



News & Types: Employment, Labor & Benefits Update

# Trimming the Employer's Arguments, the Seventh Circuit Upholds Claim of Male-on-Male Harassment under Title VII

8/14/2018

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Practices: Employment, Labor & Benefits

## EXECUTIVE SUMMARY

While there have been cases where conduct was found to be “sexual horseplay” that could give rise to tort liability, but not discrimination, asserting such a defense is extremely risky. An employer should also think twice before asserting the defense that unwanted sexual conduct is no more than “personal animosity or juvenile behavior” that all employees are subjected to regardless of sex.

Robert Smith, a male butcher who worked at a small grocery store, convinced a jury that being subjected to years of having his buttock and genitals grabbed by male co-workers and other “horseplay” of a sexual nature, was sexual harassment prohibited by Title VII of the Civil Rights Act of 1964. The jury also found in Smith’s favor against Rosebud and some of his co-workers on his claims of race discrimination, retaliation and violation of the Illinois Gender Violence act and awarded Smith a total of \$2,407,500 (\$2,250,000 against Rosebud), which was reduced to \$470,000 because of Title VII’s statutory damages caps and the excessive nature of the award. On appeal, the Seventh Circuit Court of Appeals upheld the verdict, rejecting the employer’s arguments that “the meat counter culture was one of sexual rough-housing, not sex discrimination.” *Robert Smith v. Rosebud Farm, Inc.*, (No. 17-2626, Aug. 2, 2018).

Three weeks after Smith began working at Rosebud, male coworkers behind the meat counter began harassing him by grabbing his genitals and buttocks. At trial, Smith testified that the conduct was constant and recalled the many times his coworkers groped him, grabbed him, and even reached down his pants. They repeatedly mimed oral and anal sex, both on Smith and on each other. Moreover, Smith’s supervisor, not only knew about the harassment, but he even participated once or twice. His coworkers also targeted Smith by using racial epithets and telling him “go back to Africa.”

Rosebud did not dispute that Smith introduced evidence sufficient to show that its employees severely and pervasively harassed him with the knowledge of the store’s general manager. In defense, Rosebud contended

that Smith did not prove that its employees harassed Smith because he was male because all the butchers were male and that Smith experienced “sexual horseplay”, not sex discrimination. The Seventh Circuit made mincemeat of this argument holding that while Rosebud is correct that unwanted sexual behavior is not necessarily actionable under Title VII, in this case, Smith offered direct comparative evidence that only men, and not women, experienced the kind of treatment that he did at Rosebud. The Court found that there was ample testimony—from both Smith and other witnesses that only men were groped, taunted, and otherwise tormented, not any of the 6 to 7 women who worked there. Even though none of the women was butchers, the Court held that Rosebud was a mixed-sex workplace where the men and women interacted daily.

Rosebud raised other arguments that were equally unsuccessful as the Court held that they had not been raised previously and therefore had been forfeited.

**Take-Away:** With sexual harassment claims still dominating the news, employers should consider annual harassment prevention training for all employees throughout the United States. Normally, employees and managers/supervisors are separated into two separate groups and receive slightly different training. In addition to receiving basic harassment prevention training, managers/supervisors also receive information of the company’s potential monetary exposure and the importance of their role in establishing a workplace free from the detrimental effects of harassment on the company and employee morale.