

Boh Brothers Construction: Harassment Game Changer?

by James B. Yates and Sarah E. Pawlicki

In *Equal Employment Opportunity Commission v. Boh Brothers Construction Company*, the Fifth Circuit Court of Appeals recently upheld a jury verdict in favor of a male-on-male sexual harassment case arising out of egregious facts and a supervisor's bad behavior on an all-male construction site. This same sex harassment case was brought by the EEOC under a "sex stereotyping" legal theory. The decision is one of the more interesting employment cases of 2013 for a variety of reasons. The sharply divided court addressed several nuanced legal and procedural issues and the decision is replete with valuable lessons for employers.

"Not For Tender Ears"

The dissenting opinion notes that the facts of the case are "not for tender ears." Indeed, in terms of bawdiness, the facts in the case rival Geoffrey Chaucer's "A Miller's Tale." Mr. Woods was an iron worker and structural welder performing bridge work in Louisiana after Hurricane Katrina. The majority opinion notes that the all-male construction worksite was "an undeniably vulgar place" where profanity, vulgarity and rude and crude behavior was commonplace. Mr. Wolfe, Woods' supervisor, was especially vulgar and crude and he referred to Woods as princess and queer (as well as other, more graphic, sex-based epithets) several times per day and he and others ridiculed Woods for admitting to using wet wipes instead of toilet paper on the job site. Wolfe exposed his genitals to Woods, sometimes while smiling and waving and, on numerous occasions, approached him from behind and pretended to "hump" Woods. Woods was ultimately removed from the job site and transferred after attempting to view the time records of co-workers and complaining about Wolfe's harassment and Wolfe's theft of company time and property. Woods filed charges of discrimination and retaliation over his removal from the job and his subsequent layoff. After a three-day trial, a jury returned a verdict in excess of \$450,000 which was later reduced by the trial court to conform with statutory damage caps.

Gender Stereotyping

The EEOC relied on a gender stereotyping argument, alleging that Wolfe harassed Woods on the basis of sex because Woods was not "manly enough." The United States Supreme Court noted that satisfying the "because of sex" requirement in a same-sex harassment case can be shown where:

1. The harasser was homosexual and the harassment was motivated by sexual desire; or
2. The harasser showed hostility toward the presence of a particular gender in the workplace; or
3. Where there is direct evidence of the harasser treating one sex differently.

None of the above legal theories was applicable because the workplace consisted of all heterosexual males.

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The Court's majority held that evidence of gender stereotyping could form the basis of a same-sex harassment case and that a reasonable juror could conclude that Wolfe's harassment was sufficiently severe and pervasive. Additionally, the Court noted that the Company could not successfully assert a defense to the harassment claim because the Company lacked "suitable institutional policies and educational programs regarding sexual harassment." The dissenting opinions disagreed that the plaintiff had proved that harassment occurred "because of sex," noting that all of the men on the all-male construction site engaged in "immature and gutter" behavior and cautioned that the majority opinion may now inspire increased litigation simply on the basis of vulgar and offensive speech, bawdy epithets or misunderstood humor.

Lessons For Employers

1. ***The "Equal Opportunity Harasser Defense" is a defense of last resort.*** The argument that a supervisor is mean to every employee is not all that persuasive in front of a jury. In fact, juries will relish the opportunity to punish the "mean supervisor" as well as the employer who continued to tolerate the mean supervisor's bad behavior.
2. ***Supervisory training is not optional.*** The impact (positive and negative) of an organization's front line supervisors cannot be overstated. Here, the Court noted that the supervisors received no training on how to investigate, document and resolve harassment complaints. Train them. Often.
3. ***EEO and anti-harassment written policies and employee training may be the difference between a large jury verdict or settlement and an employer obtaining a dismissal of the claim.*** In 1998 the U.S. Supreme Court instructed employers that equal employment opportunity and anti-harassment policies must be specific in terms of avoiding, reporting and correcting harassment. Broad, generic policies will not provide employers with a viable defense.
4. ***Communicate the policies and train employees.*** Woods testified that he did not see any Company policies regarding discrimination or harassment, although some notices (that the employees never read), were posted in a "shack" on the worksite.

Policies should be distributed upon hire, employees should read and understand those policies during orientation and the employer should obtain a written acknowledgement from the employee. The policies should be posted in conspicuous places and readily available to employees. Employees also should be trained periodically and employers should keep a record verifying the training.

The *Boh Brothers* decision and recent large verdicts in harassment cases should serve as a stark reminder of the value of well-written equal employment opportunity and anti-harassment policies and related training.

Should you have any questions in regards to harassment in the workplace, please contact [James B. Yates, Esq. SPHR](#) or [Sarah E. Pawlicki, Esq., SPHR](#). Or visit our web site www.eastmansmith.com.

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