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UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA

LAURIE LINDSEY,  
Plaintiff,  
v.  
COSTCO WHOLESALE CORPORATION,  
Defendant.

Case No. 15-cv-03006-WHO  
**ORDER DENYING DEFENDANT’S  
MOTION FOR SUMMARY JUDGMENT**  
Re: Dkt. No. 33

**INTRODUCTION**

Plaintiff Laurie Lindsey brings this hostile work environment action against defendant Costco Wholesale Corporation (“Costco”), asserting claims for harassment and failure to prevent harassment under California’s Fair Employment and Housing Act (“FEHA”), and for negligent hiring, supervision, and retention. Her claims are based on the actions of her supervisor, Juan Aguilera, who she alleges subjected her to a course of verbal harassment based on her sex and sexual orientation between 2008 and 2014, culminating in an incident on August 9, 2014 in which Aguilera walked up to her and “slammed” into her right side with his right arm and shoulder. Costco moves for summary judgment on each of Lindsey’s three causes of action, and on her request for punitive damages. For the reasons discussed below, the motion is GRANTED with respect to Lindsey’s request for punitive damages but DENIED with respect to her three causes of action.

**BACKGROUND**

**I. FACTUAL BACKGROUND**

Lindsey describes herself as a 31-year-old gay woman who projects a “butch, masculine appearance.” Lindsey Decl. ¶ 2 (Dkt. No. 44-8); *see also* Oppo. at 1 (Dkt. No. 44). She began working for Costco in 2003. Lindsey Depo. at 145 (Dkt. No. 35-3). In 2006, she transferred to

1 the San Francisco Warehouse, where she became a cashier. *Id.* at 97, 145. Aguilera was  
2 Lindsey’s supervisor at the San Francisco Warehouse. *See* Lindsey Decl. ¶ 2. Lindsey accuses  
3 Aguilera of “a long, sustained pattern of severe and pervasive harassment and inappropriate  
4 conduct directed at [her],” beginning in 2008 and continuing into 2014. *Oppo.* at 2. Her claims  
5 center on seven different incidents or patterns of conduct involving Aguilera.

6 First, at some point in 2008, Aguilera approached Lindsey while she was standing at a cash  
7 register and stated, “You’re chopped liver and she’s filet mignon,” referring to another female  
8 employee standing nearby. Lindsey Depo. at 170, 172. Lindsey reported the incident to  
9 Warehouse General Manager Mike Reike, who suspended Aguilera and issued him a disciplinary  
10 counseling notice. *Id.* at 173-76; Aguilera Decl. ¶ 4 (Dkt. No. 34); Aguilera Depo. at 49-50 (Dkt.  
11 No. 35-7).<sup>1</sup>

12 Second, Lindsey asserts that

13 [s]tarting around 2008, [Mr. Aguilera] began a sustained habit of  
14 referring to me as “sir” when he would interact with me at work. I  
15 never saw or overheard Mr. Aguilera referring to other female

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16 <sup>1</sup> In April 2010, Lindsey and a number of other Costco employees sent a letter to Costco’s CEO  
17 stating that that they “would like to discuss some of the issues [they] have with the management at  
18 [the San Francisco Warehouse],” and requesting that Costco representatives be sent to the  
19 Warehouse to “interview as many employees as possible.” Jolivet Decl. Ex. 11 (Dkt. No. 44-3).  
20 The issues identified in the letter include “Sexual Harassment,” “Shut Down of Open Door  
Policy,” “Intimidation Tactics,” and “Retaliation,” as well as a number of other issues having  
nothing to do with Lindsey’s claims. *Id.* At a follow-up interview with Human Resources  
employee Sarah Rajski, Lindsey did not identify Aguilera by name but described the “chopped  
liver” comment and

21 expressed that one of my male supervisors had made the comment.  
22 I also expressed that Costco’s handling of that complaint had only  
23 angered my supervisor, and that I was afraid that if I brought  
24 further complaints to Costco’s attention, the information would  
25 make its way back to the harasser and my coworkers. I also  
26 discussed that after making my complaint, my supervisor had  
27 thrown it back in my face, treating my complaint like it was a joke  
28 and advising others to “watch what they say” around me. This  
made me extremely uncomfortable to come to work on a daily  
basis. I explained to Ms. Rajski that I did not want to go through  
more hassle and retaliation if I complained about my supervisor’s  
additional remarks, and that if I complained too much it would  
raise a red flag such that people would not want to deal with me. I  
stopped raising the complaints as a result.

Lindsey Decl. ¶ 6; *see also* Jolivet Decl. Ex. 34 at D001142 (Rajski’s notes from the conversation).

1 employees or members as “sir.” I perceived these comments to be  
2 motivated by my butch, masculine appearance. These comments  
3 were derogatory and unwelcome. While I can’t say with precision  
4 whether Mr. Aguilera made these comments in every year, or made  
5 them with equal frequency in each year, overall he made them  
6 regularly throughout my employment with Costco, starting in 2008.

7  
8 Lindsey Decl. ¶ 2. At her deposition, Lindsey stated that Aguilera made the “sir” comments  
9 “intermittently” and described the comments as follows:

10 Q: . . . In what context would he refer to you as “sir”?

11 A: Supervisors often walk between registers counting drops and if  
12 they were called, they would be kind of walking around the front  
13 end at a fast pace so sometimes if he had to count my drop or had to  
14 converse with me, . . . it would be, like, a quick verbal utterance of  
15 acknowledgment instead of saying my name.

16 [ . . . ]

17 Q: Would he just come by you and say, “Hi, sir”?

18 A: Something to that effect.

19 Lindsey Depo. at 179-80.

20 Third, Lindsey asserts that

21 [i]n 2008, Aguilera . . . began a pattern of pointing out other women  
22 to me in the warehouse that he found physically attractive,  
23 commenting “look at that” or “look at her.” To my knowledge, Mr.  
24 Aguilera did not make these comments to other female coworkers.  
25 These comments were sexual and unwelcome as well. Although Mr.  
26 Aguilera did not expressly state that he was aware that I was (and  
27 am) gay, I believe his comments and conduct demonstrated that he  
28 was aware of my sexual orientation because he did not make similar  
comments to other female employees. I perceived that he was  
pointing out these women to me so that I would agree with him,  
based on his awareness of my sexual orientation. While I can’t say  
with precision whether Mr. Aguilera made these comments in every  
year, or made them with equal frequency in each year, overall he  
made them regularly throughout my employment with Costco,  
starting in 2008 until my reassignment to member services following  
the August 2014 assault.

Lindsey Decl. ¶ 3; *see also* Lindsey Depo. at 181-82. Lindsey stated at her deposition that she  
could not recall whether she asked Aguilera to stop making the comments, and that she did not  
report the comments to any other supervisor. *Id.* She testified that she did not report the  
comments because she “sensed hostility” from Aguilera and was “afraid of more retaliation.”<sup>2</sup> *Id.*

<sup>2</sup> Although Lindsey’s opposition brief and associated materials occasionally refer to retaliation,  
her complaint does not include a retaliation claim.

1 at 182-83. Asked to explain what retaliatory conduct she had experienced, Lindsey stated that in  
2 2008 she “was at the supervisor’s podium and [Aguilera] had walked up and there were other  
3 people around but I don’t recall the names exactly, but he said, ‘Watch what you say around her.’”  
4 *Id.* at 183.

5 Fourth, Lindsey asserts that

6 [s]tarting in 2008 and continuing until my reassignment to member  
7 services in August 2014, Mr. Aguilera also frequently made farting  
8 noises with his mouth when I would bend over to pick something  
9 up. Based on all of his previous harassing and inappropriate  
10 comments, including his comparison of me to “chopped liver” and  
11 another female employee to “filet mignon,” and his comments  
12 regarding other women he viewed as physically appealing, I  
13 perceived these farting noises to be a continuation of his harassment  
14 and expressions of his contempt for my sexual orientation.

15 Lindsey Decl. ¶ 4. Lindsey testified that Aguilera made the farting noises at her “at least 50 times  
16 between 2008 and 2015.” Lindsey Depo. at 284. She could not recall approximately how many  
17 times per year Aguilera made the noises. *Id.* at 286.

18 Fifth, in March 2014, Lindsey

19 was closing down a register area on the front end of the store at the  
20 request and under the supervision of Guy Wikium, a Costco Front-  
21 End Supervisor. In order to shut down the register, shopping carts  
22 are normally placed in the aisles so that members cannot walk  
23 through, and to direct members to other open registers and cashiers.  
24 As I was closing down the register area, Mr. Wikium asked me to  
25 place a spiral rope through the carts to keep them in place. At this  
26 point, Mr. Aguilera approached the end of the check-out area and  
27 said “gaps are meant to be filled.” Prior to this comment, and  
28 throughout my entire time at Costco, I never heard any Costco  
employee or supervisor (including Mr. Aguilera) refer to the  
checkout lanes as “gaps”; rather, they were referred to as “lanes” or  
“aisles.” His tone of voice and body language were sexually  
suggestive, and, I believe, were meant to convey his anti-  
homosexual views. I believe he directed the comment to me  
specifically because of my sexual orientation and to indicate his bias  
for heterosexual sexual intercourse. His comment was also sexist  
and biased against women in general, as it suggested that men are  
entitled or supposed to “fill” women’s “gaps.” Mr. Wikium rolled  
his eyes after hearing this comment, but did nothing to chastise or  
correct Mr. Aguilera’s behavior.

Lindsey Decl. ¶ 8. Lindsey did not report the incident to any other supervisor. Lindsey Depo. at  
231.

Sixth, around the same time as the “gaps are meant to be filled” comment, Aguilera made

1 another comment to Wikium:

2 [Mr. Wikium] asked Mr. Aguilera if I was “together” with another  
3 female coworker. On the front end, cashier assistants are assigned to  
4 work with cashiers, and I was working as a cashier with a female  
5 cashier assistant. Mr. Aguilera suggestively replied “I don’t know.  
6 They could be[,]” despite his responsibility as a Front-End  
7 Supervisor to know the cashier and cashier assistant assignments  
8 and to release us for breaks. This comment was directed at me, and  
his tone of voice was suggestive, almost a sneering manner, as if he  
was suggesting that my being assigned to work with another woman  
indicated that we were “together” romantically. His tone of voice  
and body language again were sexually suggestive and derogatory,  
and indicated not only his awareness of my sexual orientation, but  
his contempt for same.

9 Lindsey Decl. ¶ 9. Lindsey again did not report this incident to any other supervisor. Lindsey  
10 Depo. at 235.

11 Finally, Lindsey asserts that Aguilera physically assaulted her on Saturday, August 9, 2014  
12 at approximately 2:00 p.m. She states that she was standing by the time clock near the optical  
13 department at the front of the warehouse when Aguilera “slammed his arm and shoulder into [her]  
14 arm and torso.” Oppo. at 5-6. At her deposition, she described the incident as follows:

15 He was walking towards my direction in a brisk manner, and he had  
16 a very stoic look on his face. And I was standing there. And as soon  
as he got closer to me, he hit me with the right side of his arm and  
his upper shoulder.

17 [ . . . ]

18 Q: Did he say anything at the point in time when he made contact  
19 with you?

20 A. Yes.

21 Q. What did he say?

22 A. Immediately after, he said, “I have strong pecs. I’m strong.” And  
23 he . . . went to the vault after he hit me. And when he turned, I was  
turning to clock in from lunch to go back in, to go to the podium.  
And he was basically gloating about hitting me and assaulting me.

24 Q. What do you mean, he –

25 A: About his strength in assaulting me.

26 Lindsey Depo. at 19-20. In her declaration, Lindsey further states that when Aguilera slammed  
27 into her, he

28 gloated that he had just “pulled a Billy Wu move.” I understood this

1 to be a reference to a former Costco employee named Billy Wu who  
2 was terminated by Costco for assaulting a female member in a  
3 similar manner as Mr. Aguilera assaulted me – basically, for  
4 “checking” me with his shoulder, as a hockey player would “check”  
5 an opponent.

6 Lindsey Decl. ¶ 10.

7 Lindsey stated at her deposition that she did not fall down from the physical contact –  
8 although she “almost fell backwards” – and did not immediately feel any pain. Lindsey Depo. at  
9 21-22, 296. She does not dispute that she went back to work and continued working until her shift  
10 ended at 6:20 p.m. Heuer Decl. ¶ 2, Ex. A (Dkt. No. 33-2). However, that evening she went to  
11 the emergency room reporting “tingling, pain, and numbness emitting throughout [her] right  
12 hand/arm” and soreness in her shoulder. Dkt. No. 44-3. The doctor she saw on that day, Dr. Peter  
13 Emblad, diagnosed her with a “left wrist muscle strain.”<sup>3</sup> Fitch Decl. Ex. G at 44 of 44 (Dkt. No  
14 35-9). On August 11, 2014, she saw an occupational physician, Dr. Stasia Muhlner, who  
15 diagnosed a “right wrist sprain,” “right forearm contusion,” and “right upper arm contusion.”  
16 Jolivet Decl. Ex. 17 (Dkt. No. 44-3). Dr. Muhlner recommended “no repetitive gripping right  
17 hand, no lifting/pushing/pulling more than 5 lbs. right hand.” *Id.*

18 Lindsey had a preexisting injury to her right wrist at the time of the August 9, 2014  
19 incident. She testified that she suffered a “mild strain” to her right wrist while at work in  
20 December 2013 and received physical therapy for the injury on multiple occasions in January  
21 2014. Lindsey Depo. at 31, 300-01. According to her written statement dated August 9, 2014  
22 regarding the incident, she “ha[d] been dealing with the delicate nature of being susceptible to pain  
23 in [her] right arm/hand.” Lindsey Depo. Ex. A (Dkt. No. 35-2). Lindsey testified that she did not  
24 inform Aguilera of this injury and that she did not know whether he was aware of it at the time of  
25 the incident. Lindsey Depo. at 33.

26 Keven Heuer, the Warehouse General Manager at the time, investigated the alleged assault  
27 by reviewing warehouse video capturing events before and after the physical contact (the physical  
28 contact itself was not captured on video) and by interviewing and obtaining statements from

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<sup>3</sup> Neither party discusses why Dr. Emblad diagnosed a strain in Lindsey’s left wrist as opposed to her right. It appears to be a typo by Dr. Emblad.

1 Lindsey, Aguilera, Michael Van Voorhis, who was the only other witness to the incident, and  
2 Karen Pazos. Heuer Depo. at 71-81 (Ex. D, Dkt. No. 35-6). Heuer testified that his investigation  
3 “corroborated more [Aguilera’s] side of the story, that it was a minor bump, more like a hello,” *id.*  
4 at 89, and that Aguilera was written up for “unbecoming conduct, horseplay,” *id.* at 92. Since the  
5 incident, Aguilera has not spoken to Lindsey nor made physical contact with her. Lindsey Depo.  
6 at 63-64, 237-38.

7           Following the incident, Lindsey told Heuer that she did not feel comfortable working near  
8 Aguilera. Lindsey Depo. at 62. She states in her declaration that “whenever [Aguilera] was  
9 physically present near me I would experience physical symptoms of my internal anxiety in the  
10 form of panic attacks, including shortness of breath, elevated heart-rate, and tightness in my  
11 chest.” Lindsey Decl. ¶ 11. Lindsey asked to work in the Member Service Department by the  
12 warehouse entrance. Lindsey Depo. at 93-94. Costco granted the request and continued to pay  
13 Aguilera at the cashier’s higher rate of pay. *Id.* at 57-58.

14           On April 25, 2015, Lindsey submitted a request to be transferred to a different warehouse  
15 location. Ex. 54 (Dkt. No. 44-7). She identified the reason for the transfer request as, “I cannot  
16 work in the same building with an employee who assaulted (battery) and sexually harassed me. In  
17 addition, both my parents in [Southern California] have health issues.” *Id.* Lindsey asserts in her  
18 opposition brief that when she submitted the transfer request to Heuer, he advised her “not to  
19 include the details of her harassment from Mr. Aguilera because it ‘might make you look  
20 problematic.’” *Oppo.* at 9 (quoting Lindsey Depo. at 112). Lindsey also asserts in her opposition  
21 brief that she subsequently submitted an amended transfer request excluding the details of her  
22 harassment, but that Costco nevertheless denied the transfer, claiming that no positions were  
23 available. *Id.* Following this denial and another alleged incident of physical harassment by  
24 another of Lindsey’s supervisors, Willie Eashman, “the stress of trying to avoid Mr. Aguilera on a  
25 daily basis became highly disruptive to [Lindsey’s] mental health and overall well-being,” and on  
26 June 2, 2015 she requested a leave of absence. Lindsey Decl. ¶ 12. Costco approved the request,  
27 and then approved an extension of the leave of absence until January 1, 2016. Lindsey Depo. at  
28 119-20. On December 16, 2015, Lindsey resigned from her employment at Costco. *Id.* at 262-63.

1     **II.     PROCEDURAL BACKGROUND**

2             Lindsey filed an administrative complaint with the California Department of Fair  
3     Employment and Housing (“DFEH”) on November 20, 2014. Fitch Decl. Ex. G at  
4     LINDSEY000005 (Dkt. No. 35-9). The administrative complaint alleges that Costco “[d]enied  
5     [Lindsey] a work environment free of discrimination and/or retaliation” on account of her “Sex-  
6     Gender, Sex-Gender Identity or Gender Expression, Sexual Orientation.” *Id.* A document titled  
7     “Additional Complaint Details” attached to the administrative complaint includes the following  
8     allegations:

9                     Lindsey has been harassed due to her sexual orientation and  
10                    identification by her supervisor, Juan Aguilar. Among the long  
11                    series of verbal attacks, insults, slurs, and mocking, Aguilar often  
12                    makes comments regarding her physical appearance and sexual  
                          orientation. For example, Aguilar calls Lindsey “sir” and makes  
                          sexual and degrading comments about other female customers to  
                          her. Aguilar once told Lindsey “gaps are meant to be filled.”

13     *Id.* at LINDSEY000006 (all references to “Aguilar” as in original).

14             Along with her administrative complaint, Lindsey requested an immediate right to sue  
15     notice, which she received on November 20, 2014. *Id.* at LINDSEY000003. She filed her civil  
16     complaint in the Superior Court of California, County of San Francisco on December 3, 2014,  
17     naming both Costco and Aguilera as defendants. Notice of Removal ¶¶ 1, 3 (Dkt. No. 1). Costco  
18     removed the case to federal court on June 29, 2015 after Lindsey dismissed Aguilera with  
19     prejudice on June 1, 2015. *Id.* ¶ 3.

20             Lindsey’s complaint brings three causes of action against Costco: (1) harassment based on  
21     sex and sexual orientation in violation of FEHA; (2) failure to prevent harassment in violation of  
22     FEHA; and (3) negligent hiring, supervision and retention. Compl. ¶¶ 18-43 (Dkt. No. 1). Costo  
23     filed its motion for summary judgment on June 1, 2016. Dkt. No. 33 (“Mot.”). I heard argument  
24     from the parties on June 6, 2016. Dkt. No. 47.

25                             **LEGAL STANDARD**

26             A party is entitled to summary judgment where it “shows that there is no genuine dispute  
27     as to any material fact and [it] is entitled to judgment as a matter of law.” Fed. R. Civ. P. 56(a). A  
28     dispute is genuine if it could reasonably be resolved in favor of the nonmoving party. *Anderson v.*



1 *Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986). A fact is material where it could affect the  
2 outcome of the case. *Id.*

3 The moving party has the initial burden of informing the court of the basis for its motion  
4 and identifying those portions of the record that demonstrate the absence of a genuine dispute of  
5 material fact. *See Celotex Corp. v. Catrett*, 477 U.S. 317, 323-24 (1986). Once the movant has  
6 made this showing, the burden shifts to the nonmoving party to identify specific evidence showing  
7 that a factual issue remains for trial. *Id.* The nonmoving party may not rest on mere allegations or  
8 denials from its pleadings, but must “cit[e] to particular parts of materials in the record”  
9 demonstrating the presence of a factual dispute. Fed. R. Civ. P. 56(c)(1)(A). The nonmoving  
10 party need not show that the issue will be conclusively resolved in its favor. *See Anderson*, 477  
11 U.S. at 248-49. All that is required is the identification of sufficient evidence to create a genuine  
12 dispute of material fact, thereby “requir[ing] a jury or judge to resolve the parties’ differing  
13 versions of the truth at trial.” *Id.* (internal quotation marks omitted). If the nonmoving party  
14 cannot produce such evidence, the movant “is entitled to . . . judgment as a matter of law because  
15 the nonmoving party has failed to make a sufficient showing on an essential element of her case.”  
16 *Celotex*, 477 U.S. at 323.

17 On summary judgment, the court draws all reasonable factual inferences in favor of the  
18 nonmoving party. *Anderson*, 477 U.S. at 255. “Credibility determinations, the weighing of the  
19 evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a  
20 judge.” *Id.* However, conclusory and speculative testimony does not raise a genuine dispute of  
21 material fact and is insufficient to defeat summary judgment. *See Thornhill Publ’g Co., Inc. v.*  
22 *GTE Corp.*, 594 F.2d 730, 738-39 (9th Cir. 1979).

## 23 DISCUSSION

### 24 I. FIRST CAUSE OF ACTION: HARASSMENT BASED ON SEX AND SEXUAL 25 ORIENTATION (FEHA)

26 FEHA makes it illegal “[f]or an employer . . . , because of race, religious creed, color,  
27 national origin, ancestry, physical disability, mental disability, medical condition, genetic  
28 information, marital status, sex, gender, gender identity, gender expression, age, sexual

1 orientation, or military and veteran status, to harass an employee.” Cal. Govt. Code § 12940(j)(1).

2 The parties agree that Lindsey’s first cause of action is a hostile work environment claim.  
3 See Mot. at 10; Oppo. at 14-15. The elements of a hostile work environment claim under FEHA  
4 are “(1) the plaintiff belongs to a protected group; (2) the plaintiff was subjected to unwelcome  
5 harassment because of being a member of that group; and (3) the harassment was sufficiently  
6 severe or pervasive to alter the conditions of employment and create an abusive working  
7 environment.” *Landucci v. State Farm Ins. Co.*, 65 F. Supp. 3d 694, 703 (N.D. Cal. 2014); accord  
8 *Tenerelli v. Lockheed Martin Space Sys. Co.*, No. 15-cv-00012-BLF, 2016 WL 3072192, at \*11  
9 (N.D. Cal. May 20, 2016). FEHA makes an employer strictly liable for workplace harassment by  
10 a supervisor. See *State Dep’t of Health Servs. v. Superior Court*, 31 Cal.4th 1026, 1042 (2003);  
11 accord *McKinzy v. Nat’l R.R. Passenger Corp.*, 836 F. Supp. 2d 1014, 1024 (N.D. Cal. 2011).  
12 Costco does not dispute that Aguilera was Lindsey’s supervisor.

13 To the satisfy the “severe or pervasive” requirement of a hostile work environment claim,  
14 the working environment created by the harassment “must be both objectively and subjectively  
15 offensive.” *Hughes v. Pair*, 46 Cal.4th 1035, 1044 (2009) (internal quotation marks omitted).  
16 “[A] plaintiff who subjectively perceives the workplace as hostile or abusive will not prevail if a  
17 reasonable person considering all the circumstances . . . would not share the same perception.” *Id.*  
18 (internal quotation marks and alterations omitted).

19 “The required level of severity or seriousness varies inversely with the pervasiveness or  
20 frequency of the conduct.” *Mokler v. Cty. of Orange*, 157 Cal. App. 4th 121, 142 (2007) (internal  
21 quotation marks and alterations omitted). Conduct such as “[s]imple teasing” or “offhand  
22 comments” will not support a hostile work environment claim; nor will “isolated incidents” unless  
23 they are “extremely serious.” *Id.* (internal quotation marks and alterations omitted); see also  
24 *Hughes*, 46 Cal.4th at 1043 (“[A]n employee seeking to prove sexual harassment based on no  
25 more than a few isolated incidents of harassing conduct must show that the conduct was severe in  
26 the extreme.”) (internal quotation marks omitted). On the other hand, “a workplace may give rise  
27 to liability when it is permeated with discriminatory intimidation, ridicule, and insult.” *Lyle v.*  
28 *Warner Bros. Television Prods.*, 38 Cal.4th 264, 279 (2006) (internal quotation marks and

1 alterations omitted).

2 In determining what constitutes sufficiently pervasive harassment, courts have held that the  
3 harassing acts cannot be “occasional, isolated, [or] sporadic.” *Mokler*, 157 Cal. App. 4th at 142  
4 (internal quotation marks omitted); *accord Brennan v. Townsend & O’Leary Enterprises, Inc.*, 199  
5 Cal. App. 4th 1336, 1347 (2011); *Fisher v. San Pedro Peninsula Hosp.*, 214 Cal. App. 3d 590, 610  
6 (1989). Rather, “the plaintiff must show a concerted pattern of harassment of a repeated, routine,  
7 or . . . generalized nature.” *Mokler*, 157 Cal. App. 4th at 142.

8 Costco raises several arguments with respect to Lindsey’s hostile work environment claim,  
9 including that (1) the claim is limited to harassment by Aguilera; (2) the claim is limited to  
10 harassment by Aguilera occurring within one year of November 20, 2014, the date Lindsey filed  
11 her administrative complaint; (3) Lindsey has not presented sufficient evidence showing that  
12 Aguilera’s harassment was severe or pervasive; (4) Lindsey has not presented sufficient evidence  
13 showing that Aguilera’s harassment was because of her sex or sexual orientation.

14 **A. Lindsey cannot bring claims based on harassment by individuals other than**  
15 **Aguilera.**

16 In opposing Costco’s motion for summary judgment, Lindsey points to several alleged  
17 incidents of harassment by Costco employees other than Aguilera. She asserts that Floor Manager  
18 Jack Rodriguez and Supervisor Rick Doll made sexually suggestive comments to her (Rodriguez  
19 on one occasion in 2010 and Doll on another occasion in 2015), and that in May 2015 supervisor  
20 Willie Eashman “ran into and physically pressed [her] against a wall in the entrance area, forcing  
21 her injured right arm and shoulder into a wall and imposing his substantially greater physical  
22 presence to intimidate [and] restrain her movement.” *Oppo*. at 4, 7; *see also* Jolivet Decl. Ex. 37  
(Dkt. No. 44-5).

23 Lindsey cannot rely on these allegations to support her hostile work environment claim.  
24 “A prerequisite to bringing a civil action under FEHA is the filing of an administrative complaint  
25 with DFEH no later than one year after the violation occurred.” *Dominguez v. Washington Mut.*  
26 *Bank*, 168 Cal. App. 4th 714, 720 (2008). “The scope of the [administrative complaint] limits the  
27 scope of the subsequent civil action.” *Henry v. Regents of the Univ. of California*, 37 F. Supp. 3d  
28

1 1067, 1078 (N.D. Cal. 2014). Thus, incidents not described in the administrative complaint can  
2 only be included in the civil lawsuit “if they would necessarily have been discovered by  
3 investigation of the charged incidents, i.e., if the allegations in the civil complaint were ‘like or  
4 related’ to those specified in the [administrative complaint].” *Soldinger v. Nw. Airlines, Inc.*, 51  
5 Cal. App. 4th 345, 381 (1996).

6 Lindsey’s allegations regarding Rodriguez, Doll, and Eashman would not necessarily have  
7 been discovered by investigation of the charged incidents included in her administrative  
8 complaint. That administrative complaint identifies “Juan Aguilar” as Lindsey’s sole harasser and  
9 focuses specifically on the “sir” and “gaps are meant to be filled” comments. *See* Fitch Decl. Ex.  
10 G at LINDSEY000005-06. It includes no information regarding harassment by other individuals,  
11 and gives no indication that the alleged harassment involved anyone other than Aguilera. *See*  
12 *Henry*, 37 F. Supp. 3d at 1082 (limiting hostile work environment claim to allegations regarding  
13 one individual where the plaintiff’s administrative charges were “directed specifically at [that  
14 individual]”). In addition, the alleged incidents involving Doll and Eashman occurred in 2015,  
15 after Lindsey had filed her administrative complaint and the DFEH had issued Lindsey’s right-to-  
16 sue letter on November 20, 2014. *See Vasquez v. Cty. of Los Angeles*, 349 F.3d 634, 645 (9th Cir.  
17 2003) (“As for [the] threat to transfer [plaintiff], that event occurred several months after the  
18 alleged harassment and even after the EEOC had issued its right-to-sue letter. The EEOC could  
19 not have investigated that incident because it had not yet happened at the time the EEOC was  
20 conducting its investigation.”); *Koel v. Ashcroft*, No. 03-cv-05119-EDL, 2004 WL 2223069, at \*3  
21 (N.D. Cal. Oct. 1, 2004) (“An investigation into plaintiff’s prior complaints of discrimination and  
22 retaliation would not have revealed the thirty-day suspension because it had not happened yet, so a  
23 claim of retaliation or discrimination based on the thirty-day suspension could not have grown out  
24 of the earlier charges.”).

25 Further, even assuming that the alleged incidents involving Rodriguez, Doll, and Eashman  
26 fall within the scope of Lindsey’s administrative complaint, Lindsey subsequently abandoned  
27 these theories of liability by failing to plead them in this lawsuit. Like her administrative  
28 complaint, her civil complaint is focused exclusively on alleged harassment by Aguilera, does not

1 mention Rodriguez, Doll, or Eashman, and gives no indication that Lindsey was harassed by  
2 anyone other than Aguilera. *See* Compl. ¶¶ 10-17. A party may not “effectively amend its  
3 [c]omplaint by raising a new theory . . . in its response to a motion for summary judgment.” *La*  
4 *Asociacion de Trabajadores de Lake Forest v. City of Lake Forest*, 624 F.3d 1083, 1089 (9th Cir.  
5 2010); *see also Navajo Nation v. U.S. Forest Serv.*, 535 F.3d 1058, 1080 (9th Cir. 2008) (“[O]ur  
6 precedents make clear that where, as here, the complaint does not include the necessary factual  
7 allegations to state a claim, raising such a claim in a summary judgment motion is insufficient to  
8 present the claim to the district court.”).

9 Lindsey offers no explanation of why the alleged incidents involving Rodriguez, Doll, and  
10 Eashman are properly incorporated into this case. To the contrary, she appears to concede that this  
11 case is limited to alleged harassment by Aguilera – in arguing that she has made a sufficient  
12 showing of severe or pervasive harassment, she discusses only Aguilera and says nothing about  
13 Rodrigues, Doll, or Eashman. *See* Oppo. at 14-17. Lindsey cannot bring claims based on  
14 harassment by individuals other than Aguilera.

15 **B. Costco is not entitled to summary judgment on Lindsey’s hostile work**  
16 **environment claim.**

17 Costco’s other arguments regarding Lindsey’s hostile work environment claim concern  
18 whether under FEHA’s statute of limitations her claim is limited to harassment occurring within  
19 one year of November 20, 2014, and whether she has presented sufficient evidence showing that  
20 Aguilera’s harassment was either (1) severe or pervasive, or (2) because of her sex or sexual  
21 orientation.

22 These arguments highlight weak points in Lindsey’s claim, but they do not entitle Costco  
23 to summary judgment. The evidence of record is sufficient to create a triable issue on application  
24 of the continuing violation doctrine. Contrary to Costco’s assertions, *see* Reply at 3-5, 14-15,  
25 Lindsey’s statements in her declaration regarding the timing and frequency of Aguilera’s conduct  
26 are not so inconsistent with her deposition testimony as to justify application of the sham affidavit  
27 rule. *See Nelson v. City of Davis*, 571 F.3d 924, 928 (9th Cir. 2009) (stating that the sham  
28 affidavit rule does not preclude a party from “elaborating upon, explaining or clarifying prior

1 testimony elicited by opposing counsel on deposition,” and that “minor inconsistencies that result  
2 from an honest discrepancy, a mistake, or newly discovered evidence” do not justify striking a  
3 declaration). Nor are they insufficient as a matter of law to support an inference that Aguilera’s  
4 harassing conduct occurred with reasonable frequency during the relevant time period. *See Harris*  
5 *v. City of Fresno*, 625 F. Supp. 2d 983, 1024 (E.D. Cal. 2009) (finding a triable issue on  
6 application of the continuing violation doctrine based on plaintiff’s specific identification of  
7 several racist comments, “[c]oupled with [his] state[ment] in his declaration that he has been  
8 subject to racist comments throughout his employment and they continue to persist”); *cf. Draper*  
9 *v. Coeur Rochester, Inc.*, 147 F.3d 1104, 1109 (9th Cir. 1998) (Title VII plaintiff’s “statement  
10 during her deposition that [her harasser’s] conduct persisted for most of her term of  
11 employment . . . is, viewed properly, evidence that supports her allegation that she continued to  
12 endure sexual harassment” into the limitations period).

13 The evidence of record is also sufficient to create a triable issue on whether Aguilera’s  
14 harassment was (1) severe or pervasive and (2) because of Lindsey’s sex or sexual orientation.  
15 Lindsey has presented evidence indicating that Aguilera, her supervisor throughout the relevant  
16 time period, made regular harassing comments to her over the course of seven years, culminating  
17 in the alleged assault on August 9, 2014. Making all reasonable factual inferences in Lindsey’s  
18 favor, and taking into consideration Aguilera’s status as her supervisor, this fact pattern is  
19 sufficient for a jury to decide whether Aguilera’s conduct amounted to illegal harassment under  
20 FEHA.<sup>4</sup> *See Dee v. Vintage Petroleum, Inc.*, 106 Cal. App. 4th 30, 36-37 (2003) (highlighting  
21 alleged harasser’s status as plaintiff’s supervisor in reversing grant of summary judgment for  
22 defendant; stating that while “in many cases, a single offensive act by a coemployee is not enough  
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24 <sup>4</sup> Likewise, the extent to which the avoidable consequences doctrine shields Costco from damages  
25 presents a fact question for the jury. *See State Dep’t*, 31 Cal.4th at 1044 (“[The avoidable  
26 consequences] defense will allow the employer to escape liability for those damages, and only  
27 those damages, that the employee more likely than not could have prevented with reasonable  
28 effort and without undue risk, expense, or humiliation, by taking advantage of the employer’s  
internal complaint procedures appropriately designed to prevent and eliminate sexual harassment.  
Deciding when a harassed employee has first suffered compensable harm and when a reasonable  
employee would have reported the harassment will in many and perhaps most instances present  
disputed factual issues to be resolved by application of practical knowledge and experience.”).

1 to establish employer liability for a hostile work environment[,] . . . where that act is committed by  
2 a supervisor, the result may be different”); *Harris*, 625 F. Supp. 2d at 1020 (“The supervisory  
3 status of [plaintiff’s alleged harassers], both non-African-Americans, enhances the severity of their  
4 racial statements.”). Costco’s motion for summary judgment on Lindsey’s first cause of action is  
5 DENIED.

6 **II. SECOND CAUSE OF ACTION: FAILURE TO PREVENT HARASSMENT (FEHA)**

7 FEHA requires an employer to “take all reasonable steps necessary to prevent  
8 discrimination and harassment from occurring.” Cal. Govt. Code § 12940(k). “When a plaintiff  
9 seeks to recover damages based on a claim of failure to prevent discrimination or harassment, she  
10 must show three essential elements: (1) [she] was subjected to discrimination, harassment or  
11 retaliation; (2) defendant failed to take all reasonable steps to prevent discrimination, harassment,  
12 or retaliation; and (3) this failure caused [her] to suffer injury.” *Lelaind v. City & Cty. of San*  
13 *Francisco*, 576 F. Supp. 2d 1079, 1103 (N.D. Cal. 2008); *accord Alejandro v. ST Micro Elecs.,*  
14 *Inc.*, 129 F. Supp. 3d 898, 913 (N.D. Cal. 2015); *Achal v. Gate Gourmet, Inc.*, 114 F. Supp. 3d  
15 781, 804 (N.D. Cal. 2015). Courts have read section 12940(k) to create a tort requiring the usual  
16 elements of (1) breach of a duty of care by a “negligent act or omission,” (2) causation, and  
17 (3) damages. *Trujillo v. N. Cty. Transit Dist.*, 63 Cal. App. 4th 280, 286-87 (1998); *accord*  
18 *Ambrosini v. Universal Cable Holdings, Inc.*, No. 14-cv-00896-RS, 2014 WL 3362244, at \*3, \*3  
19 n.5 (N.D. Cal. July 7, 2014); *Ortega v. Univ. of Pac.*, No. 13-cv-01426, 2013 WL 6054447, at \*3  
20 (E.D. Cal. Nov. 15, 2013); *Houston v. Regents of Univ. of California*, No. 04-cv-04443-PJH, 2006  
21 WL 1141238, at \*27 (N.D. Cal. May 1, 2006). Reasonable steps that employers may be required  
22 to take to prevent discrimination from occurring include “prompt investigation” of discrimination  
23 claims, “the establishment and promulgation of antidiscrimination policies,” and “the  
24 implementation of effective procedures to handle complaints and grievances regarding  
25 discrimination.” *California Fair Employment & Hous. Comm’n v. Gemini Aluminum Corp.*, 122  
26 Cal. App. 4th 1004, 1024-25 (2004).

27 Costco’s principal argument with respect to Lindsey’s failure to prevent claim is that it  
28 fails along with the underlying harassment claim. Mot. at 18-19. In light of the ruling on the

1 underlying harassment claim, this argument is meritless. Costco also notes that Lindsey did not  
2 report Aguilera’s harassment to management except for the “chopped liver” comment in 2008 and  
3 the alleged assault in 2014, after which Aguilera ceased all contact with her. *Id.* However,  
4 Lindsey asserts that at least two of Aguilera’s other harassing comments were made in front of  
5 Wikium, another Costco supervisor. Lindsey Decl. ¶¶ 8-9. She also claims that she did not report  
6 more of Aguilera’s behavior because she was worried about retaliation based on Aguilera’s  
7 comment, made in the presence of other Costco employees, that people should “[w]atch what  
8 [they] say around [Lindsey].” Lindsey Depo. at 183. Lindsey’s concerns about retaliation and  
9 other inadequacies in Costco’s approach to harassment complaints are also reflected in her  
10 conversation in 2010 with Human Resources employee Rajski. *See* Lindsey Decl. ¶ 6; Jolivet  
11 Decl. Ex. 34 at D001142. Viewed in the light most favorable to Lindsey, the record is sufficient  
12 to create a triable issue on whether Costco acted negligently with respect to Aguilera’s continuing  
13 harassment of Lindsey. Costco’s motion for summary judgment on Lindsey’s second cause of  
14 action is DENIED.

15 **III. THIRD CAUSE OF ACTION: NEGLIGENT HIRING, SUPERVISION, AND**  
16 **RETENTION**

17 Costco argues that Lindsey’s negligent hiring, supervision, and retention claim is barred by  
18 California’s Workers’ Compensation Act (“WCA”). Mot. at 19-22. A number of courts in this  
19 circuit have rejected this argument. *See Scott v. Solano Cty. Health & Soc. Servs. Dep’t*, 459 F.  
20 Supp. 2d 959, 971 (E.D. Cal. 2006) (harassment and discrimination are “not a normal risk of the  
21 compensation bargain” and therefore are not precluded by the WCA); *see also Evenfe v. Esalen*  
22 *Inst.*, No. 15-cv-05457-LHK, 2016 WL 3965167, at \*8 (N.D. Cal. July 24, 2016) (noting that  
23 “when employers subject their employees to racial discrimination or sexual harassment, . . . such  
24 [conduct] falls outside the workers’ compensation exclusivity because [it is] not considered a  
25 normal risk of the compensation bargain”); *Jefferson v. Kellogg Sales Co.*, No. 08-cv-04132-SI,  
26 2008 WL 4862511, at \*3-4 (N.D. Cal. Nov. 11, 2008); *Evans v. Hard Rock Cafe Int’l (USA), Inc.*,  
27 No. 07-cv-01074, 2007 WL 2782775, at \*4 (E.D. Cal. Sept. 24, 2007); *Greenfield v. Am. W.*  
28 *Airlines, Inc.*, No. 03-cv-05183-MHP, 2004 WL 2600135, at \*6-8 (N.D. Cal. Nov. 16, 2004).



1 Costco’s challenge to the merits of this claim also fails, for the same reasons discussed above with  
2 respect to Lindsey’s failure to prevent claim.

3 Costco’s motion for summary judgment on Lindsey’s third cause of action is DENIED.

4 **IV. PUNITIVE DAMAGES**

5 Costco moves for summary judgment on Lindsey’s request for punitive damages. Mot. at  
6 24-25. This portion of Costco’s motion is GRANTED. Punitive damages generally may be  
7 awarded to a plaintiff in a civil action only “where it is proven by clear and convincing evidence  
8 that the defendant has been guilty of oppression, fraud, or malice.” Cal. Civ. Code § 3294(a).

9 Because Costco is a corporate employer, it may only be held liable for punitive damages if  
10 Lindsey satisfies the requirements of California Civil Code section 3294(b), which provides that

[a]n employer shall not be liable for damages pursuant to  
subdivision (a), based upon acts of an employee of the employer,  
unless the employer had advance knowledge of the unfitness of the  
employee and employed him or her with a conscious disregard of  
the rights or safety of others or authorized or ratified the wrongful  
conduct for which the damages are awarded or was personally guilty  
of oppression, fraud, or malice. With respect to a corporate  
employer, the advance knowledge and conscious disregard,  
authorization, ratification or act of oppression, fraud, or malice must  
be on the part of an officer, director, or managing agent of the  
corporation.”

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17 Cal. Civ. Code § 3294; *see also Baird v. Office Depot*, No. 12-cv-06316-EMC, 2014 WL  
18 2527114, at \*8 (N.D. Cal. June 4, 2014); *Violan v. On Lok Senior Health Servs.*, No. 12-cv-05739-  
19 WHO, 2013 WL 6907153, at \*14 (N.D. Cal. Dec. 31, 2013). The term “managing agent” in this  
20 context includes “only those corporate employees who exercise substantial independent authority  
21 and judgment in their corporate decisionmaking so that their decisions ultimately determine  
22 corporate policy.” *White v. Ultramar, Inc.*, 21 Cal.4th 563, 566-67 (1999). Lindsey contends that  
23 Aguilera was a managing agent, but she identifies virtually no evidence to support this conclusion.  
24 *See Oppo.* at 22-24 (citing Aguilera Depo. at 37-38, 44-45). In the two portions of Aguilera’s  
25 deposition she cites, Aguilera states that he was in charge of such tasks as “employees’ breaks,”  
26 “making sure that the front entrance was clean and swept,” “check[ing] door counts so we can  
27 prepare adequately for the rush,” “count[ing] money,” and “walking the floor to make sure that  
28 everybody was doing their assignments properly.” Aguilera Depo. at 37-38, 44-45. I agree with

1 Costco that this evidence would not allow a jury to reasonably conclude that Aguilera was a  
2 managing agent.

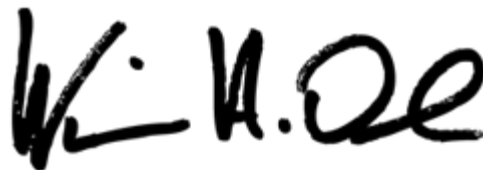
3 Lindsey's argument that a Costco officer, director, or managing agent authorized or ratified  
4 Aguilera's conduct also fails. Although she asserts that Wikium witnessed some of Aguilera's  
5 conduct, there is no indication that Wikium possessed any more independent authority and  
6 judgment in his corporate decisionmaking than Aguilera. Lindsey also relies on the April 2010  
7 letter to Costco's CEO, but that letter only references "Sexual Harassment" and other issues in the  
8 abstract and includes no specific facts regarding harassment by Aguilera or any other individual.  
9 Likewise, Lindsey did not specifically identify Aguilera during her follow-up interview with  
10 Human Resources employee Rajski, and Lindsey identifies no evidence indicating that the  
11 contents of that interview were ever communicated to an officer, director, or managing agent.  
12 Finally, while Lindsey reported the "chopped liver" comment to Warehouse General Manager  
13 Mike Reike in 2008, it is undisputed that Aguilera was suspended and issued a disciplinary  
14 counseling notice as a result. Lindsey does not explain how the "chopped liver" comment rises to  
15 the level of oppression, fraud, or malice, or how Costco could be held liable for punitive damages  
16 based on the comment in light of its response to the incident.<sup>5</sup>

17 **CONCLUSION**

18 On summary judgment, my job is not to weigh the strength of any party's case but to  
19 determine if there is a genuine dispute as to any material fact. For the foregoing reasons, Costco's  
20 motion for summary judgment is GRANTED with respect to Lindsey's request for punitive  
21 damages and DENIED with respect to her first, second, and third causes of action.

22 **IT IS SO ORDERED.**

23 Dated: August 12, 2016



24  
25 WILLIAM H. ORRICK  
United States District Judge

26  
27  
28 <sup>5</sup> To the extent that Lindsey's request for relief under Federal Rule of Civil Procedure 56(d) is relevant to her request for punitive damages, the request is DENIED.