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Same-sex harassment verdict fails to survive matter of law appeal

It is well-known that Title VII prohibits workplace sexual harassment, however, it is important to remember that Title VII is strictly an anti-discrimination law, not a general civility statute.

Accordingly, sexual conduct in the workplace will not be actionable under Title VII unless such harassment was motivated by the victim's sex. Therefore, in the absence of evidence establishing that a victim of sexual misconduct in the workplace was singled out based on his or her gender, there can be no recovery under Title VII.

In *Smith v. Rosebud Farm Inc.*, the employer sought to have the 7th U.S. Circuit Court of Appeals overturn a \$2,407,500 jury verdict (reduced to \$470,000 by the trial judge because of statutory caps and the excessive nature of the award) in favor of a male employee who claimed he had been subjected to years of sexual harassment by his male co-workers and who had been constructively discharged for filing an administrative charge of discrimination.

Rosebud Farm is a grocery store that had employed Robert Smith as a butcher from 2003 until his 2008 resignation — citing “intolerable” working conditions. Procedurally, the jury accepted as true Smith's allegations of sexual harassment at the hands of his male co-workers.

On appeal, the underlying facts were not in dispute. Accordingly, like the 7th Circuit, this article will

**BY JOE GAGLIARDO
AND BRIAN JACKSON**

Joe Gagliardo and Brian Jackson are lawyers at Laner Muchin, Ltd.

assume that the allegations of workplace sexual conduct are true.

On appeal, Rosebud Farm argued that the trial court committed reversible error in denying its motion for judgment as a matter of law and its subsequent motion seeking a new trial.

As to Rosebud Farm's argument that it was entitled to judgment as a matter of law, it argued that Smith had to show more than unwanted sexual touching or sexual taunting by his male co-workers. Rather, that Smith had to show that the harassment occurred because of his sex.

weeks into Smith's employment, his male co-workers began harassing him behind the meat counter. In doing so, Smith's male co-workers grabbed his genitals and buttocks. That conduct persisted over the next four years.

At trial, Smith recalled the many times his co-workers groped him, grabbed him and placed their hands down his pants. They also mimed oral and anal sex, both on Smith and on each other. Not only did Smith's supervisor know about the sexual harassment — he also participated in the harassment against Smith on one or two occasions.

After repeated internal complaints did not stop the sexual harassment, Smith filed a charge of discrimination with the Equal Employment Opportunity Commission and the Illinois Department of Human Rights in January 2008.

Instead, the male co-workers began to engage in threatening behavior. Behind the meat counter, they banged their meat cleavers menacingly at Smith and passed by him with large knives exposed from the meat trays carried past him.

Smith's car, which was parked in a gated, employee-only lot, had its tires slashed and its windshield cracked. Because Smith became increasingly frightened at work, he quit his job in June 2008 because of the “intolerable” working conditions.

The 7th Circuit, in affirming the jury's verdict, rejected Rosebud Farm's reliance upon *Shafer v. Kal Kan Foods Inc.*, 417 F.3d 663 (7th Cir. 2005) and *Lord v. High Voltage Software Inc.*, 839 F.3d 556 (7th Cir. 2016) in support of Rosebud Farm's argument that it was entitled to judgment as a matter of law, because, in *Shafer* and *Lord*, the same-sex harassment was not discriminatory, i.e., the respective conduct was no worse for men than woman who had been harassed in those workplaces.

Here, however, the evidentiary record established that females sometimes worked in the meat department when the shop was busy and females brought orders and returned items to the meat counter without being sexually harassed.

Thus, a reasonable jury could conclude that Smith's co-workers would not have tormented him if he had been female.

Accordingly, sexual conduct in the workplace will not be actionable under Title VII unless such harassment was motivated by the victim's sex.

Pointing to the evidence adduced at trial, Rosebud Farm's position on appeal was that the evidence demonstrated that the other men in the shop had also engaged in “sexual horseplay,” not actionable sex discrimination.

By way of background, three

After Smith's supervisor learned of Smith's administrative charge filings, the supervisor instructed the meat counter employees to stop “goofing off” and to quit the “horseplay.” Smith's co-workers, in response, stopped sexually harassing Smith.