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LIABILITY AVAILABLE BY THE CASE AT COSTCO

By: Kerri A. Wright

A \$250,000 jury verdict in federal court in Illinois provides all employers a clear reminder that they have an obligation to protect their employees from the creation of a hostile work environment caused by clients and customers, not just from fellow employees or supervisors.

In denying an employer's motion for summary judgment, and sending the matter to a jury, a federal district court in Illinois held that Title VII of the Civil Rights Act of 1964, which prohibits discrimination on the basis of gender, in turn, protects employees against a hostile work environment "so permeated with discriminatory intimidation, ridicule, and insult that it is sufficiently severe or pervasive to alter the condition of the victim's employment" regardless of whether that hostile environment is caused by another employee, an independent contractor, or even a customer. *U.S. Equal Employment Opportunity Comm'n v. Costco Wholesale Corp.*, 2015 WL 9200560 (N.D. Ill. Dec. 15, 2015)(citing *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21 (1993)). Costco received that reminder loud and clear when a jury found it failed to take reasonable steps to prevent a customer from harassing one of its employees, awarded that employee \$250,000 in emotional distress damages, and ordered Costco to reimburse her for years of medical bills for psychiatric treatment she allegedly received as a result of the harassment.

THE BACKGROUND

Dawn Suppo was employed as a Front End Assistant by Costco until she requested and was placed on an extended medical leave. Suppo's job as a Front End Assistant required her to, among other tasks, assist customers and return items to their proper location in the store.

According to Suppo, Thad Thompson was a customer at the Costco warehouse at which she worked. Over the course of approximately a year, Suppo claims that Thompson engaged in harassing behavior that included "ominous staring, unwanted physical touching, unwanted requests for dates, and overly intrusive personal questions." According to Suppo, his

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insistence on interacting with her continued to escalate, even though he had been counseled by Costco managers and the local police department to avoid interacting with Suppo. The final act of alleged harassment came when Thompson allegedly videotaped Suppo without her permission. This prompted Suppo to seek and obtain an order of protection against Thompson in court.

Suppo reported this unwelcome behavior to two management-level employees, one of whom spoke with Thompson. He was told to avoid Suppo or at least minimize contact with her. Two of the managers followed up with Suppo, advised her of their discussion with Thompson, and advised her that if anything else happened with Thompson she should let them know immediately. After this initial reporting, Costco and Suppo's version of events differ. Suppo claims that Thompson continued to harass her and that she reported his behavior repeatedly to her managers. Costco claims that she did not make any further reports until September 2011, when she reported that Thompson had videotaped her on his phone. Costco investigated this report, checked the store surveillance, and followed up with Suppo afterward, advising that nothing could be seen on the surveillance tapes. On September 6, 2011, Suppo reported the incidents directly to the store manager. Costco commenced a second investigation, which concluded that the allegations were inconclusive. Nevertheless, Costco notified Thompson by letter that he was no longer welcome to shop at that Costco location. Costco then sent Suppo a "closure letter" in which it advised her that Thompson was no longer permitted to shop at the subject Costco location and requested that she provide a copy of the protective order she obtained so that they could take appropriate measures should the need arise.

Suppo received this letter while she was on extended leave, which she claims she took because of the distress caused by Thompson's behavior. After a year on leave, and after requesting an additional year or two of leave, Costco advised her that it did not grant "indefinite" leave as an accommodation and terminated her employment. Costco advised her that she was eligible for rehire.

Suppo filed a charge with the EEOC and, on her behalf, the EEOC sued Costco, asserting that it subjected her to a hostile work environment based on Thompson's harassment. The EEOC further asserted that she was constructively discharged because she was forced to leave her job due to the harassment.

THE SUMMARY JUDGMENT DECISION

Costco sought summary judgment on both claims. The court dismissed the constructive discharge claim, basing its decision on the undisputed fact that Suppo never quit or resigned. Instead, she went out on leave and was terminated after her leave ran out.

On the Title VII claim that Costco failed to take reasonable action to ameliorate a hostile work environment, the court denied the motion (allowing the case to proceed to a jury). The decision states that employers are held strictly liable for harassment inflicted by supervisors, but if the harassment is committed by someone other than a supervisor, such as a co-worker, independent contractor, or customer, a negligence standard applies. *Id.* at *8. An employer is not considered to be on notice of the harassment unless the employee makes a "concerted effort" to inform the employer that a problem exists. *Id.* If the employer "took prompt and appropriate corrective action reasonably likely to prevent the harassment from recurring, the employer cannot be held liable." *Id.* Unfortunately for Costco, the court noted that Costco found itself in the following "very difficult" situation:

... a customer and an employee providing vastly different accounts of incidents that the employee found upsetting; the customer threatening legal action based on what he perceived as unfair treatment stemming from Costco's efforts to remediate

the situation; and an inability to confirm or refute the employee's allegations through surveillance video, eyewitnesses, or other independent means.

Id. But it was Suppo's account that had to be accepted at the summary judgment stage, which compelled this case to be heard by a jury. She claimed that she was subjected to harassing behavior by a customer for more than a year. The court found that a reasonable jury could conclude that alerting two management-level employees constituted a "concerted effort" to advise Costco of the harassment, particularly where Suppo claims that a third manager angrily rebuffed her and told her to be friendly to the allegedly harassing customer.

The court further concluded that there were factual disputes, requiring submission to a jury, surrounding what steps Costco took to make Suppo feel safe so that she could return to work in September 2011. According to Costco, Suppo was "told" she could step into the front office whenever she saw Thompson coming and that she could work exclusively up by the registers. While the court noted that they "appear to be reasonable solutions," Suppo disputed that these options were conveyed to her. *Id.* at *10.

The record further reflected that Costco tried to defuse the situation by banning Thompson from the store, "but this information was not conveyed to Suppo until November 2011, after she had already gone on medical leave." *Id.* By Suppo's account, Costco did not take that step until she had been subjected to harassment for over a year, which, the court concluded, a reasonable jury could conclude was an unreasonable period of time.

TAKEAWAYS FOR EMPLOYERS

Employers need to remember that they must provide their employees with a work environment free from harassment and discrimination, even if that harassment comes from sources over which employers feel as though they have little control, such as vendors or customers. In this case, Costco had well developed policies and practices to stamp out harassment and discrimination. It provided those policies to all employees in writing and provided training programs to all employees that, among other things, addressed prohibited conduct by both customers and coworkers. What it did not do sufficiently, to avoid this case being sent to a jury, was document the steps it took to respond to the complaints filed by the employee in question. This serves as a good reminder to employers to train managers on the importance of and how to properly document their follow up in writing. Every offer of accommodation or action taken to ameliorate the situation should be documented. Whenever possible, managers should attempt to have the employee in question sign an acknowledgement of these actions. According to Costco, its managers told the employee she could work up front or go into the office when she saw the alleged harasser enter the store. However, this "reasonable response" to her complaints was not documented in any way.

Costco also investigated the employee's complaints and eventually banned the alleged harasser from the store; however, it did not convey that information to the employee until after she went out on medical leave. Employers should act promptly when presented with complaints from employees that some individual makes them feel uncomfortable. And then immediately convey the actions taken and the decision made to the employee in writing.

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