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Is the Customer Always Right? How Employers Should Respond to Patron Misconduct

California Employment Law Update Blog on **November 29, 2021**

As anyone who has worked in a customer-facing job can tell you, dealing with difficult customers often comes with the territory. However, when customer behavior crosses a line into illegal conduct like sexual harassment, both the customer *and* the employer may find themselves in hot water.

Wynn Las Vegas, a Nevada hotel, learned the hard way recently when an appellate court reinstated a lawsuit filed against the hotel by one of Wynn's employees, Vincent Fried, in *Fried v. Wynn Las Vegas*. Fried argued that Wynn was liable for creating a hostile work environment not because of any harassment by a boss or coworker but rather by a customer.

What is a "hostile work environment"? In the sexual harassment context, a hostile work environment exists when an employee is the target of: 1) sexual conduct that is 2) unwelcome and 3) "sufficiently severe or pervasive so as to alter conditions of employment."

In 2017, a customer came into Wynn's salon and sexually propositioned Fried. Fried immediately went to his manager to report the customer, at which point the manager allegedly told him to "get it over with" and serve the customer despite the lewd comments.

This response from the manager, according to the Ninth Circuit's recent holding, by itself could be grounds for a hostile work environment claim against *Wynn*.

Fried is not seeking to hold Wynn liable for the customer's harassment. Rather, he is arguing that his manager's response to the harassment *by itself* created a hostile work environment, a separate cause of action in its own right.

As the court notes in its decision, it is already well-settled across all circuits that employers can create a hostile work environment by failing to take speedy action against harassment by a third party, such as a customer. Here, the court held that an employer's response (or lack thereof) to a third party's harassing conduct can *independently* support a hostile work environment claim, at least enough to survive summary judgment.

This means that a single instance of customer harassment, as allegedly existed here, can be enough for an employee to get before a jury.

What This Means for Employers

Of course, since this is a pretrial motion, Wynn has not lost the case just yet. The Ninth Circuit's decision simply sends the dispute back to the District Court and presumably onto trial. But what does this holding mean for other employers, especially those in customer-facing industries like hospitality?

First—if it wasn't already clear—businesses need to be extra vigilant in training employees how to recognize sexual harassment, no matter the source or target. In Fried's case, the alleged harasser was a customer, but the court's ruling could apply just as well to a contractor, supplier, visitor, or any other third party who happens to be present in a place of business.

Second, businesses should impress upon employees—especially managers and supervisors—the importance of taking swift corrective action in response to reports of harassment in the workplace, even if it's just a single instance. Downplaying the harassing conduct could give rise to a hostile work environment lawsuit, as occurred here.

Of course, managers do not have the authority to investigate or "fire" a customer. However, that does not mean a business is powerless in the face of customer misconduct. The court suggests that Fried's manager could have "requir[ed] the customer to leave the premises immediately" or at least have another employee serve the customer so as to protect Fried.

Wynn follows a similar case from January 2021 where an employee alleged sexual harassment by a customer. In *Christian v. Umpqua Bank*, the Ninth Circuit also found that the employer could have created a hostile work environment by failing to take "prompt, appropriate, and effective action" in response. The court's suggested responses in that case included telling the customer not to come back to the premises, obtaining a no-trespassing order, or involving security.

Employers may need to get creative, since different scenarios will require different responses. Until additional guidance emerges from the courts, it is better to be safe than sorry.

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