

“Locker Room” talk in All-Male Workplace Sexual Harassment, Fifth Circuit Rules

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In this space, we have reported recently on the series of rebuffs that the EEOC has received from various courts in recent months. But in *EEOC v. Boh Brothers Construction Company*, the [Fifth Circuit Court of Appeals](#) handed the EEOC a victory that serves to expand the meaning of what constitutes sexual harassment under [Title VII of the Civil Rights Act of 1964](#). In the September 27, 2013, *en banc* ruling, a 10-6 majority held that the crude sexual banter and ribbing of a heterosexual male worker by a heterosexual male supervisor could constitute sexual harassment under Title VII.

The employee, Woods, was an iron worker and structural welder. In a worker site that “was an undeniably vulgar place,” as the Fifth Circuit described it, Woods’ supervisor, Wolfe, and the other members of the crew, regularly used ‘very foul language’ and ‘locker room talk.’” After Woods revealed that he used “Wet Ones” instead of toilet paper at the work site, he was consistently targeted by Wolfe for being “kind of gay” and “feminine,” and was called a “princess,” a “pu-y,” and a “fa-ot,” two to three times per week.

In addition, Wolfe approached Woods from behind and simulated anal intercourse with him, exposed his penis to Woods while urinating, suggested that Woods perform fellatio on him, and made crude remarks about Woods’ daughter — all of which caused Woods to feel “embarrassed and humiliated.” The evidence suggested, however, that while Wolfe thought that Woods was “not manly enough,” he did not, in fact, believe Woods to be a homosexual. The evidence also suggested that Wolfe used similar language in speaking with other workers, and that vulgarity was commonplace there.

The EEOC initiated a suit against Boh Brothers, and a jury found that the employer was liable for damages arising from the sexual harassment of Woods by Wolfe. Boh Brothers appealed.

The Fifth Circuit held that a sexual harassment claim could be established by showing “evidence of sex-stereotyping” and thus “the EEOC may rely on evidence that Wolfe viewed Woods as insufficiently masculine to prove its Title VII claim.” In this, the Court held, the focus is on the alleged harasser’s subjective perception of the victim.

In other words, the Court did not “require a plaintiff to prop up his employer’s subjective discriminatory animus by proving that it was rooted in some objective proof; here, for example, that Woods was not, in fact, ‘manly.’” Here, Wolfe’s subjective belief that Woods was not manly enough was sufficient to establish that he harassed Woods “because of . . . sex,” as required under Title VII.

In so ruling, the Fifth Circuit explained that Title VII is not “a general civility code of the American workplace.” However, Judge E. Grady Jolly, in his dissent, accused the majority of doing just that: “The vulgarities can cast turmoil on a strong stomach, but that does not mean that the laws of the United States have been violated, and it does not require Title VII and the EEOC to serve as federal enforcer of clean talk in a single sex workforce.”

Indeed, the majority’s ruling provoked an angry response from the six dissenting circuit judges, all of whom effectively accused the Fifth Circuit of seeking to establish civility codes in the American workplace. The scathing dissent by Circuit Judge Edith H. Jones likewise noted:

“Vulgar speech is ubiquitous in today’s culture and is everywhere else protected from government dictat by the First Amendment. In the workplace, however, vulgar or offensive speech may now inspire litigation that costs employers hundreds of thousands of dollars to defend; may forever stigmatize the ‘harasser’ whose principal crime was bad taste; may be outlawed by workplace sensitivity training; and may subject workplaces to intrusive, court-ordered injunctive monitoring. In essence, this judgment portends a government-compelled workplace speech code.”

Judge Jones goes as far as attaching a fanciful memo of her own devising, from the legal department of the fictional “Apex Co.” to “Management” entitled “Etiquette For Ironworkers” (e.g., “10. Avoid touching any coworker in any manner, except if asked to rescue the person from physical danger, and even then, avoid touching private areas.”)

Judge Smith, in his dissent, concluded that it “is apparently the radical agency of the EEOC” to “dumb down American discourse, at least in the workplace, to avoid any chance that someone might be annoyed.”

As the above case demonstrates, the definition of sexual harassment in the work environment is only expanding with time. Employers must carefully review their sexual harassment policies to be sure to avoid the pitfalls of this law. Please contact the author if you have any questions regarding the above ruling, Title VII or sexual harassment in the workplace.

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