

Facts Outside Complaint Require Insurer To Investigate Further, But No Coverage For Insured's Willful Sexual Harassment

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Applying Massachusetts law, a federal district court has held that an insurer could not rely solely on the allegations set forth in a charge of discrimination in an administrative proceeding to deny a defense where the insurer had knowledge of facts from other sources that established a potentiality for coverage.

Nonetheless, the court also held that a finding against the insured in a separate proceeding that he had willfully engaged in sexual harassment was sufficient to trigger the policy's intentional acts exclusion.

Manganella v. Evanston Ins. Co., 2010 WL 4196040 (D. Mass. Oct. 26, 2010).

The former president of a clothing boutique sought coverage under an employment practices liability policy for a charge of discrimination filed with the state commission by the boutique's former human resources manager. In the charge, the manager alleged that she had worked for the boutique from 1997 to 2006 and that the president had subjected her to nearly constant physical and verbal sexual harassment "throughout her employment." The policy included a retroactive date of April 28, 1999, limiting coverage to claims arising out of acts committed after that date. The insurer refused to provide a defense on the grounds that the charge alleged harassment of the manager beginning with the start of her employment in 1997 and therefore before the policy's retroactive date.

In the coverage litigation that followed, the court found that the insurer had in its possession information calling into question whether the alleged harassment in fact began that early. Specifically, the insurer had an affidavit provided by the manager in connection with a prior claim on November 13, 1998, which stated that she never witnessed or heard from anyone associated with the company that the president had committed any acts of sexual harassment. According to the court, "[a]t a minimum," the insurer "had a duty to investigate the inconsistency between its own records and the [commission] charge before choosing the version of facts that justified a denial of coverage, while ignoring another under which coverage attached." The court therefore held that the denial of a defense based on the retroactive date was improper.

The court, however, found that the insurer's reliance on the intentional acts exclusion as an alternative ground to deny coverage was proper. This exclusion applied to any claim based on conduct of an insured "that is committed with wanton, willful, reckless or intentional disregard of any law or laws that is or are the

foundation for the claim.” The court looked to the findings of an arbitration panel that had been called upon to determine whether the president was entitled to a payment under a stock purchase agreement following the termination of his employment from the boutique. The panel concluded that the president had forfeited his right to the payment by having committed a “major employment breach” and a violation of the “code of business conduct” through his harassment of the manager and others. In reaching this conclusion, the panel determined that the president “did not comply with [the boutique's] policy on sexual harassment and his refusal was willful.”

According to the court, the findings of the panel triggered the exclusion. The insured attempted to avoid this result by arguing that there was a difference between conduct that is intentional and conduct that is undertaken in intentional disregard of the law. In this regard, the insured contended that the arbitrators did not decide whether he “intentionally harassed [plaintiff] in violation of law.” The court rejected this argument, explaining that the word “willful” simply means that the person knows what he is doing and does not mean that the person must know he is breaking the law.