

The San Diego Union-Tribune

July 20, 2013

Sex harassment cases bruising for accusers

It was not easy, but in the end Elizabeth Kulka won.

A San Diego Superior Court jury said that Kulka had been the victim of a long-running sexual harassment campaign while she worked as a sergeant at the Harbor Police Department.

How was she harassed? She got birth control pamphlets through the department's interoffice mail, and sent to her home. Someone signed her up for an Internet dating service, describing her in the profile as "sexually active."

A photo of a naked woman was put in her locker, and she was the subject of rumors that she was having sex with her superiors.

The department, which is under the San Diego Unified Port District, brushed off her complaints. The jury didn't: In 1999, she won \$520,000 in damages, all of which stood up on appeal.

Kulka, who retired from the department in 2008, said she felt vindicated by the verdict.

With allegations of sexual harassment and mistreatment of women now swirling around San Diego Mayor Bob Filner, and potential lawsuits against him looming, Kulka reflected last week on her court battle.

The Police Department's lawyers "went through everything" about her, she said. "By the time it was said and done, they knew everything about me, and everything I had ever put down on paper."

Sexual harassment lawsuits can be bruising and invasive cases. Many aren't as public as Kulka's. Often, they're settled out of court or the case is dismissed before getting near a jury.

No women have formally filed a claim or lawsuit against Filner. Instead, lawyers Marco Gonzalez and Cory Briggs, as well as former Councilwoman Donna Frye, said they have spoken with an unknown number of women who have shared that Filner harassed them.

The three former Filner allies have held two news conferences to call for the mayor's resignation.

He has refused, after first acknowledging inappropriate behavior and apologizing. Now he is denying he sexually harassed anyone and says he would be exonerated if an impartial investigation were done.

Some details of the allegations have been revealed: Filner is said to have forcibly kissed and then touched the breast of a campaign worker; grabbed and kissed a constituent; and made a sexually suggestive comment to a mayoral staffer about her panties while in an elevator.

Gonzalez has also talked of a “Filner headlock,” in which the mayor puts his arm around a woman’s neck to pull her closer and suggest they speak alone. He also described the “Filner dance,” which women did to avoid being kissed by the mayor.

If the women sue, as Gonzalez has said some will, here’s a look at how harassment cases work from the inside out, according to veteran litigators who bring the claims and those who defend them.

On offense



[Joshua Gruenberg](#) is a veteran San Diego lawyer who has represented workers in cases against the city, county and other agencies, as well as private employees.

His first step: try to resolve the situation short of filing a lawsuit. Maybe a new job assignment, or a consultation with the human resources department to get the victim separated from the perpetrator.

All of this is to avoid what Gruenberg does well: go to court. “When a client hires a lawyer, typically you have to be prepared to go to battle,” he said.

Plaintiffs in harassment cases, as Kulka discovered, are put under a microscope by employers once the suit is under way. Gruenberg also does his homework before filing a suit.

He investigates the harassment claims as much as possible, collecting statements from others if he can and fully vetting the client's story.

And once the suit is going he'll investigate as much as he can the defendant. Has the person been sued for harassment before? He'll talk to others who have worked for the defendant.

Sometimes, Gruenberg's clients have lost their jobs after making a complaint of harassment, leading to a second claim that they were retaliated against. In those situations, Gruenberg takes the deposition of the person with the most knowledge about why his client was fired, like the head of human resources.

He'll get specific reasons why the client was fired and then work to systematically discredit those reasons. Just as defense lawyers attack the credibility of accusers, Gruenberg goes after the credibility of the employer.

Here's how he said all of that came together in the case of Pamela Luna, the former administrator of a Riverside County community health program. She sued in 2011 claiming she lost her job after complaining that the county's health officer at that time had sexually harassed her.

Luna said she was the target of frequent ogling, verbal harassment and unwanted touching. She said she complained to supervisors numerous times, but no investigation ever happened.

Gruenberg said county officials contended she was fired because she was not a "good fit," had been the subject of complaints from others and had a bad attitude after a request to travel to a conference was rejected.

Statements from other workers showed no complaints against Luna, he said. He also showed that the county Human Resources Department tried to dissuade Luna from filing any complaints against the supervisor and falsely told her all complaints had to be in writing.

In the end, that was enough. In January, the county agreed to settle the case for \$490,000. One of the main reasons for the settlement, Gruenberg said, was the specter that the county would have to pay the legal fees he was incurring as he built the case.

On Defense



For almost two decades, Lonny Zilberman has defended employers in all manner of job-related litigation, including sexual harassment. The attorney at the San Diego firm Wilson Turner Kosmo also teaches sexual harassment law to private companies.

Each case is different, so there's no template or cookie-cutter approach to defending an employer. But Zilberman outlined some of the basic steps that a lawyer defending an employer would likely go through.

“What I’m looking for right out of the box is what is the plaintiff claiming? Are they alleging physical contact, or is it just verbal conduct?”

Next, determine if there is any corroboration. Are there witnesses? A report to another worker or human resources? The less corroboration — the more that the case becomes a “he said-she said” contest — the better for the defense.

“Ideally, you’d like it that there was that ambiguity,” Zilberman said, “so we could argue this is just what one person said happened.”

Finally, the core of the defense: an exhaustive inquiry into the accuser. This is the most controversial part of sex harassment defense cases.

The women who have said Filner victimized them have not been identified. Gonzalez, Briggs and Frye have said the women are reluctant to come forward largely because they fear a media circus. But the greater scrutiny often comes as the lawsuit is litigated, when past work and medical records are pored over and the plaintiff is questioned in hours of depositions.

“They try to wear down the victim,” said Scott Toothacre, the lawyer who represented Kulka in her suit against Harbor Police. “It does take a toll.”

In these suits, accusers frequently claim the sexual harassment led to emotional distress. That’s a key claim for accusers but also provides an opening for the defense.

“We want to see if there are alternative stressors in your life that could have caused this emotional distress,” Zilberman said. “It opens the door for the defense to say, frankly, your life is going to become a bit of an open book.”

Here’s how all those factors worked together in a case Zilberman recently won. He could not name the company he represented or the employee because the case was handled through confidential arbitration.

The woman was a supervisor at a Fortune 100 company that has offices in San Diego.

She said she had received numerous unwelcome comments from her manager about her body parts, her appearance and her clothing. She also complained that at an office birthday party the supervisor asked her to smell the birthday cake, and when she bent down he pushed her face into it.

Last, she said she had discovered a small peephole in the wall of the women’s restroom that would allow someone in the adjacent stockroom to look into the restroom. She said she became fatigued and depressed, gained weight and had other emotional stress because of the harassment.

As the case developed, Zilberman said, he could find no one who could corroborate the comments she said she was subjected to. She had never complained to the company’s human resources department. And no one else knew of or had been told about the hole in the restroom wall.

Inconsistencies also developed in her story.

Zilberman reviewed her extensive medical records. He noticed that during the time of the harassment, she actually lost weight. “Seems like a small thing, but she had made a big deal out of her weight gain,” he said.

He also reviewed all of her employment records and resumé, and found that she had lied and exaggerated part of her work history, such as the dates she held certain jobs and her titles.

In a mediation session, the woman asked for \$1 million. There was no settlement, and the case went to a weeklong arbitration with nine witnesses. Zilberman argued the woman had credibility issues and had embellished and exaggerated facts.

The company won. The woman got nothing.

Aftermath

Now retired from the Harbor Police, Kulka said the hardest part of her lawsuit was the amount of time it took. At work, even after she won her sexual harassment suit, some people were wary of associating with her.

“A lot of things that had happened to me, people didn’t know about,” she said. “But when I started talking about it, they couldn’t believe some of the things I went through.”

The verdict proved her right, she stayed on the job and she never gave it up until she was ready. Still, asked if she would do it again, Kulka paused a long time. “I would try to avoid it, at all costs, if I could.”

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