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Can In-House Counsel Use Client Information to Support her Discrimination Claims against her Employer?

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Judge Jesse M. Furman of the Southern District of New York ruled on July 11, 2019, that Jennifer Fischman, former Acting General Counsel and Chief Compliance Officer of Mitsubishi Holdings America, Inc. ("Mitsubishi"), did not rely on privileged and/or confidential client information in asserting claims of sex discrimination and retaliation against her former employer. Judge Furman also found that, even if Ms. Fischman had relied on privileged and/or confidential information, dismissal of her complaint at the pre-discovery stage of litigation would not be the proper remedy. Judge Furman's written opinion clarifies both the scope of the attorney-client privilege and the ethical obligation to protect client confidences in the in-house counsel context. Although it is commonly assumed that in-house legal advisors are prohibited from using any information whatsoever about their employers in pursuing discrimination claims against them, this opinion dispels that notion.

In her complaint, Ms. Fischman alleges that Mitsubishi discriminated against her because of her sex by refusing to promote her from "acting" to permanent General Counsel and Chief Compliance Officer, then hiring a man to fulfill that role; paying her less than her male colleagues; and, finally, by terminating her employment. She also alleges that Mitsubishi retaliated against her for investigating allegations of sexual harassment and securities fraud against Mitsubishi's then-President, who later was promoted to Executive Officer of the company.

More than two months after Ms. Fischman filed her complaint, Mitsubishi submitted to the court a short letter requesting that the complaint be sealed on the basis that it contains privileged and/or confidential information. The court denied Mitsubishi's motion to seal in part because the company "provide[d] no explanation, let alone justification, why they waited over two months to seek the relief they are seeking," that is, keeping Ms. Fischman's allegations from public view. The court refused to reconsider that ruling in its July 11 order.

The company filed a motion to dismiss on the same ground—that the complaint contains privileged and/or confidential information. In support of its motion to dismiss, Mitsubishi argued that Ms. Fischman's allegations were "entirely dependent on confidential and attorney-client privileged information" and that, without that information, she could not state a claim for relief. Specifically, Mitsubishi claimed that Ms. Fischman had violated the attorney-client privilege and/or breached her ethical obligation not to disclose client confidences by alleging: the company's annual revenue; the fact that she managed "a

number of high exposure lawsuits" during her tenure; the fact of the company's relationship to its subsidiaries; her job duties and accomplishments; her male colleagues' compensation; Mitsubishi employees' comments about sexism at the company; the performance of internal investigations at the company; and unethical conduct by her own colleagues. Mitsubishi also claimed that Ms. Fischman's allegations "threaten[ed]" to disclose information about Mitsubishi's "internal procedures, such as what it . . . defines as grounds for termination"; "policies of progressive discipline" and "how [the company] has handled employees who have been disciplined in accordance with company practices and procedures." According to Mitsubishi, these facts were privileged and/or confidential because they constituted "information [learned of] during [Ms. Fischman's] employment as a lawyer for [Mitsubishi]"; "the content of conversations she had with and about [Mitsubishi's] clients"; and "detailed information she learned in the course of performing her duties as counsel to [Mitsubishi] and its clients."

In denying the motion, Judge Furman expressly held that none of the information identified by Mitsubishi was protected by the attorney-client privilege or by Ms. Fischman's ethical obligation to protect client confidences. The court explained that the only circumstances in which a client may invoke the attorney-client privilege are to protect "a communication between client and counsel" that was (1) "intended to be and was in fact kept confidential" and (2) "made for the purpose of obtaining or providing legal advice." Since most of the information identified by Mitsubishi "involve[s] narratives of events, rather than communications," it is not subject to the attorney-client privilege. Specifically, the court indicated that allegations about matters such as the company's revenue, Ms. Fischman's job duties and accomplishments, the performance of internal investigations, and unethical conduct by her colleagues, did not involve communications. As to the information that derived from communications, Judge Furman held that it is not privileged because it "recount[s] informal conversations between employees about sexism in the company," not comments made for the purpose of obtaining or providing legal advice.

Though recognizing that an attorney's ethical obligation to protect confidential client information "does extend beyond attorney-client privilege," Judge Furman ultimately found that none of Ms. Fischman's allegations ran afoul of that obligation, either. Under the New York Rules of Professional Conduct, "confidential client information" is information that is "gained during or relating to the representation of a client, whatever its source," that is "(a) protected by the attorney-client privilege, (b) likely to be embarrassing or detrimental to the client if disclosed, or (c) information that the client has requested be kept confidential." N.Y. Rules of Professional Conduct § 1.6.

First, Ms. Fischman's allegations regarding her male colleagues' compensation do not constitute confidential client information because "the fee to be paid" by a client to its attorney is irrelevant to the legal advice rendered by the attorney, and therefore does not "relat[e] to" her representation of the client. Ms. Fischman's allegations regarding her colleague's comments about sexism at Mitsubishi likewise are not confidential client information because they were irrelevant to Ms. Fischman's legal work at the company. Mitsubishi also had not requested that any of this information be kept confidential. Second, Ms. Fischman's allegations regarding Mitsubishi's relationship to two entities publicly affiliated with it do not constitute confidential client information because that confidential

client information "does not generally include the fact of representation." Judge Furman also found that these facts were not protected because confidential client information "does not ordinarily include . . . information that is generally known in the local community or in the trade, field or profession to which the information relates," and this information had been public since Ms. Fischman filed her complaint – in part because the company waited nearly three months to move to seal it.

Finally, Judge Furman found that even if Ms. Fischman had relied on privileged and/or confidential information, dismissal of her claims would be "inappropriate" at this stage of the proceedings. Noting that Second Circuit and New York State courts have upheld the admission of evidence "even if it finds that counsel obtained the evidence by violating ethical rules" and citing the need to "balance the competing concerns of enforcing ethical rules" – which are not binding on courts – "and allowing possibly meritorious litigation," the court found that it would be "to the detriment of the justice system" to dismiss Ms. Fischman's complaint, which alleged behavior that, if true, states a claim for relief. The court further indicated that Mitsubishi could seek a less drastic remedy, such as a protective order, to protect privileged or confidential information from discovery and renew its argument that Ms. Fischman cannot prove her case without such information at the summary judgment stage of the proceedings.

Given the dearth of judicial precedent on in-house counsel's use of client information to pursue claims against their employers, Judge Furman's opinion provides useful guidance to New York attorneys serving in those roles who are weighing legal claims against their employers, as well as the attorneys who do or will represent them. It also serves as a reminder of courts' reluctance to dismiss a complaint that states a plausible claim for relief, even if it poses ethical questions, and more broadly, of the justice system's overriding interest in resolving a claim on its merits.

This blog was subsequently published in *Law360*.