

PUBLICATION

Not Manly Enough? Fifth Circuit Recognizes Title VII Same-Sex, Gender-Stereotyping Discrimination

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The Fifth Circuit recently became one of a growing number of courts to recognize same-sex, gender-stereotyping as a form of discrimination prohibited by Title VII. In September, the Court handed down its much-anticipated opinion in *Equal Emp't Opportunity Comm'n v. Boh Brothers Constr. Co., L.L.C.*, (click the case title for the full opinion). Gender-stereotyping (also called sex-stereotyping) is a form of discrimination in which Individual A discriminates against Individual B because Individual B does not conform to a gender stereotype; i.e, Individual B does not act how Individual A thinks a man or woman is "supposed" to act. When gender-stereotyping discrimination involves members of the same sex, it is commonly referred to as same-sex, gender-stereotyping. This was the type of discrimination at issue in the Fifth Circuit's decision.

In 2005, Boh Bros. hired Kerry Woods, an iron worker and structural welder. Woods' supervisor was Chuck Wolfe. Woods claimed that Wolfe subjected him to almost-daily verbal and physical harassment because Woods did not conform to Wolfe's view of how a man should act. Wolfe directed very foul language and locker room talk at Woods; referring to Woods by graphically derogatory names several times a day. Several times each week—while Woods was bent over to perform a task—Wolfe approached Woods from behind and simulated a sex act. Wolfe also exposed himself to Woods while Wolfe was urinating, and Wolfe viewed Woods' use of moist towelettes instead of toilet paper as "kind of gay" and "feminine." When Woods complained to management, Wolfe told Boh Bros. that he "didn't care for Woods" because Woods was "different" and "didn't fit in."

In 2007, Boh Bros. laid off Woods because of a lack of work. Woods then filed with the EEOC a charge of discrimination, alleging sexual harassment and retaliation. The EEOC's enforcement division took over the charge and sued Boh Bros. on Woods' behalf. Following a three-day trial, the jury returned a verdict in favor of Boh Bros. on the retaliation claim. However, the jury found in favor of Woods on the harassment claim and awarded Woods \$201,000 in compensatory damages and \$250,000 in punitive damages. Baker Donelson previously wrote on the jury verdict [here](#) and [here](#).

Boh Bros. appealed the jury's verdict to the Fifth Circuit. In 2012, a three-judge panel of the Fifth Circuit overturned the jury's verdict. It is well-established that Title VII protects only a certain number of characteristics: race, creed, color, national origin, etc., and of course, sex. In order to bring a claim under Title VII, one must prove that the complained-of harassment or discrimination was based on a protected characteristic. In *Boh Bros.*, the EEOC argued that Woods' harassment was based on sex and, therefore, protected by Title VII. The Fifth Circuit panel "left for another day" the question of whether gender-stereotyping could be a form of same-sex harassment under Title VII. Instead, it determined that the jury's verdict was based on sympathy, not the actual evidence, and overturned it accordingly. A copy of the Fifth Circuit panel's initial opinion may be found [here](#).

Following the initial decision, the EEOC filed a motion for rehearing. The Fifth Circuit granted *en banc* review, overturned its initial decision, ultimately ruled in the EEOC's favor, and re-instated the jury's verdict. The most notable conclusions from the 68-page decision are as follow, as well as what an employer needs to take away from those conclusions:

1. Gender-stereotyping (or sex-stereotyping) is a form of discrimination/harassment under Title VII. In other words, Title VII prohibits discrimination/harassment based on the fact that an individual fails to conform to traditional gender stereotypes. To quote the Fifth Circuit: "[A] plaintiff may establish a [Title VII] claim with evidence of sex-stereotyping."

Take Away: Employers need to update their policies and training materials to include gender-stereotyping. For example, discrimination/harassment policies could be revised to include a prohibition against offensive verbal or physical conduct based upon perceived gender stereotypes. Employers should also include a gender-stereotyping reference in their EEO statements; for example, "Employer prohibits . . . based on an individual's non-conformance with a gender-stereotype."

2. Same-sex, gender-stereotyping can form the basis of a harassment or discrimination claim under Title VII. To again quote the Fifth Circuit: "[T]he EEOC may rely on evidence that Wolfe viewed Woods as insufficiently masculine to prove its Title VII claim."

Take Away: In addition to updating policies and training materials to include gender-stereotyping, employers need to be aware that courts are becoming less and less likely to buy into the proverbial "oh, it's just good ol' fashion teasing," "it's just locker room talk," or "it's just horseplay" defenses. Gender-stereotyping claims are on the EEOC's radar, and employers need to take seriously complaints by employees about the conduct or actions of other employees or supervisors of the same gender.

3. A court won't look at whether the victim of the harassment or discrimination actually fits the traditional gender stereotype. The EEOC claimed that Woods was harassed because he was not "manly" and he didn't act how a man is "supposed to act" at a construction worksite. The Fifth Circuit made clear that whether Woods "acted like a man" is not actually the question, and so it does not matter that Woods was "unquestionably manly." The question is whether Wolfe (the harasser) viewed Woods as unmanly, and the Fifth Circuit determined that, at least in Wolfe's view, Woods fell outside of Wolfe's "manly-man" stereotype.

Take Away: An employer cannot discredit an allegation of same-sex, gender-stereotyping because it sounds unrealistic or because the victim appears capable of handling himself. A male ironworker reporting that another male ironworker called him a princess, a sissy, and unmanly may not immediately raise a red flag. But that situation can be viewed by a court as absolutely no different than a male employee telling a female employee she should dress prettier, be less "butch, " and act more like other girls do.

4. "Had Boh Brothers adopted suitable institutional policies and educational programs regarding sexual harassment, it may have avoided liability."

Take Away: That is a direct quote from the Fifth Circuit's decision, and without question is the most important thing that employers must take away from all of this. Boh Bros. did not have a human resources department; it did not have policies in place explaining discrimination or harassment; nor did it have policies in place explaining how to report discrimination or harassment. Had Boh Bros. put these policies in place, and had it used HR personnel appropriately, it very well could have avoided liability altogether.