Legal Update Article

Third-Party Harassment and Discrimination: The Customer Isn't Always Right

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As fiscal year 2019 ends for the Equal Employment Opportunity Commission (EEOC), it has announced it is pursuing several new discrimination suits, including one alleging a casino failed to protect female staffers from sexual harassment by patrons.

Sexual misconduct and harassment have been in the national spotlight more than ever and claims based on customer or vendor harassment are the inescapable results of that heightened awareness. The U.S. Court of Appeals for the Seventh Circuit has made clear that customer or vendor harassment is actionable. In *EEOC v. Costco Wholesale Corp.,* 903 F.3d 618 (7th Cir. 2018), the Seventh Circuit unequivocally held that the customer is not always right. To the contrary, it ruled that a customer's wrongs cannot be tolerated.

What do employers need to do when an employee complains of customer or vendor misbehavior?

Why is it the employer's responsibility?

While employers do not have the ability to control their customers' or vendors' actions, Title VII of the Civil Rights Act requires employers to provide their employees with nondiscriminatory working conditions, and working conditions are not affected only by employees. Customers and vendors may contribute as much to the working environment as coworkers do.

The Seventh Circuit provided an illustrative hypothetical of this in*Dunn v. Washington County Hospital:*

> Suppose a patient kept a macaw in his room, that the bird bit and scratched women but not men, and that the Hospital did nothing. The Hospital would be responsible for the decision to expose women to the working conditions affected by the macaw, even though the bird (a) was not an employee, and (b) could not be controlled by reasoning or sanctions. It would be the Hospital's responsibility to protect its female employees by excluding the offending bird from its premises.

429 F.3d 689, 691 (7th Cir. 2005).

Still, this does not mean the law makes employers vicariously liable for customers' actions. Rather, the Seventh Circuit held, the standard of liability applicable to coworker harassment also applies to customer-based harassment. Although this standard does not translate perfectly to situations of alleged customer harassment, it is adaptable.

What is an employer's obligation?

Employers are liable for third-party harassment if they "unreasonably fail to take appropriate corrective action reasonably likely to prevent the misconduct from

recurring." *Lapka v. Chertoff,* 517 F.3d 974, 984 (7th Cir. 2008). While this standard is necessarily vague, the goal is to prevent future misconduct, which may or may not involve punishment of the alleged harasser.

When an employee complains about harassment from a customer, the *Lapka* court said, "the hallmark of [appropriate] corrective action is a prompt investigation." Employers, therefore, must begin the investigation as soon as possible. In the *Dunn* court's example above, the hospital might not have been required to kick out the macaw immediately (although it probably should), but it should investigate the macaw incidents immediately.

When conducting the investigation, remember that harassment need not be sexual in nature to create a claim. In *EEOC v. Costco,* a customer was stalking an employee, but the employer's investigation concluded the customer's actions toward the employee were not offensively sexual, so the employer was slow to act to protect its employee. The Seventh Circuit held the employer unreasonably failed to separate the employee and the stalker, who was causing her to feel fearful and intimidated.

How does the employer discharge its obligation?

After an investigation, employers must take corrective action reasonably likely to prevent future harassment. The efficacy of the employer's actions will be examined. Courts have noted that physical separation makes it "distinctly improbable" that harassment will continue. Even so, the employer must make sure the separation (or other action) is effective, and continues to be effective, at preventing misconduct.

Employers should consider the following to minimize potential customer or vendor harassment:

- Ensure policies cover and denounce customer-based harassment;
- Advise the customer of the complained-of alleged misconduct that any such conduct must cease immediately;
- Prevent the customer from entering the employer's property;
- Where the employer has a business relationship with the harasser's employer, consider whether to report the alleged conduct to the harasser's employer to ensure it does not continue;
- If necessary or possible, offer the complainant the option of working in an area where no contact with the offending customer is needed; and
- Consider whether a protective order or the involvement of law enforcement is necessary and appropriate.

In trying to stop any misconduct, employers must be careful with how they choose to separate the employee from the customer. Removing the complainant to his or her disadvantage or when not necessary may lead to a retaliation claim.

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Employers need to be vigilant. Please contact a Jackson Lewis attorney with any questions related to harassment policies, training for management and employees, and other preventive practices.