



on the job

TRACKING DEVELOPMENTS IN EMPLOYMENT LAW

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Same Sex Harassment is not Excluded under the Michigan Civil Rights Act (MCRA)

By Caroline Grech-Clapper

In a case of first impression of whether same-gender hostile work environment claims are recognized under the Michigan Civil Rights Act (MCRA), the Michigan Court of Appeals in *Robinson v Ford Motor Company v Darren Smith* affirmed the trial court's decision that rejected defendant's claims that (1) plaintiff's same-gender hostile work environment claim is not cognizable under the MCRA, and that (2) a claim cannot be sustained when the harasser is heterosexual.

Plaintiff alleged that a male co-worker sexually harassed him while working in defendant's plant. Plaintiff alleged that he was harassed for two years from his co-worker's conduct of slapping his buttocks, pinching his nipples, pulling down plaintiff's pants to expose his underwear, defendant's exposing his testicles to another co-worker while grasping plaintiff's hand and attempting to or actually making plaintiff touch them, and while his co-worker placed his hands in plaintiff's pants by placing his finger between plaintiff's buttocks. Defendant co-worker also offered to show plaintiff his penis and asked plaintiff about the size of his penis. The co-worker also allegedly told plaintiff that he wanted to see his "naked butt" in a vat of KY jelly and that "You're my bitch, I own your ass." In March 2003, Plaintiff allegedly suffered a breakdown, after two consecutive days where defendant digitally penetrated plaintiff's mouth with a dirty glove, by jumping on his back with an erection and forcing his fingers down plaintiff's throat. Plaintiff reported all of the incidents to his supervisors.

SECRET WARDLE NOTES:

This case is a good example of what is more than horseplay between men. It is important to note that a sexual harassment claim can be made by a same-sex offender. Under this case of first impression, sexual horseplay and sexual joking around are not excluded from sexual discrimination claims. It is recommended that you consider educating your employees, and particularly your managers, about this case and the expanded boundaries of sexual harassment.

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Defendant moved for dismissal arguing that the sexual horseplay by a heterosexual male directed against another male was outside the statutory definition of sexual harassment. The Appellate Court rejected defendant's arguments and relied on the United States Supreme Court's decision of *Oncale v Sundowner Offshore Services, Inc*, 523 US 75 (1998), which held that sexual harassment extends to any kind of sexual harassment and does not exclude same-sex harassment. The Court further held that proof of the harasser's sexual desire is not necessary.

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