

Insights, News & Events

## “SEXUAL HORSEPLAY” OR “SEX DISCRIMINATION”? THE HALF-MILLION DOLLAR QUESTION

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A federal appeals court recently upheld a half-million dollar verdict against a small Chicago retailer after it concluded that a male employee was the victim of sex discrimination. Although the employer admitted much of the misconduct occurred, it tried to defend itself by arguing that the behavior was mere “roughhousing” and “horseplay,” and it was not directed at the plaintiff because of his sex. A jury—and the appeals court—disagreed. What can you learn from this stinging verdict?

### UGLY BEHAVIOR LEADS TO MASSIVE JURY AWARD

Robert Smith began working as a butcher for Rosebud Farm, a small grocery store on the south side of Chicago, in 2003. Over the next five years, he encountered unwanted behavior at the hands of male coworkers. According to the court, they consistently subjected Smith to harassment by grabbing his genitals and buttocks, groping him, reaching down his pants, and miming sexual acts at him. The court’s opinion says that Smith’s supervisor not only knew about but also participated in the harassment.

Smith complained to management, to no avail. He filed a legal claim with state and federal agencies, and

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things actually got worse: his car tires were slashed in the company parking lot, his windshield was cracked, and coworkers menacingly banged their meat cleavers at him and pointed large knives at him. In June 2008, he quit his job because of the intolerable working conditions. Next, he filed a Title VII lawsuit against Rosebud.

After a federal court trial, the jury returned a verdict in Smith's favor. The jury wanted to award him over \$2.4 million, but, due to statutory caps built into Title VII, the court adjusted the verdict and awarded Smith over \$559,000 in relief. Rosebud filed an appeal with the 7th Circuit Court of Appeals, and on August 2, 2018—10 years after Smith quit his job—the Circuit Court affirmed the judgment, handing Smith a final victory.

## **COURT: BEHAVIOR DIRECTED AT WORKER BECAUSE OF HIS SEX**

Rosebud's defense against the claim was based on an interpretation of Title VII, the main federal employment discrimination statute. It agreed that Smith introduced evidence sufficient to show that he was the victim of severe and pervasive harassment, and that management was aware of the misconduct (both of which are necessary elements of any Title VII claim). But it reminded the court that Title VII does not impose a flat ban on all harassment, and that the conduct at issue was more along the lines of workplace horseplay. As the Supreme Court has said, the statute does not create a "general civility code for the American workplace." Instead, Rosebud noted, claimants can only prove Title VII violations if they can show they were harassed *because of* their sex.

The 7th Circuit generally agreed with this premise. "Title VII is an anti-discrimination statute," it said, "not an anti-harassment statute." It cited to cases that drew a distinction between "sexual horseplay"—which would not be actionable under Title VII—and "sex discrimination." In one such case, the court declined to find a Title VII violation based on some truly abhorrent sexual behavior in the workplace because the

offending coworker in that case was found to have picked on anyone of either sex at the workplace.

But in Smith's case, the court found that the harassment Smith experienced was a form of sex discrimination. It pointed out that "only men, and not women, experienced the kind of treatment [Smith] did at Rosebud." During the time Smith worked at Rosebud, the retailer employed approximately 15 to 16 men and six to seven women. Multiple witnesses testified at trial that, during that time, only men were groped, taunted, and otherwise tormented. "No witness recalled seeing female Rosebud employees subjected to the same treatment," the court concluded. This supported the inference that Smith's coworkers treated him this way because he was male. As a result, the court upheld the half-million dollar verdict in Smith's favor.

## **WHAT DOES THIS MEAN FOR YOU?**

The lesson to be learned from this case is obvious: immediately put a stop to any workplace behavior that could be construed as harassing, and make sure your managers know how to handle such incidents and harassment complaints. After all, as this case demonstrates, even if you believe the conduct simply amounts to juvenile horseplay, roughhousing, or locker-room behavior, a jury might one day conclude that the conduct constitutes discrimination.

Managers commonly overlook inappropriate behavior among workers because they believe the interactions are good-natured. Sometimes the victim even laughs along or dismisses the harassment. But this is no reason to turn a blind eye and neglect your zero-tolerance policy. Your employee might be laughing along as a coping mechanism, or they could decide to use this mistreatment to their advantage at some later point if the relationship sours. Either way, the best course is for you to deal with any reports of such misconduct swiftly and thoroughly, not letting small matters turn into half-million-dollar jury verdicts.

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