g.,] personal and advertising injury.’”

In other words, “the policy does not limit its coverage to cases filed in court, and Norfolk does not so argue,” Cohen said, adding that “it makes no difference to the analysis that discrimination in the form of sexual harassment is the essential legal theory underpinning the … complaint.”

The court also found that the alleged conduct could certainly be considered invasion of privacy leading to injury that falls under the employer’s personal and advertising injury coverage.

Finally, the court determined that because Cleary could be found liable based on something less than intentional and knowing infliction of injury upon Towers, the judge erred in applying the policy exclusion to clear Norfolk of a duty to defend.

“[E]ven if we were to accept Norfolk’s position that, on the facts alleged by Towers, Cleary should be charged with knowing to a substantial certainty that her failure to police Adelman was resulting in the violation of Towers’s rights and the invasion of her privacy, Norfolk still would have a duty to defend Cleary Consultants, Inc.,” Cohen wrote.

For more information about the judges mentioned in this story, visit the Judge Center at www.judgecenter.com.
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