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Phone: +1 646 783 7100 | Fax: +1 646 783 7161 | customerservice@law360.com

Officemax VP Aided In Worker Misclassification, Court Told

By **Lisa Ryan**

Law360, New York (March 13, 2015, 5:58 PM ET) -- Workers accusing OfficeMax Inc. of withholding its assistant managers' overtime wages in a collective action urged a New York federal judge on Friday to compel the company's corporate representative to testify about communications with its in-house counsel, saying he played a "lead role" in the decision to classify the employees as exempt.

The workers told the judge that Office Max's corporate representative, Chris Richardson, refused to testify at his Feb. 26 deposition regarding communications with in-house counsel H. Knox McMillan on the basis that the communications were protected under attorney-client privilege. The communications in question allegedly relate to the company's decision to misclassify the workers, and whether it depended on McMillan's advice is "irrelevant."

"Defendants' claim of privilege is fatally flawed," the motion said. "Defendants waived the attorney-client privilege with respect to communications regarding the decision to classify [assistant managers] as exempt by pleading ... that it acted in 'good faith' when it made the classification decision."

The collective action was filed in September 2012, claiming OfficeMax improperly withheld overtime wages from its assistant managers in violation of the Fair Labor standards Act. The employees worked more than 40 hours in a week and performed non-exempt duties, the suit claims.

The suit was conditionally certified in March 2014, and Richardson, OfficeMax's Vice President for the East Region, was slated to testify in February about the company's decision to classify the workers as exempt, according to the motion.

"Richardson's testimony squarely puts the advice of defendants' in-house counsel ... at issue in connection with defendants' decision to classify [the workers] as exempt. Specifically, Richardson testified that he and McMillan were part of a 'team' which classified the ... position as exempt in 2008 and 2011," the motion said.

Richardson said he, McMillan and OfficeMax's team relied on the job description they wrote, as well as their informal observations in the field, when making the decision. He allegedly had "numerous" in-person and telephone conversations with McMillan about the decision, and admitted in his testimony that McMillan was the "lead component" in the decision, according to the motion.

But when asked about the substance of his conversations with McMillan, Richardson refused to answer and instead said that he had been instructed not to respond, according to the motion.

Even though the collective group's counsel explained the "implied/at-issue" waiver, Richardson refused to answer.

The motion says that the plaintiffs are "entitled" to the requested discovery, and that the Second Circuit has held that privilege is waived when a defendant asserts a claim, like good faith, that "in fairness requires examination of protected communications."

Representatives for the parties didn't respond Friday to requests for comment.

The plaintiffs are represented by Susan H. Stern, Gregg I. Shavitz, Paolo C. Meireles and Michael Palitz of Shavitz Law Group PA, and Seth R. Lesser and Fran L. Rudich of Klafiter Olsen & Lesser LLP.

The defendants are represented by Trent M. Sutton, Lee J. Hutton, Meredith C. Shoop, Timothy S. Anderson and Michael G. Congiu of Littler Mendelson PC.

The suit is Heitzenrater et al v. OfficeMax Inc. et al, case number 1:12-cv-00900, in the U.S. District Court for the Western District of New York.

— Editing by Ben Guilfooy.

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