

CLIENT ALERT: COSTCO FOUND LIABLE FOR HARASSMENT BASED ON THE CONDUCT OF ITS CUSTOMER

COSTCO FOUND LIABLE FOR "THIRD-PARTY HARASSMENT" – FAILING TO ADEQUATELY PROTECT ITS EMPLOYEE FROM SEXUAL HARASSMENT BY A CUSTOMER.

In a decision that has significance for retailers and employers whose employees have meaningful customer contact, the U.S. Court of Appeals for the Seventh Circuit, in the case *Equal Employment Opportunity Commission v. Costco* upheld a \$250,000 verdict against Costco because it failed to protect its employee from a harassing customer. Broadly, the decision underscores the importance for retailers and employers of taking and documenting appropriate measures after being made aware of harassment of an employee by a customer, and the potential liability inherent in failing to do so.

HOW CAN AN EMPLOYER BE RESPONSIBLE FOR A CUSTOMER'S HARASSMENT OF ITS EMPLOYEE?

Costco's employee, Ms. Suppo, complained that one of its customers, Mr. Thompson, was repeatedly coming into the store, following her and taking videos of her with his phone. The harassment also included the customer touching her as she walked the aisle, and at one point screaming at her as she shopped at another Costco location.

Costco took steps to protect Ms. Suppo, just not enough in the Seventh Circuit's opinion. Costco's store manager met with Mr. Thompson and instructed him to stay away from Ms. Suppo, which resulted in the customer assuring the manager that he would leave her alone. Costco even took the additional step of escorting Mr. Thompson off the premises. Nonetheless, in the weeks and months that followed, the customer returned to the store at least 20 times, routinely following Ms. Suppo through the store. During this time, Mr. Thompson asked Ms. Suppo whether she had a boyfriend, told her she looked pretty and asked for her phone number.

Ms. Suppo's manager's early-on discussion with Mr. Thompson and escort of him off the premises was completely appropriate; however, the Seventh Circuit found that Costco did not insert itself to protect Ms. Suppo during the subsequent 13 months the conduct occurred – as one would expect if being harassed by a co-worker. After opening an investigation into the matter, the store's manager sent an "investigation closure" letter to Ms. Suppo informing her that although the company "could not confirm" a violation of its harassment policy, it had instructed Mr. Thompson not to shop at her location. The key issue, however, is that Costco's harassment policy had been violated by the customer. They just did not realize it.

Ultimately, Ms. Suppo took an extended medical leave and refused to return to the store, resulting in her termination.

WHAT THE COURT SAID:

The Seventh Circuit assessed Ms. Suppo's customer-based harassment claim against Costco the same as if it was co-worker-based. The Court found that, "A reasonable juror could conclude that being hounded for over a year by a customer despite intervention by management, the involvement of the police and knowledge that he was frightening her would be pervasively intimidating or frightening to a person of average steadfastness." Costco was unsuccessful in arguing that Mr. Thompson's conduct was not severe or pervasive enough to create a hostile work environment. More importantly, Costco struggled to produce documentation of its efforts to protect Ms. Suppo from the customer, making it difficult to show that it had attempted to remedy the harassment in response to her complaints. In this regard, the Court concluded that, "A juror could also have held that Costco's investigation and corrective measures were unreasonably weak."

WHAT THIS MEANS FOR EMPLOYERS, PARTICULARLY RETAILERS

If your employees have meaningful customer contact, you are responsible for protecting them from harassing conduct that occurs based on their gender, as well as their race, age, religion, nationality or disability.

Recognizing this obligation is critically important. Your obligations as an employer with respect to employee customer interaction are the same as with co-worker harassment: you do not need to learn anything new in terms of protocols for investigation of the conduct or potential remedies you might implement. However, you must ensure that you document your investigation and your efforts to remedy the situation. Taking the proper steps is one thing, but being able to prove that you took these measures is equally important.

EEOC v. Costco Warehouse Corporation, NO. 17-2532 (7th Cir. Sept. 2018)

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