

# One Minute Memo<sup>®</sup>



## Fifth Circuit: Title VII Prevents Same-Sex Harassment Based On Gender Stereotypes

Title VII prohibits workplace discrimination “because of sex,” and courts have long recognized a related cause of action when sexual harassment creates a hostile work environment. Recently, however, the Fifth Circuit held, by an *en banc* majority of ten judges, that harassment based on gender stereotypes is actionable harassment “because of sex” under Title VII. This means an employee can sue if he or she is harassed for failing to live up to the harasser’s expectations of how a man or woman should talk, dress, look, and act. As explained below, this decision raises new challenges for employers seeking to comply with Title VII.

### Case Background

In *EEOC v. Boh Brothers Construction Co.*, No. 11-30770 (5th Cir. Sept. 30, 2013), an ironworker on a bridge-maintenance crew was subjected to “almost-daily verbal and physical harassment because [he] did not conform to [the supervisor’s] view of how a man should act.” Among other things, his supervisor: (1) ridiculed him because he used baby wipes instead of traditional toilet paper; (2) called him “pu--y,” “princess,” and “fa--ot”; (3) stood behind him and simulated intercourse; (4) exposed his penis while waving and smiling; and (5) joked about forcing oral sex upon him. According to the majority, the evidence demonstrated that the supervisor thought the victim was not a “manly-enough man” and fell outside the supervisor’s “manly-man stereotype.”

Notably, the evidence did not follow any of the three traditional paths the Supreme Court recognized for addressing same-sex harassment. See *Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 80-81 (1998). The Fifth Circuit upheld the jury verdict even though (1) there was no evidence the harasser was homosexual or motivated by sexual desire; (2) there was no evidence the harasser was motivated by the general hostility towards a particular gender in the workplace; and (3) there was no evidence the harasser treated men and women differently.

The Fifth Circuit held that *Oncale*’s three evidentiary paths for proving same-sex harassment were merely “illustrative, not exhaustive. Same-sex harassment is “because of sex,” the court noted, if it is based on a perceived lack of conformity with gender stereotypes, and liability does not depend on whether the victim was in fact “manly.” Rather, liability turns on the harasser’s motivation, and harassment based on a perceived lack of masculine behavior is therefore actionable under Title VII. *Id.* at 14-17.

### Dissenting Opinions

The opinion triggered an extraordinary outpouring of four separate dissenting opinions. Judge Smith pointed out that the opinion “imposes an unsustainable burden on private employers in Texas, Louisiana, and Mississippi.” His dissent focused on

the practical upshot of the majority's ruling. Counsel for the plaintiff admitted at oral argument, for instance, that under his reasoning an employer would be liable if a supervisor commented, "Look, [Plaintiff is] wearing a pink shirt again."

Judge Jones's dissent highlighted the difficulty of identifying actionable conduct at predominately male-populated worksites, such as construction sites and oil/gas fields. In a mock company memorandum, entitled "Etiquette for Ironworkers," the dissent set forth company "rules" banning use of the phrase "man up" and prohibiting anyone from making fun of male coworkers for "not being able to eat a raw jalapeno."

Four strong dissents to an *en banc* ruling is a strong indicator that the Supreme Court may take up this issue, if asked. Furthermore, the various circuit courts that have addressed the issue of gender stereotyping are not in agreement and need the Supreme Court to provide guidance to district courts.

## Implications for Employers

The concern of the employer community is that this decision may transform Title VII from an anti-discrimination statute, to a general workplace civility code, inviting lawsuits on claims that did not exist before. The decision could have long reaching consequences for employers, particularly those in the construction and energy industries. We expect to see an uptick in gender-stereotyping cases. Therefore, employers should consider including this topic in training, and may wish to revisit language in their anti-harassment policies. Prompt remedial action is, of course, always wise when confronted with any alleged harassing behavior.

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