



Case Study: The Legal Challenges of Sexual Harassment in the Modern Workplace

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It seems you can't open a newspaper or watch a television news show today without seeing coverage of a sexual harassment case. At Procopio, we've assisted many employers who have faced employee complaints of sexual harassment. Fortunately, there are many steps an employer can take to navigate such situations to both comply with the law and improve employee relations. But it's worth noting that while many news items we hear about sound salacious — as if taken from a script of the TV show “Mad Men”—many workplace sexual harassment claims today involve far more nuanced and subtle

behavior by the alleged harasser. These situations are far more challenging to navigate for employers.

Let me paint a picture by describing “Roger,” a fictional individual compiled from the subjects of several investigations I've conducted over the years. As a senior executive at a successful company, Roger was masterful at masking his behavior to appear innocuous and socially acceptable. Described as charismatic and friendly by many, he nonetheless was perceived as sexually predatory with some saying he behaved like a “frat boy”

and others describing him as a “creep.” Is such behavior unlawful?

Under the law, one form of sexual harassment occurs when conduct of a sexual nature is sufficiently severe and pervasive to alter the work environment and make it hostile for the targeted employee. In other words, there is a spectrum of potentially unlawful harassing conduct. While a single “severe” incident (e.g. groping) could instantly constitute sexual harassment, a series of less “severe” sexual actions (e.g. sexual jokes) would be necessary to create a sufficiently “pervasive” environment of harassment and intimidation.

Roger’s behavior ultimately led to an anonymous complaint to our client’s management, which promptly notified me. It’s important to note that, even if an accuser is anonymous, an employer is obligated to undertake a prompt, thorough and impartial investigation of all complaints of harassment. With supervisory employees, the stakes are high. Under California law, an employer faces automatic liability for harassment by a supervisor. So while an investigation won’t entirely prevent liability, it is essential to limiting liability. Of course, the investigation is only effective if it leads to corrective action commensurate with the investigation’s findings.

We immediately began an internal investigation on behalf of our client, interviewing numerous male and female employees about the allegations, followed by a conversation with Roger himself. We heard many disturbing things. Like many harassers, Roger tended to target young employees with little power or authority. He touched both male and female employees in unprofessional ways that could easily be interpreted as sexual. Importantly, even the male employees reported being uncomfortable with his uninvited grabbing, slapping and pinching. He turned work discussions into unwelcome innuendo by comparing unhappy customers to unhappy married people who put “feelers” out before

cheating on their spouse. He drank alcohol in excess on several occasions around employees, which appeared to exacerbate his behavior. And in a sign of modern-day harassment, he sent late-night texts to women unrelated to work while texting other young women from his personal (not work) phone. While there was no graphic “sexting,” the texts nonetheless felt “creepy” to the female recipients.

In politics, they say that your downfall comes not from your crime, but from your cover-up. For accusers who have a litany of excuses for their behavior—“I’m just trying to foster a relaxed, team atmosphere,” or “I just like to compliment people”—what often trips them up is an inclination to issue blanket denials. Deception can be identified by the right investigator. In Roger’s case, there were many inconsistencies in his denials that were contradicted by the concrete allegations of credible witnesses. At times, he lied about trivial details unrelated to the core accusations. Sometimes he issued blanket denials when there were multiple credible witnesses who contradicted him. For example, he denied being present during a happy hour when multiple other witnesses reported seeing him there. In short, he repeatedly undermined his own case.

When the investigation supported many of the allegations, the employer was required to take corrective action commensurate with that finding. Corrective action is defined as action that is designed to stop the harassment. Had Roger acknowledged that his actions were inappropriate, expressed sincere remorse and promised to change his behavior, it’s possible that some combination of disciplinary action and training would have sufficed as corrective action. But Roger’s implausible denials meant the only option for the employer was to terminate Roger’s employment. After presenting him with the results of the investigation and informing him that his behavior had violated the company’s unlawful harassment policy (which he had signed), the employer fired Roger.

Roger's case teaches us many things. Employers need to have a robust harassment policy that is clearly articulated and distributed to employees. Employees need to agree in writing to abide by that policy as a condition of employment. Supervisors and employees should be trained to fully understand what constitutes acceptable workplace conduct and what will not be tolerated. Employees should be encouraged to come forward, even if anonymously. If a supervisor is accused of harassment, he or she should understand that it is in their best interest to fully cooperate and be forthcoming during the investigation. And the employer needs to move quickly to respond to any harassment allegation by conducting a thorough and impartial investigation.

Roger's employer did the right thing for its employees by retaining Procopio and allowing a proper investigation to be conducted. More importantly, when faced with evidence of unwelcome sexual conduct, the employer chose to enforce its harassment policy, protect its employees and end the employment of its senior executive. What a great message to send to its employees – the company valued its workplace culture more than the financial contributions of a senior executive. And that, folks, is what prevents lawsuits!

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