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Employment Law: Smith v. Rock-Tenn. Services: Employer Held Liable for Same-Sex Sexual Harassment in the Workplace

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POLICY NOTE

EMPLOYMENT LAW—*SMITH V. ROCK-TENN. SERVICES*—EMPLOYER HELD LIABLE FOR SAME-SEX SEXUAL HARASSMENT IN THE WORKPLACE

By: Kaitlyn Dean

Title VII of the Civil Rights Act of 1964 has been relevant for decades, but some of its full implications are still developing in light of shifting gender norms in American culture.[1] Recently, in *Smith v. Rock-Tenn. Services*, the Sixth Circuit held that hostile work environment claims are not limited to cases in which the harasser and the victim are of the opposite sex and that the jury's inference of sex discrimination was not unreasonable based on the plaintiff's evidence.[2]

In Title VII claims, Supreme Court precedent allows for an inference of sex discrimination to be drawn from the evidence but also notes that such an inference can be difficult to draw in same-sex situations.[3] The Court suggests that, especially between males, the line between "male-on-male horseplay" and "discriminatory conditions of employment" can be easily blurred.[4] Despite several documented incidents of unwanted touching and repeated pleas by the male plaintiff for the harassment to stop,[5] the defendant in *Smith* argued that the behavior of the male aggressor was "mere 'horseplay,' beyond the reach of Title VII"[6] and, thus, could not have created a hostile work environment.

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[1] 42 U.S.C. § 2000e–2(a)(1).
[2] Smith v. Rock-Tenn. Servs., 813 F.3d 298 (6th Cir. 2016).
[3] *Id.* at 307 (citing Oncale v. Sundowner Offshore Servs., 523 U.S. 75, 80 (1998)).
[4] *Id.*
[5] *Id.* at 303–04.
[6] *Id.* at 308.

The defendant's argument highlights a common narrative in our society: that abusive, sexual behavior between males is somehow less abhorrent because it can be easily premised with phrases such as "horseplay," or, "boys will be boys." The *Smith* decision makes it clear that the Sixth Circuit will not tolerate hostile work environments simply because employers choose to mischaracterize sexual harassment as horseplay or ordinary male socializing. As the *Smith* court pointed out, this is a self-serving mindset for responsible parties.[7]

This precedent will not only impact similar Title VII cases currently pending in Tennessee, but will also put employers on notice to take sexual harassment allegations in the workplace more seriously. Employer liability is a requirement for a Title VII claim, meaning a plaintiff must show that the employer "manifested indifference or unreasonableness in light of the facts the employer knew or should have known."[8] The *Smith* opinion establishes that an employer's omissions in light of a sexual harassment allegation are just as important as actions that are taken and that meager attempts to halfway follow policy are not sufficient to escape a Title VII action.[9] While this could potentially lead to stricter workplace regulations, employers may save themselves trouble and money by adopting and adhering to more stringent policies.

The implications for workplace policy in light of *Smith* are undoubtedly important. Ideally, however, the significant impact of this case and similar cases is that other male recipients of sexual harassment, at work and in general, will find it less stigmatizing to come forward. As

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[7] Smith v. Rock-Tenn. Servs., 813 F.3d 298, 308 (6th Cir. 2016).
[8] *Id.* at 311 (citing Waldo v. Consumers Energy Co., 726 F.3d 802, 814 (6th Cir. 2013)).
[9] *Smith*, 813 F.3d at 312.

we have recently seen in Tennessee, fostering this type of "boys will be boys" environment can have disastrous consequences, and the Court's rejection of the horseplay argument in *Smith* was a step in the right direction.[10] Delegitimizing male-on-male sexual harassment as an acceptable social norm will incentivize victims to speak up.

A major case unfolding in Chattanooga reflects how situations can escalate when sexual harassment between males is treated as a casual rite of passage. In December 2015, while on a school-related athletic trip, three upperclassmen from Ooltewah High School assaulted their freshman teammate and sodomized him with a pool cue.[11] The attack caused serious internal damage to the victim's organs, and he was hospitalized for more than a week.[12]

Hamilton County has taken the crime seriously, and the adults, who were supposedly supervising the students, have been charged with failure to report child abuse.[13] Also in response to the assault, the Hamilton County District Attorney's Office launched an investigation into the culture of abuse within the athletic programs at Ooltewah.[14] The underlying cultural problem at Ooltewah, however, seems pervasive and similar to the accepted culture at Rock-Tenn. Services. No one in either setting took issue with the environment that was being fostered, and no one in a leadership position took any legitimate steps to stop the sexual harassment. The detective who was originally assigned to the Ooltewah case, Rodney Burns, even stated

[10] *Id.* at 308.
[11] Sarah Kaplan, *Rape of a Basketball Player, Accusations of Abuse and Bullying Tear Apart High School*, WASHINGTON POST, Jan. 22, 2016, https://www.washingtonpost.com/news/morning-mix/wp/2016/01/22/.
[12] *Id.* at 1.
[13] *Id.*
[14] *Id.* at 4.

in a juvenile court hearing that the case "is much smaller than what it's blown up to be."[15] Burns went on to say that the attack "was something stupid that kids do . . . [,] but it wasn't done for sexual gratification or really sexual in nature."[16] Even in a situation where a minor was violently raped and seriously injured, Burns's default response was to characterize the act as archetypal male behavior.[17] While this case is still unfolding, the defendant's arguments will likely compare to the defendant's arguments in *Smith*—that this was just typical male behavior that happened to go too far.

The rejection of the defendant's misguided argument in *Smith* will ideally lead to more inclusive work environments and stricter adherence to zero-tolerance sexual harassment policies. The compensatory damages that the Sixth Circuit upheld in favor of the *Smith* plaintiff cost Rock-Tenn. Services three-hundred thousand dollars;[18] therefore, it is likely employers will be more incentivized to have clear, meaningful procedures in place should a harassment situation arise. More importantly, *Smith* has potentially opened the door for a more dynamic discussion on what is normal, acceptable "horseplay" between males. While the Ooltewah debacle may present a more extreme case of sexual harassment than presented in Rock-Tenn., the root problem is the same. Further, the classification of sexual harassment as male-on-male "horseplay" is an issue that will not be resolved until more workplaces, schools, and courts reject the false narrative that sexual harassment and abuse between males is acceptable because "boys will be boys."

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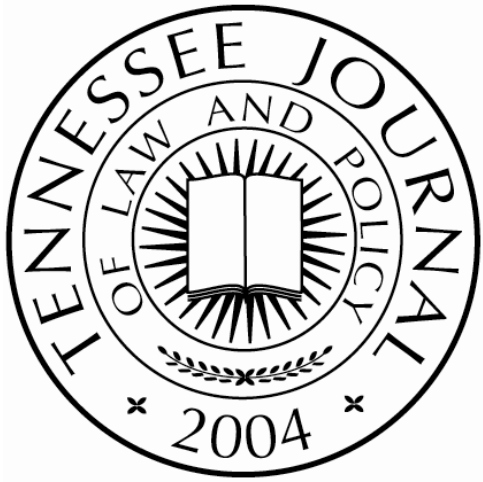
[15] Kendi Anderson, *Detective Charged with Aggravated Perjury Could Face Harshest Penalty in Ooltewah Rape Case*, CHATTANOOGA TIMES FREE PRESS, May 21, 2016, http://www.times freepress.com/news/local/story/2016/may/21/.
[16] *Id.* at 2.
[17] *Id.*
[18] Smith v. Rock-Tenn. Servs., 813 F.3d 298, 306 (6th Cir. 2016).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