


Labor and Employment Corner

by Steven F. Griffith Jr. and Erin E. Pelleteri

Are You Man Enough for Your Job?

The Civil Rights Act of 1964 is among the most important pieces of legislation in the history of the United States—one would be hard pressed to argue to the contrary. Title VII of the Act brought employers into the 21st century, helped level the playing field for employees competing for jobs and promotions, and required that employers implement and enforce policies to ensure equality for all.

Title VII remains highly relevant and, at times, critical to enforcement of the level playing field described above. However, the utility of anti-discrimination policies and their enforcement by employers is only as strong as the guidance employers receive about what Title VII prohibits and what it does not.

For years, the Supreme Court consistently held that Title VII is not a general code of civility in the workplace.[1] Instead, it prohibits employers from discriminating against an employee "because of such individual's race, color, religion, sex, or national origin."[2] The Supreme Court has held that Title VII's prohibitions on discrimination "because of sex" preclude same-sex sexual harassment, as well as harassment based on "gender stereotyping."[3] This type of harassment occurs when a person is harassed based on their perceived failure to conform to traditional gender roles. In expanding the prohibitions under Title VII, the Supreme Court has observed that statutory provisions must be read to address not only the primary evil, but "reasonably comparable" evils as well.[4] However, the Court has also emphasized that Title VII should never be read to "prohibit all verbal or physical harassment in the workplace" or ordinary socializing in the workplace—such as "male-on-male horseplay."[5] Over a decade later, this type of "male-on-male horseplay" was challenged in a same-sex sexual harassment action.

In *EEOC v. Boh Brothers Construction Co. LLC*, the Equal Employment Opportunity Commission (EEOC) filed a same-sex sexual harassment and retaliation claim under Title VII against Boh Bros. Construction Co. LLC on behalf of Kerry Woods, a former Boh Brothers employee.[6] Woods claimed that one of his supervisors sexually harassed him at various worksites by calling him derogatory names, simulating sex, and flashing him. The EEOC argued that the supervisor's conduct was "because of ... sex," Specifically, the EEOC argued that the supervisor harassed Woods because he did not conform to the traditional male stereotype as evidenced by the type of insults made to Woods, including taunts regarding his use of Wet Wipes. Boh Brothers responded that the behavior—while crude—was typical in an all-male workforce. Boh Brothers also argued that there was no evidence that the behavior was motivated by sex as neither the supervisor nor Woods was homosexual, and there was no evidence that the supervisor treated Woods any differently than other employees. The jury determined that the behavior did constitute sexual harassment, and awarded $451,000 in compensatory and punitive damages.

As discussed below, the appellate history—and ultimate holding of the case—surely stand for the proposition that employers must have comprehensive anti-discrimination policies, training, and investigations of possible claims to invoke affirmative defenses effectively and avoid liability under Title VII. But, the circumstances under which a potential claim can now arise are arguably less clear in light of this outcome.

On appeal, the Fifth Circuit overturned the jury award, finding that there was insufficient evidence that Woods was discriminated against "because of ... sex." In its panel opinion, the Fifth Circuit discussed the various methodologies set forth in *Oncale* under which the plaintiff might satisfy Title VII's "because of ... sex" requirement: (1) showing that the harasser was homosexual and motivated by sexual desire; (2) showing that the harassment was framed "in such sex-specific and derogatory terms ... as to make it clear that the harasser [was] motivated by general hostility to the presence" of a particular gender in the workplace; or (3) offering "direct comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace." *Oncale*, 523 U.S. at 80-81. The Fifth Circuit observed that the EEOC sought to prove its claim through another evidentiary path—"gender stereotyping"—that was not listed in *Oncale*, but had been earlier recognized by the Supreme Court in *Price Waterhouse v. Hopkins*.[7] While the Fifth Circuit's panel decision noted that it had never considered whether the three paths in *Oncale* were exhaustive, it found it unnecessary to determine whether gender stereotyping could be utilized because there was insufficient evidence that the supervisor's harassment was based on gender stereotyping. The EEOC sought rehearing en banc, which was granted in March 2013.

After rehearing was granted, the Louisiana Associated General Contractors, a general contractors trade group, filed an amicus brief

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in which it asserted that allowing gender stereotyping to be used in this context placed employers, particularly those in the construction industry, "in an untenable situation, both practically and financially." Lambda Legal, a legal organization whose stated mission is to safeguard and advance the civil rights of lesbian, gay, bisexual, and transgender people, also filed an amicus brief. Lambda Legal argued that Title VII's mandate—to prohibit all discrimination "because of ... sex"—required that the Court avoid any restriction on the evidentiary options that a plaintiff might choose to demonstrate that discrimination had occurred. Lambda Legal further argued that plaintiff need not prove that the alleged harasser actually perceived his victim as not conforming to the gender stereotype, only that the victim would not have suffered mistreatment if he were a woman.

On Sept. 27, 2013, the Fifth Circuit reversed the panel decision and in a 10-6 en banc opinion, reinstated the jury's award of compensatory damages and injunctive relief. The en banc court rejected the argument that gender stereotyping was not a viable method for establishing same-sex harassment, but emphasized that a plaintiff would still be required to prove that the discrimination occurred "because of ... sex," and, that it was so objectively offensive so as to alter the conditions of his/her employment. The Fifth Circuit went on to note that the evidence showed that the supervisor "hurled raw sex-based epithets uniquely at [plaintiff] two-to-three times a day, almost every day, for months on end." This conduct, coupled with the other acts committed by the supervisor, altered the conditions of Woods' employment.

The Fifth Circuit also rejected Boh Bros.' contention that it established an *Ellerth/Faragher* affirmative defense.[8] In its discussion, the Fifth Circuit noted Boh Bros.' lack of suitable policies and minimal training for its employees on the reporting and investigation of sexual harassment, and, in particular, the testimony by one of the investigating employees that he was unaware that sexual harassment could occur even when it was not motivated by sexual desire. The Fifth Circuit went on to detail what it considered a particularly poor job of investigating Woods' claim, such as the lack of documentation/reporting by supervisors, the short interview with the supervisor, and the fact that Woods was actually sent home without pay for three days following his report. Juxtaposed against this cursory investigation was the in-depth investigation of Woods' claim that the supervisor misused company funds. While Boh Bros. spent less than thirty minutes investigating Woods' claim of sexual harassment, it hired a private investigator who spent more than 84 hours and generated reports on the alleged misappropriations. And, after its investigation of this particular allegation, Boh Bros. demoted the supervisor, but failed to write him up for his treatment of Woods. Considering this evidence, the Fifth Circuit affirmed the jury's rejection of the *Ellerth/Faragher* defense.

Several judges dissented, writing that the holding served to "untether Title VII from its current mooring in sexual discrimination" and applied it to prevent "not only sexual harassment, but also myriad other undesirable conduct." In particular, the dissenters observed that the majority's acceptance of the gender stereotyping theory as a viable evidentiary path appeared to remove the requirement that Woods actually prove that the discrimination was motivated by sex. According to the dissent, the fact that the supervisor targeted certain words and gestures to Woods was the sole basis on which the majority based its finding of harassment. The dissent went on to observe that, absent evidence that the supervisor targeted Woods because he did not conform to the male stereotype, the majority's holding could allow an "unquestionably manly man" who was called

a sissy to bring a claim under Title VII.

Though the Fifth Circuit was bitterly divided on almost every point, every judge agreed that the conduct at issue should not occur in any workplace environment—whether it be a construction site, an oil patch, or an office building. One could hardly disagree with such a unanimous point. The conduct to which Woods was subjected was inexcusable and, certainly, intolerable in any workplace setting. However, left open from the Fifth Circuit's decision is the question of whether such conduct should be prohibited by Title VII and how it should be handled by employers.

For any company with multiple worksites, this ruling creates significant problems. Because of the nature of the work, the actions giving rise to potential claims can arise at various, unconnected locations outside of the oversight of human resources and (sometimes) management personnel who could field questions and/or intervene. Accordingly, even when a complaint is lodged, the investigation would take place after the fact and likely out of context. And, it will be left to these companies (and those who advise them) to differentiate between routine taunting and similar conduct between that which is based on sex and now prohibited under Title VII. In other words, an explanation of what is acceptable and unacceptable in the eyes of the law (a not too unreasonable request from clients at times) is left unanswered and open for future rulings from the courts. ⊙

Endnotes

[1]*Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 80 (1998).

[2]42 U.S.C. § 2000e-2(a)(1).

[3]*Price v. Waterhouse Hopkins*, 490 U.S. 228, 251 (1988); *Oncale*, 523 U.S. at 80-81.

[4]*Id.* at 80.

[5]*Id.*

[6]*EEOC v. Boh Bros. Construction Co.*, 689 F.3d 458, 463 (5th Cir. 2012).

[7]490 U.S. at 251.

[8]Under this defense, an employer is not vicariously liable for harassment by a supervisor if it can show: "(a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) the plaintiff employee reasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." *See Burlington Indus. v. Ellerth*, 524 U.S. 742, 765 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775, 807 (1998).