



Labor and Employment Corner

by Stephen E. Trimboli

The Gender Stereotyping Paradox: Are Actions Brought by Gay Employees Under Title VII Viable Claims or Lost Causes?

Two male employees bring lawsuits for sex

discrimination against their employers, each alleging that he was the victim of gender stereotyping in violation of Title VII. Each man claims that his co-workers subjected him to homophobic slurs. Each man also claims that he was harassed for engaging in what co-workers viewed to be unmanly, effeminate behavior. However, one man is understood by his co-workers to be heterosexual and the other is perceived to be, or actually is, gay. Does each man have an equally viable Title VII claim?

Depending on the federal circuit, the “straight” plaintiff would have a viable claim, but the gay man may not. Title VII prohibits discrimination based on gender stereotyping as a form of sex discrimination. However, no federal statute currently in existence prohibits discrimination based upon sexual orientation itself. Distinguishing between gender stereotyping and sexual orientation becomes a tricky proposition when the plaintiff is gay or lesbian. As a result, some federal circuit courts have looked on gender stereotyping claims brought by gay plaintiffs with skepticism. Despite acknowledging that gay plaintiffs have the right to bring such claims, these circuit courts cautiously guard against allowing gay or lesbian plaintiffs to use gender stereotyping claims as a means for litigating sexual orientation discrimination claims “through the back door.” Thus, in those circuits, the burden falls on the plaintiff to clearly establish that the alleged discriminatory conduct at issue was a result of gender stereotyping, and not of the plaintiff’s sexual orientation. The paradoxical result in these circuits is that heterosexual plaintiffs who endure homophobic epithets, lewd gestures, and similar forms of harassment are more likely to succeed in court than are gay and lesbian plaintiffs who endure the same behavior.

This article addresses that paradox.

The Fifth Circuit’s recent *en banc* decision in the case *Equal Employment Opportunity Commission (EEOC) v. Boh Brothers Construction Company*¹ is an example of a gender stereotyping claim brought by a plaintiff who was heterosexual. In *Boh Brothers*, the

plaintiff, an iron worker, alleged that his supervisor called him various homophobic epithets, including “pu—y,” “princess,” and “fa—ot.”² The plaintiff also alleged that when he performed a task that required him to bend over, his supervisor would approach him from behind and simulate having anal intercourse with him.³ Notably, although the supervisor viewed the plaintiff’s *conduct* as “kind of gay” and “feminine,” the supervisor did not perceive the plaintiff to be gay.⁴ The EEOC issued a complaint on the worker’s behalf, alleging that the supervisor engaged in same-sex harassment; specifically, that the supervisor harassed the plaintiff because he “was not a manly enough man” in the supervisor’s eyes.⁵

In holding that the plaintiff had an actionable claim for sex discrimination against his employer under a gender stereotyping theory, the Fifth Circuit first noted that gender stereotyping claims trace their origin to the U. S. Supreme Court decision in *Price Waterhouse v. Hopkins*.^{6,7} The female plaintiff in *Price Waterhouse* alleged that she had been denied partnership with her employer, an accounting firm, because her supervisors viewed her as too “macho,” and not “feminine” enough.⁸ In holding in favor of the *Price Waterhouse* plaintiff, the Supreme Court reasoned that by enacting Title VII, “Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sexual stereotypes.” Although “remarks at work that are based on stereotypes do not inevitably prove that gender played a part in a particular employment decision,” they “can certainly be evidence that gender played a part.”⁹

Applying those principles to its decision in *Boh Brothers*, the Fifth Circuit found that the supervisor’s use of “sex-based epithets like ‘fa—ot,’ ‘pu—y,’ and ‘princess,’ as well as the supervisor’s simulation of sexual acts on the plaintiff, suggested that the supervisor viewed the plaintiff as falling outside of a “manly man stereotype.” A reasonable jury could therefore find that the plaintiff suffered harassment because of his sex.¹⁰

Stephen E. Trimboli is a founding member of the law firm of Trimboli & Prusinowski, located in Morristown, N.J. Trimboli specializes in labor and employment law on behalf of management, representing public- and private-sector employers in the full range of labor and employment law issues. His practice also includes commercial litigation, administrative law, occupational safety and health law, interest arbitration, police and fire disciplinary hearings, pension law disputes, appeals, wage and hour law, and EEO compliance. He is a member of the New Jersey chapter of the Federal Bar Association and regularly reports on labor and employment law developments in the Third Circuit. He is a graduate of the Johns Hopkins University and the New York University School of Law.

However, in *Vickers v. Fairfield Medical Center*,¹¹ the Sixth Circuit dismissed a similar gender stereotyping claim brought by a gay man. Similar to the plaintiff in *Boh Brothers*, the *Vickers* plaintiff alleged that he had been called “fa-” and other derogatory homophobic slurs by his co-workers and had been subjected to simulated sex acts. However, unlike *Boh Brothers*, the plaintiff’s co-workers in *Vickers* perceived him to be gay because of his friendship with a gay physician.¹² The plaintiff alleged that his co-workers had subjected him to a slew of homophobic epithets and lewd sexual gestures because of his perceived (and, indeed, actual) sexual orientation.¹³ The *Vickers* plaintiff argued that he was a victim of gender stereotyping because his harassers allegedly objected to “those aspects of homosexual behavior in which a male participant assumes ... traditionally female or less masculine roles.”¹⁴

Despite its similarity to *Boh Brothers*, the Sixth Circuit rejected the *Vickers* plaintiff’s gender stereotyping claim. According to the Sixth Circuit, recognizing the plaintiff’s theory of the case would effectively amend Title VII to allow sexual claims based on sexual orientation. “[I]n all likelihood, any discrimination based on sexual orientation would be actionable under a sex stereotyping theory ... as all homosexuals, by definition, fail to conform to traditional gender norms in their sexual practices.”¹⁵ The Sixth Circuit also found that the plaintiff had failed to show that his gender nonconformance was demonstrable in the workplace through his appearance or behavior. The plaintiff had “made no argument that his appearance or mannerisms on the job were perceived as gender nonconforming in some way and provided the basis for the harassment he experienced.”¹⁶ The Sixth Circuit cited the Second Circuit’s decision in *Dawson v. Bumble & Bumble*,¹⁷ a case involving a gay female employee, for the proposition that a “gender stereotyping claim should not be used to bootstrap protection for sexual orientation into Title VII.”¹⁸

In *Prowel v. Wise Business Forms, Inc.*,¹⁹ the Third Circuit attempted to strike a more balanced approach to the issue. The plaintiff, a gay machine operator, alleged that he was called, “princess,” “fa—ot,” and other homophobic slurs, similar to the plaintiffs in *Boh Brothers* and *Vickers*. The plaintiff also alleged that he was the victim of lewd sexual jokes and gestures. In allowing the *Prowel* plaintiff’s claim to proceed, the Third Circuit reasoned that a gay plaintiff could be discriminated against *both* for failing to conform to gender stereotypes and for his sexual orientation, but that this dual nature should not bar the plaintiff from proceeding with a sex discrimination claim under Title VII.²⁰

In holding that the *Prowel* plaintiff could proceed with a gender stereotyping claim under Title VII—despite the fact that his harassment involved homophobic slurs and anti-gay sentiment—the Third Circuit reasoned: “It is possible that the harassment [plaintiff] allege[d] was because of his sexual orientation, not his effeminacy. Nevertheless, this does not vitiate the possibility that [plaintiff] was also harassed for his failure to conform to gender stereotypes.”²¹ Noting that the alleged harassers had made reference to his clothing, the way he crossed his legs and filed his nails, and the way he walked, the court observed that such remarks constituted “sufficient evidence of gender stereotyping harassment—namely, [plaintiff] was harassed because he did not conform to [his co-workers’] vision of how a man should look, speak, and act—rather than harassment based solely on his sexual orientation.”²²

Notably, the Third Circuit reasoned that “there is no basis in the statutory or case law to support the notion that an effeminate *heterosexual* man can bring a gender stereotyping claim while an effeminate

homosexual man may not.”²³ Accordingly, the Third Circuit found that the plaintiff had a viable gender stereotyping claim despite the anti-gay nature of much of the harassment, and despite his sexual orientation.

However, unlike the plaintiff in *Vickers*, the *Prowel* plaintiff presented evidence suggesting that his workplace behavior differed from that of his male co-workers. The *Prowel* plaintiff claimed that he had a high voice and did not curse; was well groomed and wore “dressy” clothes; carried himself in an effeminate manner; and, talked about art, music, and interior design.²⁴ The plaintiff claimed that his co-workers reacted negatively to his demeanor and appearance, taunted him with anti-gay epithets, left lewd drawings in the workplace, made threatening statements such as “they should shoot all the fa-s,” and accused him of having AIDS and sleeping with male co-workers.²⁵ The allegations allowed the *Prowel* court to identify a viable gender stereotyping claim separate and apart from a nonviable claim based solely on the plaintiff’s sexual orientation.

To date, the Supreme Court has yet to decide a case in which an openly gay or perceived-to-be-gay worker alleges that he or she was a victim of gender stereotyping in the workplace. However, based on its interpretation of Title VII in *Oncale v. Sundowner Offshore Services, Inc.*,²⁶ it is likely that the Court would adopt a position similar to that taken by the Third Circuit in *Prowel*.

The *Oncale* plaintiff was working as a roustabout on an eight-man offshore oil well crew on a platform located in the Gulf of Mexico. All of his co-workers were male. On several occasions, the plaintiff was subjected to sex-related, humiliating actions against him by co-workers in the presence of the rest of the crew. He allegedly was physically assaulted in a sexual manner, and on one occasion was threatened with rape. The *Oncale* plaintiff ultimately quit his job, stating, “I felt that if I didn’t leave my job, that I would be raped or forced to have sex.”²⁷

The Supreme Court held unanimously that the plaintiff could bring a Title VII sexual harassment claim based on harassing conduct committed by persons of the same sex despite the fact that sexual orientation is not a protected characteristic under that statute. The *Oncale* Court reasoned that although “male-on-male sexual harassment in the workplace was assuredly not the principal evil Congress was concerned with when it enacted Title VII, statutory prohibitions often go beyond the principal evil to cover reasonably comparable evils, and it is ultimately the provisions of our laws rather than the principal concerns of our legislators by which we are governed.”²⁸

The factual and legal discussion in *Oncale* does not reveal the co-workers’ motivation for harassing the plaintiff. Thus, it is not clear whether the plaintiff was gay, perceived as gay, perceived not to be behaving in a manner considered sufficiently “male” by his co-workers, or simply the target of unwanted horseplay. However, the logic of *Oncale* suggests that the Supreme Court would likely find that the principal evil in gender stereotyping cases—discrimination against an employee for failure to adhere to sexual stereotypes—is actionable regardless of whether the harassers were also motivated by the plaintiff’s perceived sexual orientation. Indeed, the reasoning of *Oncale* suggests that as long as the harassing conduct is based upon the plaintiff’s gender, the sexual orientation of either the victim or perpetrator is irrelevant.²⁹ Therefore, like the Third Circuit, the Supreme Court would likely hold that the critical question in such cases is whether sufficient evidence exists to demonstrate that the employee was harassed because he or she did not conform to the employer’s vision of how

Endnotes

- ¹*Walden v. Fiore*, 571 U.S. ___, 134 S.Ct. 1115 (2014).
- ²*Id.* at 1119.
- ³*Id.*
- ⁴*Id.*
- ⁵*Fiore v. Walden*, 688 F.3d 558, 563 (Nev. 2012).
- ⁶*Walden* at 1120.
- ⁷*Fiore* at 563; *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388, 389, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971) (holding that a violation of the Fourth Amendment by a “federal agent acting under color of his authority gives rise to a cause of action for damages consequent upon his unconstitutional conduct.”).
- ⁸*Walden* at 1120 (“Respondents alleged that petitioner violated their Fourth Amendment rights by (1) seizing the cash without probable cause; (2) keeping the money after concluding it did not come from drug-related activity; (3) drafting and forwarding a probable cause affidavit to support a forfeiture action while knowing the affidavit contained false statements; (4) willfully seeking forfeiture while withholding exculpatory information; and (5) withholding that exculpatory information from the United States Attorney’s Office.”).
- ⁹*Id.*
- ¹⁰*Id.*, quoting *Fiore* at 582.
- ¹¹*Id.* at 1119.
- ¹²*Id.* at 1121.

- ¹³*Id.*, quoting Federal Rule of Civil Procedure 4(k)(1)(A).
- ¹⁴*Id.*, quoting *Daimler AG v. Bauman*, 571 U.S. ___, ___, 134 S.Ct. 746, 753, 187 L.Ed.2d 624 (2014).
- ¹⁵*International Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S.Ct. 154, 90 L.Ed. 95 (1945), quoting *Milliken v. Meyer*, 311 U.S. 457, 463, 61 S.Ct. 339, 85 L.Ed. 278 (1940).
- ¹⁶*Shaffer v. Heitner*, 433 U.S. 186, 204, 97 S.Ct. 2569, 53 L.Ed.2d 683 (1977).
- ¹⁷*Goodyear Dunlop Tires Operations, S.A. v. Brown*, 564 U.S. ___, ___, 131 S.Ct. 2846, 2851, 180 L.Ed.2d 796 (2011); *Walden* at 1122 (“This is in contrast to ‘general’ or ‘all-purpose’ jurisdiction, which permits a court to assert jurisdiction over a defendant based on a forum connection unrelated to the underlying suit (e.g., domicile).”).
- ¹⁸*Walden* at 1122, quoting *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 475, 105 S.Ct. 2174, 85 L.Ed.2d 528 (1985).
- ¹⁹*Id.* at 1122.
- ²⁰*Id.*; *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 291-292, 100 S.Ct. 559, 62 L.Ed.2d 490 (1980).
- ²¹*Id.*; *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 417, 104 S.Ct. 1868, 80 L.Ed.2d 404 (1984).
- ²²*Id.* at 1125.
- ²³*Id.* at 1124.
- ²⁴*Id.* at 1121.
- ²⁵*Id.* at 1119, quoting *Rush v. Savchuk*, 444 U.S. 320, 332, 100 S.Ct. 571, 62 L.Ed.2d 516 (1980).

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that individual should look and behave, rather than focusing, as some federal circuit courts have, on whether the harassment was based on sexual orientation.

However, until the Supreme Court speaks on the issue, the gender stereotyping paradox will remain. Gay and lesbian plaintiffs will face greater difficulty in pursuing sex discrimination claims based on gender stereotyping, at least in certain circuits, than will heterosexual plaintiffs, as the federal courts struggle to distinguish actionable gender stereotyping claims from nonactionable claims based solely on sexual orientation. And employers will face a greater likelihood of incurring federal liability based on claims brought by heterosexual plaintiffs than those brought by gay and lesbian plaintiffs, as counterintuitive as that might seem.

The best defense for employers against *any* such claims is prevention. Harassing conduct based on gender, including homophobic language and mistreatment based on real or perceived “unmanly” and “unwomanly” behavior, should be prohibited, and allegations of such conduct should be investigated and, where appropriate, remedied promptly. ☉

Endnotes

- ¹*EEOC v. Boh Brothers Construction Company*, 731 F.3d 444 (5th Cir. 2013).
- ²*Id.* at 449.
- ³*Id.*
- ⁴*Id.* at 457-59.
- ⁵*Id.* at 453.
- ⁶*Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989).

- ⁷*Id.* (citing *Price Waterhouse*).
- ⁸*Price Waterhouse*, 490 U.S. at 235.
- ⁹*Id.* at 251.
- ¹⁰*Boh Brothers*, 731 F.3d at 457.
- ¹¹*Vickers v. Fairfield Medical Center*, 453 F.3d 757 (6th Cir. 2006), *cert. den.*, 551 U.S. 1104 (2007).
- ¹²*Id.* at 759.
- ¹³*Id.*
- ¹⁴*Id.* at 763.
- ¹⁵*Id.* at 764.
- ¹⁶*Id.* at 763.
- ¹⁷*Dawson v. Bumble & Bumble*, 398 F.3d 211, 218 (2nd Cir. 2005).
- ¹⁸*Id.* at 764 (citing *Dawson*).
- ¹⁹*Prowel v. Wise Business Forms, Inc.*, 579 F.3d 285 (3d Cir. 2009).
- ²⁰*Id.* at 292.
- ²¹*Id.* at 292.
- ²²*Id.* at 291-92.
- ²³*Id.* at 292 (emphasis in original).
- ²⁴*Id.* at 287.
- ²⁵*Id.* at 287-88.
- ²⁶*Oncale v. Sundowner Offshore Services, Inc.*, 523 U.S. 75, 79 (1998).
- ²⁷*Id.* at 77.
- ²⁸*Id.*
- ²⁹*See, e.g., id.* at 79 (rejecting the notion that male-on-male harassment is actionable only when motivated by sexual desire).