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## Employment law: Screening a sexual harassment claim

HOW TO EVALUATE AND HANDLE POTENTIAL CLAIMS BROUGHT BY ALLEGED VICTIMS

Men and women of all colors, shapes and ages can be victims of sexual harassment. In 2017, one would think that past scandals have taught employers to prevent and to stop sexually harassing their employees, but it still happens frequently. In 2011 alone, the United States Equal Employment Opportunity Commission (EEOC) and state and local Fair Employment Practices agencies around the country received 11,364 complaints of sexual harassment. *Sexual Harassment Charges EEOC & FEPA's Combined: FY 1997-FY 2011*, U.S. Equal Employment Opportunity Commission, [https://www.eeoc.gov/eeoc/statistics/enforcement/sexual\\_harassment.cfm](https://www.eeoc.gov/eeoc/statistics/enforcement/sexual_harassment.cfm) (last visited Apr. 15, 2017). Of those, approximately eighty-five percent were filed by women. Even though most people have an idea as to

how to recognize sexual harassment claims, below are several tips to keep in mind when screening potential clients with sexual harassment claims against an employer.

### What is sexual harassment?

Federal and California law recognize various types of sexual harassment as illegal. The California Fair Employment and Housing Act (FEHA) defines sexual harassment as harassment based on sex, gender or gender identity as well as harassment based on pregnancy or perceived pregnancy, childbirth, breastfeeding or any related medical conditions. (Cal. Code Regs., tit. 2 §§ 11029, 11036.) The form most familiar to many people is *quid pro quo* sexual harassment when sexual favors

are demanded in exchange for job benefits (e.g., a job offer, promotion, raise, or favorable performance review).

Sexual harassment includes many forms of offensive behavior such as making sexual gestures, leering, displaying sexually suggestive objects, and pictures, making or using derogatory comments, physical touching, or assault.

However, the law recognizes another form of sexual harassment: harassing conduct that is so "severe or pervasive" that it creates a hostile work environment in the workplace. For example, a supervisor who repeatedly screams at women but not at men, gives better performance reviews to men performing the same work as women, or repeatedly promotes men over women even though the female

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candidates are more qualified. The list goes on. Sexual desire is not necessary for a hostile work environment claim.

To pursue a sexual harassment claim, the employee does not have to be the target of the harassing conduct. For example, a woman who witnesses her supervisor sexually propositioning or groping her co-workers can bring a claim for a hostile work environment.

Over the past year, sexual harassment in the workplace has been covered widely due to a litany of high-profile claims against Fox News, Uber, and Thinx. Each of these cases provides examples of the various legal theories of sexual harassment.

### Case study one: Classic quid pro quo

The bombshell sexual harassment claims against then-Chairman and Chief Executive Officer (CEO) of Fox News, Roger Ailes, fall under the category that most people recognize as “classic” sexual harassment – quid pro quo sexual harassment.

In July of last year, Gretchen Carlson, a former anchor, filed a lawsuit alleging that Mr. Ailes threatened to end her career if she did not comply with his sexual advances. He allegedly made repeated comments about her legs, invited her to his office to “ogle” her, asked her to “turn around” to “view her posterior,” and told her that she should “have had a sexual relationship a long time ago” with him. Compl. ¶¶ 20, 22 *available at* <http://smithmullin.com/wp-content/uploads/2016/07/Carlson-Complaint.pdf>.

The accusations led to an internal investigation, a number of other women coming forward with sexual harassment complaints against Mr. Ailes, and his eventual ouster several weeks later as Chairman and CEO. Koblin, John, Steel, Emily, and Rutenberg, Jim, (*Roger Ailes Leaves Fox News, and Rupert Murdoch Steps In*, N.Y. Times, July 21, 2016,) (<https://www.nytimes.com/2016/07/22/business/media/roger-ailes-fox-news.html>.) Fox News reportedly paid Ms. Carlson \$20 million to settle her lawsuit. See Grynbaum, Michael M. and Koblin, John, *Fox Settles with*

*Gretchen Carlson over Roger Ailes Sexual Harassment Claims*, N.Y. Times, Sept. 6, 2016,) (<https://www.nytimes.com/2016/09/07/business/media/fox-news-roger-ailes-gretchen-carlson-sexual-harassment-lawsuit-settlement.html>.)

### Case study two: A mix of quid pro quo and hostile work environment

A former Uber employee, Susan Fowler, posted a blog that went viral about her “very, very strange year at Uber.” See Fowler, Susan, *Reflecting on One Very, Very Strange Year at Uber*, Feb. 19, 2017, (<https://www.susanjowler.com/blog/2017/2/19/reflecting-on-one-very-strange-year-at-uber>.) Ms. Fowler’s account could provide the basis for both quid pro quo and hostile work environment sexual harassment claims. First, she claims that her then-new manager sent her chat messages that “he was in an open relationship” and that “he was trying to stay out of trouble at work, but he couldn’t help getting in trouble because he was looking for women to have sex with.” She claimed that when she reported her manager to Human Resources, her complaint was essentially shrugged off even though she was not the first person to complain about that particular manager. Second, she also alleges that Uber created a hostile work environment towards women causing women to leave the organization. One example Ms. Fowler provided of Uber’s disparate treatment towards women was the company’s refusal to order female leather jackets because “there were not enough women in the organization to justify placing [the] order.”

Since Ms. Fowler went public, Uber has hired two law firms to investigate her claims. Ms. Fowler’s blog post has also resulted in much soul searching about sexism in Silicon Valley. See also *Does Silicon Valley Have a Sexism Problem?* Feb. 21, 2017, <http://www.bbc.com/news/world-us-canada-39025288>. According to a 2016 survey, sixty percent of women working in Silicon Valley experience unwanted sexual advances at work. *Does Silicon Valley Have a Sexism Problem?*, Feb. 21, 2017, [\[us-canada-39025288\]\(http://www.bbc.com/news/world-us-canada-39025288\). Uber’s investigation is ongoing at the time of this article going to print.](http://www.bbc.com/news/world-</a></p>
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### Case study three: Same-sex sexual harassment not based on sexual desire

Former Thinx employee, Chelsea Leibow, filed claims for a hostile work environment against the company’s then-Chief Executive Officer (CEO), Miki Agrawal. The facts of this case study are unusual because a female employee asserted sexual harassment against another female and the sexual harassment was not alleged to have been based on sexual desire. Further complicating matters was that Thinx was a startup company that marketed itself specifically as a pro-woman company. The company sold “period-proof underwear” that allowed women to bleed freely into their underwear without worry of leaks.

Ms. Leibow alleged that the then-CEO, Miki Agrawal, was “obsessed” with her breasts, touched them repeatedly without her consent, asked her to see her nipple piercings, and regularly commented on how her breasts looked in various outfits. See Malone, Noreen, *Sexual-Harassment Claims against a She-E.O.*, Mar. 20, 2017, <http://nymag.com/thecut/2017/03/thinx-employee-accuses-miki-agrawal-of-sexualharassment.html>.

Despite the repeated groping and comments, Ms. Leibow did not feel that Ms. Agrawal was “coming onto her.” Ms. Leibow also alleged that Ms. Agrawal created a hostile work environment based on conduct not directed at her specifically. For example, Ms. Agrawal touched Ms. Leibow’s co-workers breasts, routinely changed clothes in front of her employees, and conducted meetings via video-conference at least once while in bed unclothed. (*Ibid.*) Ms. Agrawal has since stepped down as CEO.

### Tips in evaluating a sexual-harassment case

These cases highlight important points to consider when handling sexual

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harassment cases. Sexual harassment claims are rarely straightforward and often involve judging a prospective client's credibility. From experience gained over the years, I offer the following tips when evaluating a sexual harassment claim:

**1. Do not judge potential clients harshly if they did not react the way you would have**

The strongest sexual harassment cases are those that are documented. In ideal case scenarios, employees would have done the following to bolster their claims:

They would have contemporaneously written down all inappropriate comments made by the harasser, as well as dates and descriptions of where the harassment occurred. They would also be able to provide you with a list of witnesses willing to provide declarations and the contact information for those witnesses.

They would have unambiguously told the harasser to stop each time. They would not have sent smiley-face emojis or tried to "laugh" off the harassment. If sexually or physically assaulted, the employee would have filed a police report immediately.

They would have written a complaint to the company immediately following the harassment or assault.

It is rare that a prospective client will have performed all or even some of the above behaviors. Imposing how you would have behaved if you were sexually harassed at work, and dismissing those who deviate from your expectations of a "proper response," may preclude you from taking on clients with potentially strong sexual harassment claims. Not all people react the same way to sexual harassment.

Growing up in New York City, I learned to be outspoken from a young age. I rode the subway alone as a teenager and spoke up forcefully when a man attempted to molest me on the train. I always believed that if I ever experienced sexual harassment at work, I would be the type of person to immediately speak up and nip it in the bud. However, when it did happen to me at work, I was silent.

During a previous job, a supervisor, twice my age, took me under his wing and asked me out on a date while I attended an administrative hearing with him. I felt my stomach drop and sweat develop under my armpits. I found that I was unable to confront him. Instead, I laughed it off and pretended that it had not happened. I dreaded seeing him at work and remained silent as he continued to pursue me at work. I never found the courage to report him. Thankfully I was an intern and left a few months later. Being an intern should have made it easier for me to speak up because I did not have to fear losing my job. Oddly something much more perverse kept me from saying anything. I had not wanted to seem confrontational and aggressive; I wanted to avoid making things awkward for *him*.

The reality is that women at work are under enormous pressure to learn how to reject a man's sexual advances without injuring his ego. To be friendly and approachable but not too friendly as to invite flirtation. Most women avoid speaking up because they are fearful of losing their jobs or jeopardizing their careers. They want to focus instead on building their careers.

In scenarios where the employee submitted to her supervisor's sexual demands, you should not necessarily be deterred from representing these employees. Many women do so because they are fearful of retaliation and are in such a vulnerable position that they feel compelled to do whatever is necessary to keep their jobs. The power dynamic between a supervisor and employee makes it difficult to say "no." Sometimes harassers target a particular person in the work place because they know that person is vulnerable.

If you have prospective clients who submitted to their harasser's sexual advances, do not forget to ask whether they have ever experienced sexual abuse. You may be surprised by how often the answer is "yes." My own experience and those I have developed from working repeatedly with victims of sexual harassment have helped me be more empathetic and open minded to the various ways victims may react when sexually harassed.

**2. Weigh the pros and cons of settling such claims early**

You should ask prospective clients what their goals are and do your best to support their wishes. Most prospective clients with sexual harassment claims do not want to come forward publicly. Many are afraid of being "blackballed." Others feel too embarrassed and ashamed. For these clients, it makes sense to attempt to settle their claims as early as possible. As the Fox News case demonstrates, damages in sexual harassment cases often run high if they involve allegations against high-level executives. Companies are generally more willing to settle such claims early prior to the filing of a lawsuit.

For those clients who are not sure and look to you for advice whether to settle early or to file a lawsuit, be careful to weigh the pros and cons of an early resolution. It may be more strategic to file a lawsuit because it typically encourages others to come forward (such as what happened in the case against Roger Ailes) or it may result in increased public scrutiny on an entire industry (such as what happened in the case against Uber). If this does happen, it will place additional pressure on the company to settle the case. Be sure to read the news to follow which industries are under public scrutiny for allegedly permitting rampant sexual harassment in the workplace.

**3. Gather "me-too" evidence**

Ask about "me-too" evidence in sexual harassment cases. Studies show that perpetrators are often repeat offenders (as alleged by Ms. Fowler in her post about her experience at Uber). There are likely other victims out there. Having multiple witnesses come forward against the same perpetrator bolsters your client's claims and drives up case value. Submit a Freedom of Information Act (FOIA) request to both the U.S. Equal Employment Opportunity Commission and the California Department of Fair Employment and Housing seeking records of prior sexual harassment allegations against the same company or perpetrator.

**4. Check for a retaliation claim**

I have spoken to attorneys who have forgotten to assert retaliation claims in

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addition to sexual harassment claims on behalf of their clients. For those employees who do speak up against the underlying sexual harassment, ask questions to explore whether they experienced any subsequent retaliation. A prospective client's retaliation claim can be stronger than the underlying sexual harassment claim.

Under California law, an employee can have a viable retaliation claim even if the employee is incorrect that the underlying conduct was illegal sexual harassment. Most people commonly believe that the workplace should be completely sanitized of any sexual conduct and that one comment or one touching on the shoulder constitutes sexual harassment. Such conduct, as upsetting as it may be to the employee, will not likely meet the legal definition for sexual harassment.

However, do not be afraid to take on cases where an employee does not have a strong sexual harassment claim, but has a strong retaliation claim for complaints to the company about what they believed in good faith to be illegal sexual harassment.

Further, juries can be unpredictable in how they will react to sexual harassment claims. People typically have stronger judgments about a sexual harassment case – what constitutes sexual harassment and how the victim should have behaved. Further, women may be less sympathetic because they too have experienced sexual harassment and do not think what happened to your client is compensable.

I will never forget a story Nathan Goldberg, one of our founding partners, told me. He tried a case on behalf of a woman who had been raped and left a woman on the jury because during voir dire she reported that she herself had been raped. After the trial, our client prevailed. However, Mr. Goldberg learned that the juror who had been raped had been the only juror to vote against our client. When asked why, she

replied, "I was raped but no one gave me any money for it." Juries may be more sympathetic to and less judgmental about retaliation claims. It is a good idea to include retaliation claims when you can.

#### **5. Do not forget about the new amendment to CCP § 1002**

Do not forget about the new amendment to the California Code of Civil Procedure section 1002 or you may risk facing discipline from the State Bar. Last year, the California Legislature passed AB 1682, which amended CCP section 1002 in several critical ways. Prior to the passage of AB 1682, existing law "prohibited the confidential settlement agreement of any civil action the factual foundation for which establishes a cause of action for civil damages for an act that may be prosecuted as a felony sex offense." (Cal. Code Civ. Proc. § 1002(a)(1).)

However, section (c) explicitly allowed the parties to enter into a settlement agreement that required the amount of money paid in the settlement to be confidential. AB 1682 removed section (c). AB 1682 added section (e), "An attorney's failure to comply with the requirements of this section by demanding that a provision be included in a settlement agreement that prevents the disclosure of factual information related to the action described in subdivision (a) that is not otherwise authorized by subdivision (c) as a condition of settlement, or advising a client to sign an agreement that includes such a provision, may be grounds for professional discipline and the State Bar of California shall investigate and take appropriate action in any such case brought to its attention."

In light of the new legislation, if you represent a client who was sexually assaulted at work and you are not sure whether your client was a victim of an act that rises to the level of a felony sex offense, it would be prudent to consult

with a criminal defense attorney before negotiating any settlement agreement for your client. Be wary of any settlement agreement that contains a confidentiality provision requiring your client to keep silent about the factual allegations and the settlement amount. It is unclear whether the term "civil action" applies to pre-litigation settlements or to only actions that have been filed in court or other legal proceeding. However, why take that risk given that the amended statute makes clear that an attorney who fails to comply with this provision may face professional discipline by the State Bar?

#### **Conclusion**

Sexual harassment comes in many forms, from subtle remarks to sexual assaults. Victims often suffer long-lasting psychological effects. It is important to practice with compassion and to be mindful of the options you have in pursuing a sexual harassment claim. Be persistent and do not be afraid to take a leap of faith to fight for your clients if you believe they are credible.

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