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Sexual harassment gets expanded reading

It is undisputed that Title VII prohibits workplace harassment based on sex when perpetrated by an employer's customer. However, it is important to remember that Title VII prohibits sex-based workplace harassment even though the large majority of the conduct complained of is not of a sexual nature.

In *EEOC v. Costco Wholesale Corp.*, the employer, Costco, sought to have the 7th U.S. Circuit Court of Appeals overturn a jury award of \$250,000 in compensatory damages in favor of a female employee who claimed she had been subjected to a year of stalking by a Costco customer.

Costco is a warehouse club that is open only to its members. These members are charged an annual fee for this access. In May 2010, seasonal worker Dawn Suppo began working as a regular part-time employee at Costco's north suburban Glenview location.

Suppo first encountered the alleged harasser and stalker, Thad Thompson, in May or June 2010. Her last unwelcomed interaction with him took place about 13 months later.

As a result of Thompson's persistent and unwanted attention, Suppo sought and received protective orders from Cook County Circuit Court and eventually took an unpaid medical leave of absence. Costco subsequently terminated Suppo's employment because she failed to return to work within 12 months — the outer limit of the company's medical leave policy.

The trial court granted Costco summary judgment on the discharge claim but allowed the harassment claim to proceed to trial. At trial, Costco's request for judgment as a matter of law was denied, and the jury found in Suppo's favor. With respect to damages, the trial court found that Suppo could not recover back wages because she was dis-

charged for failing to return to work, not constructively discharged because of the harassment.

On appeal, the majority of the underlying facts were not in dispute. Like the 7th Circuit, this article will assume that the key allegations of workplace conduct are true.

Before the 7th Circuit, Costco argued that Suppo did not experience harassment that was severe or pervasive from an objective point of view and that, therefore, the trial court erred in denying its request for judgment as a matter of law.

The Equal Employment Opportunity Commission filed a cross-appeal on the issue of Suppo being denied back wages for the period covering her year-long medical leave and two years beyond her termination.

As to Costco's argument that it was entitled to judgment as a matter of law, it argued that Thompson's comments were "tepid" compared to sexual conduct consistently deemed insufficient to create a hostile work environment. As to the EEOC's position on back wages, it argued that Suppo should have been able to recover three years of back pay lost as a result of Thompson's conduct.

"[a]ctionable discrimination can also include behavior such as demeaning, ostracizing or even terrorizing the victim because of sex."

By way of background, commencing almost immediately with the start of Suppo's hire as a regular employee, Thompson began following Suppo at work while she performed her "go-back" duties, such as, reshelving items that customers decided not to purchase.

During that first exchange, Thompson told Suppo that he had observed her talking to a

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male co-worker, and Thompson followed up on that observation by asking Suppo personal questions. That initial exchange concerned Suppo, and two months later, she reported that incident and her related fears to management.

In temporal order, and in summary fashion, the key subsequent events are as follows: Suppo reported that Thompson, wearing sunglasses and a hat, again followed her in the store; loss-prevention and management were present and instructed Thompson to avoid and not talk to Suppo; Thompson, after invoking his "freedom of speech," ultimately agreed to leave Suppo alone; Suppo filed a police report directed at Thompson; overhearing Suppo's follow-up conversation with the police, management shouted at Suppo and told her to be friendly toward Thompson; the police interviewed Thompson, who apologized and agreed to avoid Suppo; Thompson did not avoid Suppo, but rather stalked her dozens of time at the

Glenview location; on multiple occasions, Thompson attempted to talk to Suppo and to give her his phone number; Thompson asked Suppo about her dating status, which male co-workers she talked with, the identity of a male she had been seen shopping with and where she lived; Thompson told Suppo that she was pretty, beautiful and exotic; Thompson asked Suppo out on

dates; Thompson touched Suppo's hand and face and, on one occasion, touched her wrist while commenting on her veins and an injury that was slowly healing; management witnessed two of these incidents and informed Thompson he was being watched; Suppo asked to have a parking spot close to the entrance, but that request was denied; Thompson, after Suppo refused to talk with him, used his phone to record Suppo; Suppo secured a stalking no-contact court order against Thompson; Suppo began a medical leave of absence; management conducted an investigation and subsequently advised Suppo that they did not uncover a violation of its harassment policy but had nevertheless instructed Thompson to shop at a different Costco location; while Suppo and her father were shopping at the location where Thompson had been instructed to shop, Thompson approached Suppo and her father and screamed profanity at them; and Costco, in turn, finally revoked Thompson's club membership.

The 7th Circuit, in affirming the jury's verdict, rejected Costco's reliance upon cases rejecting sexual harassment claims involving more salacious conduct. In doing so, the court explained that "[a]ctionable discrimination can also include behavior such as demeaning, ostracizing or even terrorizing the victim because of sex."

As to the EEOC's position of three years of back pay, the court ruled that Suppo could not recover any wages for the two-year period following her refusal to return to work, but remanded the issue of the one year of back pay during Suppo's medical leave because she could recover for lost wages during that time frame if the trial court concluded that she was forced to take that unpaid leave as a result of the harassment.