

Case Study: A Claim of Workplace Harassment and the related Handling Process

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I. Introduction

Foreign company “A” (hereinafter referred to as "the Company"), located in Seoul, received notification from the Seoul Regional Employment and Labor Office (hereinafter referred to as the "Labor Office") regarding the Labor Office receiving a complaint of workplace harassment. The Company was instructed to conduct an investigation into the related incident and report its findings.

What follows is a summary of the relevant details: On October 1, 2022, the Company hired employee B (hereinafter referred to as the "Employee") as a mid-level manager in the Accounting Department, with a probationary period of three months. During the hiring process, the Company had high expectations for the Employee, considering her fluent English skills and prior experience working in the accounting department of a foreign-owned company. However, during the probationary period, the Employee's job-related performance was seen to be inadequate and she lacked the expected accounting abilities, which hindered her ability to independently execute tasks. As a result, the Company planned to terminate the Employee due to her displayed unsuitability during the probationary period. However, during the subsequent interview process, the Employee stated that she would improve if given another chance. Consequently, the Company agreed to extend the probationary period an additional three months, upon mutual consent with the Employee. However, despite receiving sufficient opportunities, the Employee's accounting skills and job performance did not improve, leading to her termination on March 31, 2023, during the extended probationary period.

In April 2023, the Employee filed a complaint with the Labor Office, alleging workplace and sexual harassment by the Accounting Department Manager. The Labor Office instructed the Company to conduct an investigation into the alleged harassment and submit a report on the findings. Subsequently, the Company engaged this labor law firm to conduct an objective and fair investigation into the allegations of workplace harassment and sexual harassment. Through the investigation process, this labor law firm aimed to examine the Company's obligations and the appropriateness of its measures in handling the related incidents of harassment.

II. Legal Obligations of the Employer

1. Employer's duty when claims occur of workplace harassment and/or sexual harassment¹

Under Article 76-3 (Duty in Cases of Workplace Harassment) of the *Labor Standards Act* (hereinafter “LSA”) and Article 13 (Duty in Cases of Workplace Sexual Harassment) of the *Equal Employment Opportunity and Work-Family Balance Act* (hereinafter “*Equal Employment Act*”), the following five obligations are described for employers. First, upon receiving a report or becoming aware of workplace harassment or related incidents, the employer must promptly conduct an objective investigation to ascertain the facts regarding the matter. Second, protective measures must be taken for the Employee who claims to be a victim. Third, an investigation into the facts of the workplace harassment must be conducted, and it should be determined whether the incident meets the criteria for workplace harassment. Fourth, the employer must implement appropriate personnel measures through necessary actions to prevent the recurrence of harassment, based on the conclusions reached regarding the workplace harassment incident, and inform the Employee of the results. Fifth, the employer must take measures to maintain confidentiality regarding the receipt of workplace harassment reports or the investigation process to prevent secondary harm. Failure to fulfill these obligations may result in the imposition of fines.

2. Concept and criteria for determining workplace harassment and sexual harassment

Article 76-2 (Prohibition of Workplace Harassment) of the LSA prohibits actions that exceed the scope of reasonable work-related conduct and cause physical or mental suffering to another employee or worsen the working environment, through the use of one's position or relationship of superiority in the workplace. To recognize workplace harassment, all three of the following criteria must be met: First, there should be the use in the harassment of one's position or relationship of superiority in the workplace. Second, the conduct must exceed the scope of reasonable work-related conduct. Third,

¹ Kim Elim, Jung Bongsoo, "Manual on Bullying and Sexual Harassment in the Workplace," 2023, K-labor, pp. 14-15.

it must cause physical or mental suffering to the employee or worsen the working environment.²

The *Equal Employment Act* defines "workplace sexual harassment" as actions by the employer, a superior, or an employee that utilize one's position in the workplace or are related to work and cause sexual humiliation or disgust through sexual advances or demands, or result in disadvantages in terms of working conditions or employment due to the employee's refusal to comply. To recognize workplace sexual harassment, all three of the following criteria must be met: First, there should be the use of one's position or relevance to work in the workplace. Second, there should be the use of means such as sexual advances. Third, the conduct must cause sexual humiliation or disgust, or result in disadvantage in terms of working conditions or employment due to the Employee's refusal to comply.³

III. Objective Investigation and Reporting by the Company

1. Objective investigation by the Company

In order to maintain objectivity in response to the request for investigation of workplace harassment from the Ministry of Employment and Labor, the Company entrusted the investigation to an external organization, this labor law firm. The reason for this was the sharp conflict of interest between the parties involved in the incident. The individual claiming to be the victim was a former employee of the company's accounting department who was dismissed for incompetence during the probation period. The individual identified as the perpetrator was the head of the accounting department, who dismissed this Employee alleged as a victim. If the company's HR department were to conduct an investigation into workplace harassment or sexual harassment on its own, the potential existed that there would be a lack of objectivity and fairness. Therefore, in order to ensure reliability of the investigation, it was decided to entrust the investigation to an external party.

2. Investigation of workplace harassment and sexual harassment and determination

² Ministry of Employment and Labor, "Manual for Assessing, Preventing, and Responding to Workplace Bullying," February 2019.

³ Ministry of Employment and Labor, "Manual for Preventing and Responding to Workplace Sexual Harassment," 2021.

This labor law firm, entrusted with the investigation, conducted interviews with the victim to gather her statements, both in writing and in person. Afterward, it interviewed potential witnesses who could provide information to verify the facts, and finally, interviewed the alleged perpetrator.

(1) Acts of phone interruption and monitoring

1) Claim by the Employee: While having a conversation with an employee of Company C on February 27, 2023, the alleged perpetrator repeatedly and suddenly called out loudly, saying, "Manager Kim, Manager Kim," while holding the phone she was receiving calls on. This caused confusion as the Employee had to immediately end the call with the other person to respond and go to the alleged perpetrator's location. The same situation occurred on February 28, 2023, while having a conversation with a bank employee, and during a call with Company D, where the alleged perpetrator came to the Employee's desk at some point and asked for the phone, while explaining the situation directly over the phone, thereby interfering with the Employee's work.

2) Determination by the investigator: Regarding the acts where the alleged perpetrator interrupted phone conversations of the Employee on three occasions, February 27 and 28, it was determined that the alleged perpetrator, as a direct supervisor, had the responsibility to guide the Employee's work and that the acts were necessary to ensure that the work was not proceeding in the wrong direction. The acts were also considered within the appropriate scope of work and did not appear to be excessively monitoring only the Employee's work, so they were not considered workplace harassment.

(2) Coercion to drink alcohol and mentioning alcohol

1) Claim by the Employee: During the job interview, when the alleged perpetrator, who was one of the interviewers, asked, "Can you drink alcohol?" the Employee replied, "I don't drink alcohol because I go to church." On January 20, 2023, during lunch with the alleged perpetrator at a kimchi stew restaurant near Seolleung Station, he said, "Even though Manager Kim doesn't smoke, she follows me downstairs to talk to me when I go out to smoke," and at the same time, he placed a glass of soju in front of the Employee's rice bowl. This was perceived as an act of pressuring the Employee to drink. Furthermore, on March 2, 2023, while having dinner with the alleged perpetrator and the head of the finance department at a Chinese restaurant beside the Company's office, the alleged perpetrator asked, "Have you never drunk alcohol

before?" When the Employee answered "No," the alleged perpetrator said, "I want to make you try alcohol," and another person present said, "There was also a man who doesn't drink alcohol on a TV show called SOLO, and he was peculiar," making the Employee feel like not drinking alcohol was being treated as wrongdoing.

2) Determination by the investigator: The act of the alleged perpetrator pressuring the Employee, who does not drink alcohol, with remarks and placing a glass of alcohol in front of her during lunch was a one-time occurrence. The behavior itself did not directly force the Employee to drink or go as far as coercion, so it is difficult to consider it as exceeding the appropriate scope. Additionally, the mentioning of alcohol did not involve the alleged perpetrator or witnesses directly telling the Employee that her behavior was strange. Therefore, it is difficult to conclude that it caused physical or mental distress to the Employee or worsened the working environment, so it was determined that it did not constitute workplace harassment.

(3) Acts of evaluation based on appearance

1) Claim by the Employee: During the job interview, the Employee was wearing a mask, so the alleged perpetrator could not see her face properly. However, after the Employee started working, the alleged perpetrator saw her face and commented, "Your actual appearance is thinner than in the photo." After that, the alleged perpetrator would occasionally ask the Employee, "When are you going to gain weight?" and "How much do you weigh now?" while checking her weight multiple times, engaging in persistent evaluations of her appearance.

2) Determination by the investigator: Regarding the claim that the alleged perpetrator repeatedly checked the Employee's weight, there were statements from witnesses that the Employee had mentioned losing 5 kg due to contracting COVID-19 and that there were conversations among female employees advising the Employee to eat more because she appeared thin. While it is possible that discussions about weight could have caused stress to the Employee, the comments related to appearance made by other employees could be interpreted in various ways depending on the context and situation. Considering that the alleged perpetrator, as a supervisor, may have mentioned the Employee's weight out of concern for her health and to encourage her recovery, and there were no additional conversations specifically related to appearance, it was determined that this did not constitute workplace harassment.

(4) Remarks related to "moolbong" (a type of drug)

1) Claim by the Employee: During dinner at a Chinese restaurant on March 2, 2023, the alleged perpetrator started talking about "*moolbong*" (a date rape drug) and said, "*Moolbong* is used when dealing with women," "*Moolbong* doesn't leave any evidence in the body," "*Moolbong* keeps appearing on my YouTube," and "Should I try smoking marijuana on a business trip?"

2) Determination by the investigator: Regarding the claim that the alleged perpetrator mentioned "*moolbong*," the finance manager, who was present at the time, stated that she did not recall the alleged perpetrator making such remarks. Since there is no concrete evidence to confirm the exact conversation, it is difficult to determine the facts. However, even if we assume that the alleged perpetrator did make the remarks related to "*moolbong*" as claimed by the Employee, it would need to be considered from an adult perspective whether such remarks could cause sexual humiliation or disgust for a person in a similar position to the victim. As the remarks did not involve explicit descriptions of physical relationships between men and women, and considering the possibility that the remarks were related to the recent news and issues surrounding drug cases, the presence of another female employee of a similar age nearby, and the frequency and context of the remarks, it is difficult to conclude that they would have caused sexual humiliation or discomfort for an average person in a similar situation. Therefore, it was determined that it did not constitute workplace sexual harassment.

(5) Other claimed harassing behaviors

1) Claim by the Employee: (i) The Employee claims that after she had difficulty inputting her goals into the workday system, the alleged perpetrator expressed dissatisfaction and, while passing by the Employee's desk when leaving work, stuck out his tongue and shook his head in frustration. (ii) On another occasion, before a team meeting in a conference room, the alleged perpetrator approached the Employee's seat and threw a coil notebook at her. Although the finance manager from the same department was sitting slightly away from the Employee and was looking at her laptop, she did not witness the scene of the notebook being thrown. The alleged perpetrator later complained that the Employee had not worked on a public holiday.

2) Determination by the investigator: (i) The claim that the alleged perpetrator stuck out his tongue and shook his head in frustration behind the Employee's desk in February 2023 could not be corroborated through witness testimonies. Therefore, it is difficult to establish the facts and conclude that it constituted workplace harassment. (ii) The claim that the alleged perpetrator threw a coil notebook at the Employee's seat

before a team meeting in a conference room and later complained about the Employee not working on a public holiday could not be confirmed through witness testimonies. Therefore, it is difficult to establish the facts and conclude that it constituted workplace harassment.

IV. Investigator's Determination and Recommendations

1. Investigator's determination

Regarding workplace harassment, the Employee expressed that she was deeply hurt by the alleged perpetrator's actions, such as interrupting her phone calls, pressuring her to drink alcohol, mentioning alcohol, and criticizing her goal setting. However, from the perspective of an average person in a similar position as the Employee, it is difficult to conclude that the actions reached a level of causing mental distress and deteriorating the work environment.

Regarding workplace sexual harassment, concerning the perpetrator's mention of "*moolbong*" in relation to the Employee, the lack of objective evidence makes it challenging to confirm the exact conversation. Even if we assume that the alleged perpetrator made remarks related to "*moolbong*" as claimed by the Employee, it needs to be considered from an adult perspective whether such remarks could cause sexual humiliation or disgust for a person in a similar position to the victim. Considering the absence of explicit descriptions of physical relationships between men and women, the possibility that the remarks were related to recent news and issues surrounding drug cases, the presence of another female employee of a similar age nearby, and the frequency and context of the remarks, it is difficult to conclude that they would have caused sexual humiliation or discomfort for an average person in a similar situation.⁴

2. Investigator's recommendations

Taking into account the statements of the Employee, the involved parties, and witnesses, it can be inferred that the alleged perpetrator's actions did not directly constitute workplace harassment or sexual harassment but rather created a strong perception of workplace harassment or sexual harassment for the Employee due to preexisting conflicts between the department manager and team members, as well as dissatisfaction related to recent agreements to extend the Employee's probationary

⁴ Quoting the advisory content of Professor Kim Elim from the Department of Law at KNOU University regarding the related incident (June 2, 2023).

period and later termination of employment. Therefore, the following measures are recommended to prevent incidents of workplace harassment and sexual harassment:

(1) Measures to protect the Employee:

According to the LSA, "necessary measures, such as changing the workplace or ordering paid leave, should be taken to protect the victimized employee during the investigation period." However, in the case of the Employee, whose employment relationship ended on March 31, 2023, such measures are not necessary.

(2) Improvement measures for the alleged perpetrator, although not constituting harassment:

Considering that the Company prohibits workplace harassment and sexual harassment in its employment rules and that disciplinary action can be taken when acts of sexual harassment are committed, it can be interpreted that such acts are considered significantly serious disciplinary offenses. Therefore, although the investigator did not recognize the alleged perpetrator's actions as workplace harassment or sexual harassment, there are aspects that should be improved, considering the potential for the mentioned remarks to be interpreted as sexual harassment when taken together, despite being related to social issues. It is important to be mindful that engaging in conversations with employees on certain topics may cause discomfort to the other party (such as "*moolbong*," body weight, alcohol-related mentions) and ensure that such incidents are not repeated. If they occur again, appropriate sanctions or disciplinary action should be taken.

(3) Necessity for organizational-level measures and education:

Since this is the first reported case of workplace sexual harassment and harassment within the Company, it is crucial to take this opportunity to raise awareness among employees, including the alleged perpetrator, about the potential for such remarks to be perceived as sexual harassment when targeting women. Thorough implementation of education on preventing workplace sexual harassment is necessary.