

# PUBLICATION

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## Fifth Circuit Hands Win to EEOC in Same-Sex Harassment

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**The EEOC won a significant victory on September 30, 2013, as the United States Court of Appeals for the Fifth Circuit, sitting *en banc*, reinstated a jury verdict finding that the defendant, Boh Brothers Construction Company, had illegally subjected an ironworker to same-sex harassment. See *EEOC v. Boh Brothers Construction Co., LLC*, No. 11-30770 (5th Cir. 9/27/2013).**

The EEOC filed the suit in the United States District Court for the Eastern District of Louisiana, alleging that a superintendent, Chuck Wolfe, harassed the complainant, Kerry Woods, with verbal abuse, sexual gestures, and by exposing himself. The two men were construction workers on a highway project near New Orleans, Louisiana. The EEOC presented evidence at trial that Wolfe harassed Woods because he thought he was feminine and that he did not conform to what Wolfe thought was a typical “rough ironworker.” The jury found for the EEOC, awarding more than \$450,000 in damages. The district court adjusted the award to \$300,000 to comply with the statutory cap. Boh Brothers appealed, and in April of 2012, a three-judge panel of the Fifth Circuit reversed the jury's verdict, finding that the EEOC had failed to establish that Wolfe had harassed Woods “because of sex” under Title VII of the Civil Rights Act of 1964. The EEOC filed for a rehearing *en banc*. The Fifth Circuit granted a rehearing and heard arguments in May of 2013.

In reversing the earlier panel, the Fifth Circuit for the first time held that harassment is “because of sex” if it is based on lack of conformity to gender stereotypes. The *en banc* majority, made up of 10 judges, found sufficient evidence that Woods was harassed because of his sex, and held that the critical consideration was the harasser's perception of the victim, not whether the evidence showed that the victim failed to conform with prevailing gender stereotypes.

The majority's opinion drew scathing dissents, which criticized the majority for pushing Title VII into a “new world” that bars not just sexual harassment, but other conduct that may not even resemble sexual harassment or discrimination. The dissenting judges expressed concern that the majority opinion would expand Title VII to require “a government-compelled workplace speech code.” Of course, the dissents recognized the practical issues associated with regulating the speech of predominantly male crafts like ironworking. The dissent even wrote a mock company memorandum, entitled “Etiquette for Ironworkers,” which banned phrases like “man up.”

The ramifications of the *Boh Brothers* decision are unclear. The decision certainly opens employers up to more same-sex harassment litigation, but the majority failed to provide much guidance for employers struggling to implement harassment policies. Employers have long struggled with trying to recognize conduct that violates the law, and as the dissent argued, it would seem that even horseplay could expose an employer to liability. More same-sex harassment lawsuits are now virtually guaranteed.

However, employers can learn something from *Boh Brothers*. The majority disapproved of Boh Brothers's apparent failure to take the harassment investigation seriously, as the company sent a general superintendent to interview two employees for about ten minutes each before concluding the supervisor's conduct was unprofessional but not unlawful. Conversely, the company hired a private investigator – who spent nearly 85 hours of work – to investigate Woods's allegation that Wolfe was stealing company resources. While an employer cannot insulate itself completely from liability, the Fifth Circuit has made it clear that employers

should implement a clear, comprehensive harassment and discrimination policy and take every complaint of harassment seriously.