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## Sixth Circuit to Employers: Failure to Timely and Thoroughly Investigate Sexual Harassment Claims May Cost You

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Monday, February 15, 2016

The Sixth Circuit Court of Appeals [reminded us](#) last Wednesday that claims of sexual harassment and hostile work environment are not just limited to victims of the opposite sex. The Sixth Circuit decision in ***Smith v. Rock-Tenn Services, Inc.*** upheld a Tennessee District Court's award of \$300,000 to an employee against his former employer after the employee alleged sexual harassment and hostile work environment claims pursuant to **Title VII** of the **Civil Rights Act of 1964**. The Sixth Circuit upheld the award after determining the employer failed to take thorough, timely action after a male employee complained of improper, unwanted, and offensive physical contact by a male co-worker.

The first two incidents, about a week apart, involved the co-worker touching the plaintiff's buttocks. After both incidents, plaintiff confronted the co-worker, warning the co-worker not to touch him. (This was consistent with the company's harassment policy, which indicated that a person subject to harassment was supposed to confront the harasser and ask for the conduct to stop.) Nevertheless, the physical harassment by the co-worker continued and this time, plaintiff immediately reported the incident to supervisors. The Court found plaintiff's actions to fall in line with the company's policy against harassment.

Despite Plaintiff's complaints, his supervisor informed him that nothing could be done until the following Friday because the appropriate supervisor-operations manager to handle this issue was on vacation until then. This declaration was followed by the supervisor's mind-numbing decision to send Plaintiff back out to the same work area as his harasser without any attempt to separate the two men. Unfortunately for the employer, the missteps didn't stop there. After enduring another week of working with his harasser, the company sent Plaintiff and his harasser to get a hearing test together. It was shortly thereafter that Plaintiff suffered an anxiety attack forcing him away from work and leading him to write a letter to the company's management detailing the harassment.

The decision serves as a cautionary tale to employers to take immediate and appropriate action in the face of a complaint of harassment. The Sixth Circuit focused heavily on the company's inadequate response to plaintiff's complaint. According to the decision, the company delayed in beginning its investigation, did not separate the men during the investigation, or suspend the alleged harasser pending the investigation. Furthermore, during the investigation, no written statements were obtained from witnesses, there was no investigation report, and the only record of the investigation was a single page of handwritten notes. The company's HR manager testified that the company handbook, which set forth policies for investigating harassment complaints, was a guideline that could be followed but that wasn't always necessarily followed. Although the company attempted to characterize the behavior as mere "horseplay," the court rejected the "it's just guys being guys" defense, determining Plaintiff proved his claim of same-sex harassment by establishing that he worked in a mixed-sex workplace and that the harasser exposed only the men to unwelcome touching.

This case stands in contrast with [a case decided by the Third Circuit](#), which denied a claim of same-sex sexual harassment. The Third Circuit decision explained that although "[a]n unpleasant work environment is not a good thing... it is not necessarily actionable... [unless] 'the workplace is permeated with discriminatory intimidation,

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ridicule, and insult... that is sufficiently severe or pervasive to... create an abusive working environment.” In this case, the Third Circuit court denied the plaintiff’s hostile work environment claim concluding that the vague and infrequent instances of harassment complained of by plaintiff did not demonstrate “meaningful frequency” of the alleged conduct and, therefore, were insufficient to establish a hostile working environment.

Although the Third Circuit decision did not find the underlying harassment severe enough to support a Title VII hostile work environment claim, both the Sixth Circuit and Third Circuit decisions should remind employers faced with a complaint of same-sex sexual harassment, or any other type of harassment, that the employer has an obligation to investigate the complaint promptly and that the investigation should be thorough and well-documented. In addition, the employer should consider taking steps to avoid further issues while the investigation is being conducted. The cases also stand as a reminder that an investigation should seek to uncover the extent of the alleged harassment.

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