

Newsletter

November Employment Insights: Fifth Circuit Expands the Scope of Same-Sex

11/15/2013

The United States Court of Appeals for the 5th Circuit recently upheld a jury verdict expanding the breadth of same sex workplace harassment claims under Title VII of the Civil Rights Act. Unlike prior 5th Circuit precedent, the en banc panel in *E.E.O.C. v. Boh Brothers Construction Co.* held that a same-sex plaintiff can rely on same-sex gender stereotyping evidence to prove that discrimination occurred “because of sex” in violation of Title VII. This opinion establishes new limits in the 5th Circuit: no longer will teasing someone for not being manly enough—even among men at a construction site—be tolerated in the workplace.

SUPREME COURT STATUTES AND REGULATIONS

The Supreme Court has long recognized that severe or pervasive workplace harassment may violate Title VII. And since 1998, the Supreme Court has held that same-sex harassment may be unlawful. To violate Title VII based on same-sex discrimination, a same-sex plaintiff must show that he or she was discriminated against because of their sex and that such harassment was so objectively severe and pervasive that it altered their work environment. But before *Boh Brothers*, the 5th Circuit recognized only three evidentiary means of proving same-sex harassment: (1) if the harasser was homosexual and motivated by sexual desire; (2) if the harasser was clearly motivated by hostility toward a particular gender; or (3) by offering direct comparative evidence about how the harasser treated members of both sexes. And no matter which evidentiary route a plaintiff chose to follow, the 5th Circuit required a strict showing that the conduct actually constituted discrimination because of sex.”

The facts in the *Boh Brothers* case did not fit into any of these categories. The case involved an all-male bridge repair crew in Louisiana. Foul language was a part of the culture in that work environment, but the crew’s superintendent took it too far with an ironworker who he believed was “girly” and too “feminine.” Because the ironworker did not conform to the superintendent’s manly standards, the superintendent relentlessly made disparaging comments regarding the ironworker’s sexuality. Moreover, the superintendent inappropriately exposed himself to the ironworker and regularly mimicked lewd, emasculating acts when the ironworker had his back turned to him.

[E.E.O.C. V. BOH Brothers Construction Co.](#)

The EEOC eventually stepped in and filed a suit on the ironworker’s behalf for sexual harassment based on gender stereotype and retaliation. A jury awarded the ironworker over \$300,000 in damages, but the Fifth Circuit originally vacated the judgment explaining that the harassment was not “because of sex.”

On rehearing, however, the en banc Fifth Circuit panel upheld the jury verdict by a 10-6 vote. It focused on the prior court’s interpretation of whether the superintendent harassed the ironworker “because of sex” and whether the harassment was severe and pervasive. While the 5th Circuit recognized that the ironworker’s facts

fell outside of the three previously enumerated circumstances, it reasoned that “every circuit to squarely consider the issue has held that the [three] categories are illustrative, not exhaustive, in nature.”

THE DECISION AND CONCLUSION

In evaluating whether the evidence showed that the superintendent discriminated “because of sex” the 5th Circuit looked to the superintendent’s subjective motivation. The 5th Circuit held that the superintendent was motivated by his belief that the employee was not sufficiently masculine. In reaching its decision, the court has opened another avenue for same-sex plaintiffs to prove sexual discrimination based solely on gender stereotyping evidence. Indeed, the fact that the superintendent discriminated against the ironworker for not fitting his perceived male stereotype amounted to sexual harassment.

Likewise, the court had no problems finding that the same evidence established a “severe” and “pervasive” disruption of the employee’s work environment, especially because the ironworker experienced such harassment daily. The court noted that Title VII workplace discrimination claims must be viewed with common sense and sensitivity to social context to determine whether the conduct is severe and pervasive.

Employer Takeaway

While this case may have created a difficult standard for courts to follow, the lesson for employers is that there is often a fine line between workplace banter and harassment. Employers must have specific policies in place that provide employees with a clear path to raising a complaint. Moreover, the employer must take prompt remedial action to address complaints of sexual harassment. Furthermore, appropriate corrective action must be taken to ensure any improper conduct is halted, and any appropriate disciplinary measures pursued. In short, Boh Brothers should serve as a cautionary tale to both employers and employees to refrain from gender based teasing in the workplace.

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