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Employers face liability for aggravated indifference to harassment complaint

Employers should take seriously complaints of sexual or other unlawful harassment — whether on-duty or off-duty, onsite or off-site — and respond appropriately

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A California Court of Appeal panel recently ruled that an employer faces liability to an employee who complained of a co-worker's offsite and off-duty sexual harassment if the employee proves the employer's response to the complaint created a hostile workplace environment. The court reached this conclusion in *Kruitbosch v. Bakersfield Recovery Services* even as it also concluded the co-worker's alleged conduct, while "reprehensible," was insufficiently work-related to be tied to the employer.

Facts

Steven Kruitbosch worked in corporate compliance at Bakersfield Recovery Services (BRS). BRS treats recovering substance abusers.

Kruitbosch took leave on Feb. 1, 2023, to grieve the recent death of his long-time partner. He was scheduled to return to work on March 7.

The week before Kruitbosch's return, Lisa Sanders, a case manager ranked below Kruitbosch, allegedly started sending Kruitbosch unsolicited nude pictures of herself and saying she wanted to have sex with him. Kruitbosch rejected Sanders's advances.

Undeterred, on March 3, 2023, Sanders went to Kruitbosch's home uninvited. Kruitbosch told her to stop harassing him.

Later that day, Sanders texted Kruitbosch, inviting him to a hotel room to have sex and adding "I have dope." She also sent more sexual images. Sanders, like most BRS employees, knew Kruitbosch was a recovering drug addict. Kruitbosch again rejected these advances.

Kruitbosch returned to work on March 7 and immediately complained to acting program director Stephanie Carroll about Sanders's conduct. HR representative Kimberly Giles also was informed of Sanders's conduct. Carroll told Kruitbosch there was little she could do. Later that day, Giles posted a video on social media depicting whining dogs representing a

day at the office “Imbo.” Giles later that week sarcastically allegedly said to Kruitbosch “I hope you don’t get no more pictures.” BRS took no action to separate Kruitbosch from Sanders or discipline Sanders.

Kruitbosch felt BRS’s inaction licensed Sanders’s continued harassment. He resigned on March 13, 2023, believing his continued employment at BRS threatened his mental health, grief recovery, and sobriety.

Kruitbosch sued BRS for sexual harassment under the California Fair Employment & Housing Act (FEHA) and other claims. The trial judge dismissed the complaint, concluding Sanders’s conduct was insufficiently work-related to make BRS liable for it, even if Kruitbosch’s allegations were true.

Sanders’s conduct held not work-related

A plaintiff claiming hostile environment sexual harassment under FEHA must prove harassing conduct that was: (1) unwelcome; (2) because of sex or gender; (3) sufficiently severe or pervasive to create an abusive work environment; (4) in some fashion work-related, and, if the alleged harasser is a nonsupervisory co-worker; (5) actually or constructively known to the employer.

The court of appeal held Sanders’s conduct was not work-related. Kruitbosch did not allege Sanders had contacted him on March 3 for any work-related purpose. Although Kruitbosch alleged Sanders only got his home address and cellphone number through work, he did not claim BRS “promoted or facilitated employees’ exchange of personal contact information or benefited from it.”

But the court’s analysis did not end there.

Employer’s response may create hostile environment

The court of appeal ruled BRS would nonetheless be liable to Kruitbosch if he ultimately proved the company’s aggravated indifference in responding to his complaint created a hostile work environment. Kruitbosch could reasonably understand from the program director’s refusal to act and from the HR employee’s mocking social media post and sarcastic comment to him “that it was not that Sanders’s conduct occurred off-site which prevented BRS from acting, but that BRS viewed what she had done as not serious; that plaintiff, as a man, should not be affected by sexual advances from a woman; and that plaintiff’s well-being in the workplace was of no import to BRS.”

The court concluded: “The very nature of BRS’ business involved addiction treatment and recovery services — an environment where employees, including plaintiff, were open about their addiction history. Sanders’ use of this information arguably increased the severity of

her unwelcome sexual advances, and BRS' failure to take any action could reasonably be viewed as condoning Sanders' harassing behavior," thereby creating a work environment that threatened Kruitbosch's sobriety.

Employers should take seriously complaints of sexual or other unlawful harassment — whether on-duty or off-duty, onsite or off-site — and respond appropriately. In reaching its conclusion, the court of appeal noted it was “not suggesting FEHA mandates a specific response an employer must make to an employee complaint of harassment.” But as alleged, BRS' response to Kruitbosch's complaint provides a model of what not to do.

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