The Americans with Disabilities Act Prohibits Hostile Work Environments, Second Circuit Rules

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On March 6, 2019, the U.S. Court of Appeals for the Second Circuit decided Fox v. Costco Wholesale Corporation, eliminating any uncertainty concerning whether an employee can assert a hostile work environment claim under the Americans with Disabilities Act (ADA). The court’s ruling is clear: “hostile work environment claims are cognizable under the ADA.”

Background

Christopher Fox began working for Costco in 1996. He has Tourette syndrome.

According to Fox, after a new store manager was hired in 2013, he began receiving reprimands for various performance issues—such as leaving the store’s entrance unattended and leaving a shopping cart in front of freezers. Costco also received customer complaints concerning Fox. On one occasion, a customer complained that Fox told her that she “looked beautiful with her pocketbook.” On another occasion, a customer complained that Fox stated she was “the love of [his] life.” Fox did not deny the comments, claiming, “I can’t always help what I say.” As a result, the manager suspended Fox for three days and transferred him to an assistant cashier position, where he would have less customer contact.

According to Fox, one symptom of his Tourette syndrome is that “he would often touch the floor before moving.” He also has a verbal tic, which manifests itself in Fox swearing. Fox stated that he would cough “in order to prevent others from hearing him swear.”

Following his transfer to the assistant cashier position, Fox alleged Costco employees started mimicking his verbal and physical tics, which resembled a football player touching the ground. For example, they would state “hut-hut-hike” in his presence. Fox claimed his managers frequently witnessed these comments and that the comments persisted for “months and months.”

In March 2014, Fox emailed Costco’s chief executive officer, claiming his work environment was aggravating his Tourette syndrome. Fox did not mention the “hut-hut-hike” comments. Costco investigated the matter and took remedial action. Nevertheless, Fox alleged the mistreatment continued. Among other things, Fox claims he was denied time sheets, was “reprimanded for leaving his work station to drink water,” and was subject to ridicule from his coworkers concerning his work performance. Once again, Costco investigated the matter and took remedial action.
In November of 2014, Fox had a panic attack at work. He was escorted from the building by emergency medical technicians. From that date forward, Fox was on an indefinite medical leave.

Fox commenced a lawsuit in the U.S. District Court for the Eastern District of New York. In his complaint, Fox claimed disability discrimination, hostile work environment, retaliation, and failure to accommodate his disabilities—all in violation of the ADA and New York law. The district court granted Costco's motion for summary judgment and dismissed Fox’s complaint in its entirety.

**Second Circuit Revives the ADA Hostile Work Environment Claim**

On appeal, the Second Circuit affirmed the district court's dismissal of Fox's disability discrimination, retaliation, and failure to accommodate claims. However, the Second Circuit held that Fox created an issue of fact concerning whether he was subject to a disability-based hostile work environment. In doing so, the Second Circuit, for the first time, decided that a hostile work environment claim is cognizable under the ADA. In reaching its conclusion, the court was guided by the plain language of the ADA, which states covered employers "shall not discriminate against a qualified individual on the basis of disability in regard to . . . terms, conditions, and privileges of employment." The ADA borrowed this language from Title VII of the Civil Rights Act of 1964, which the Supreme Court of the United States already held provides for hostile work environment claims. According to the Second Circuit, "it follows that disabled Americans should be able to assert hostile work environment claims under the ADA, as can those protected by Title VII . . . and we here so recognize." The court also noted that many other circuit courts recognize ADA hostile work environment claims.

Having concluded the ADA prohibits hostile work environments, the court proceeded to analyze whether Fox presented evidence that the harassment in his case "was sufficiently severe or pervasive to alter the conditions of [his] employment and create an objectively hostile or abusive working environment." The court concluded that several of Fox's allegations fell short. For example, his reprimands for leaving the entranceway unattended and leaving his register to get water did not meet the standard. Furthermore, his suspension for making inappropriate comments to customers failed to qualify as "objectively hostile or abusive" treatment.

In contrast, the court found the "hut-hut-hike" allegations . . . raise a material issue of fact as to whether Costco employees engaged in ongoing and pervasive discriminatory conduct." The court also found "crucial" the fact that his supervisors allegedly witnessed the comments for "months and months" and did nothing to stop it, which served to impute the conduct to Costco.

**Key Takeaways**

The Fox decision establishes that the ADA prohibits hostile work environments—at least in the Second Circuit. Employers may want to regularly update and distribute policies prohibiting discrimination, retaliation, and harassment based on any protected characteristic, and providing a mechanism for employees to complain about violations. Proper implementation of these policies, including promptly investigating complaints and taking remedial action as appropriate, can serve as a defense to liability in relation to hostile work environment claims.
For also serves as a reminder for employers to encourage managers who witness possible harassment to take action. Their failure to do so can result in liability for their employers. Employers may want to train managers on policies prohibiting discrimination, harassment, and retaliation, emphasizing the need to report—and respond to—possible violations.