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SAME-SEX HARASSMENT AFTER *BOH BROTHERS*

Alex Reed*

I. INTRODUCTION

The Fifth Circuit Court of Appeals created a marked circuit split with its decision in *Equal Employment Opportunity Commission v. Boh Brothers Construction Company*.¹ The court, sitting en banc, broke with its sister circuits and held that plaintiffs alleging same-sex harassment on the basis of gender stereotypes are not required “to prop up [their] employer’s subjective discriminatory animus by proving that it was rooted in some objective truth.”² A male plaintiff, therefore, need not establish that he is effeminate or insufficiently masculine under prevailing cultural norms to state a cognizable same-sex harassment claim on the basis of gender stereotypes. Likewise, a female plaintiff need not prove that she is macho or inadequately feminine in some objective sense to have a viable same-sex harassment claim. Rather, the Fifth Circuit determined that the proper focus in such cases is on the harasser’s subjective perception of the victim, and more specifically, whether the harasser subjectively perceived the victim as failing to conform to gender norms.³

Every circuit court to consider the issue prior to *Boh Brothers*, however, had determined that a plaintiff’s exhibition of objectively gender-nonconforming characteristics was necessary to raise an inference of actionable sex discrimination.⁴

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¹ 731 F.3d 444 (5th Cir. 2013) (en banc).

² *Id.* at 456–57.

³ *Id.* at 457.

⁴ See *Prowel v. Wise Bus Forms, Inc.*, 579 F.3d 285, 291–92 (3d Cir. 2009) (concluding that a male plaintiff who acknowledged speaking in a high voice, walking in an effeminate manner, and crossing his legs “the way a woman would sit” provided sufficient evidence of harassment on the basis of gender stereotypes); *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 764 (6th Cir. 2006) (affirming the dismissal of a same-sex harassment claim where the male plaintiff “failed to allege that he did not conform to traditional gender stereotypes in any observable way at work”); *Medina v. Income Support Div., N.M.*, 413 F.3d 1131, 1135 (10th Cir. 2005) (finding no same-sex harassment where “there [wa]s no evidence . . . that [the female plaintiff] did not dress or behave like a stereotypical woman”); *Nichols v. Azteca Rest. Enters., Inc.*, 256 F.3d 864, 874 (9th Cir. 2001) (holding that a male plaintiff who was mocked for, inter alia, “walking and carrying his tray ‘like a woman’” established a viable same-sex harassment claim); cf. *Lewis v. Heartland Inns of Am., L.L.C.*, 591 F.3d 1033,

These courts reasoned that a plaintiff alleging same-sex harassment on the basis of gender stereotypes must provide objective evidence of his or her gender nonconformity because without such evidence, “there would appear to be no basis for an alleged harasser to possess a subjective intent to discriminate against that victim because of nonconformance,” i.e., on the basis of the victim’s sex.⁵

Title VII of the Civil Rights Act of 1964 provides, in relevant part, that “[i]t shall be an unlawful employment practice for an employer . . . to discriminate against any individual with respect to . . . terms, conditions, or privileges of employment, *because of such individual’s . . . sex . . .*.”⁶ Although the statute does not address harassment specifically, plaintiffs may state a cognizable Title VII claim by proving that sex-based discrimination created a hostile or abusive working environment.⁷ To prevail on such a claim, a plaintiff must establish that (1) the plaintiff is a member of a protected class; (2) the plaintiff was subjected to unwelcome harassment; (3) the harassment was “because of . . . sex”; (4) the harassment was sufficiently severe or pervasive so as to alter the conditions of the plaintiff’s employment; and (5) the existence of a basis for employer liability.⁸

The “objective evidence” standard and “subjective perception” test represent two competing methodologies by which courts may assess gender-stereotyping evidence in same-sex harassment cases to determine whether discrimination occurred “because of sex.” Under the prevailing objective-evidence standard, if a male plaintiff could not prove that he “behaved in a stereotypically feminine manner” while at work,⁹ or could prove only that he was suspected of behaving in a stereotypically feminine manner outside of work,¹⁰ a court would find that he failed to state a viable same-sex harassment claim irrespective of the harasser’s personal beliefs regarding the plaintiff’s gender presentation. Similarly, if a female plaintiff was unable to show that she conducted herself in a stereotypically masculine manner while on the job or that her professional appearance was insufficiently feminine by conventional social standards,¹¹ a court would find that she failed to state a

1036 (8th Cir. 2010) (finding that the evidence supported an inference of gender stereotyping where the female plaintiff preferred to wear men’s button-down shirts and slacks, avoided makeup, wore her hair short, and had previously been mistaken for a male); *Dawson v. Bumble & Bumble*, 398 F.3d 211, 221 (2d Cir. 2005) (asserting that “one can fail to conform to gender stereotypes in two ways: (1) through behavior or (2) through appearance” and finding that the female plaintiff had not introduced any evidence that she was terminated for failing to conform her appearance to feminine stereotypes).

⁵ *Boh Bros.*, 731 F.3d at 472 (Jolly, J., dissenting).

⁶ 42 U.S.C. § 2000e-2(a) (2012) (emphasis added).

⁷ *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 65 (1986).

⁸ Nailah A. Jaffree, Note, *Halfway out of the Closet: Oncale’s Limitations in Protecting Homosexual Victims of Sex Discrimination*, 54 FLA. L. REV. 799, 809 (2002).

⁹ *Simonton v. Runyon*, 232 F.3d 33, 38 (2d Cir. 2000).

¹⁰ *See Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 763 (6th Cir. 2006) (finding harassment was predicated on the plaintiff’s “supposed sexual practices,” which the court noted “is not behavior observed at work”).

¹¹ *Dawson v. Bumble & Bumble*, 398 F.3d 211, 221 (2d Cir. 2005).

cognizable same-sex harassment claim without considering whether she was subjectively perceived as gender nonconforming by her harassers.

To date, the objective-evidence standard has constituted an almost insurmountable hurdle for plaintiffs alleging same-sex harassment on the basis of gender stereotypes. A search of federal court decisions issued between March 1998 and March 2013 reveals only nine instances in which plaintiffs were able to satisfy the objective-evidence standard.¹² Consequently, many employers have failed to amend their antiharassment policies to prohibit same-sex harassment on the basis of gender stereotypes and have declined to train their employees on the fact that same-sex harassment need not be motivated by sexual desire in order to violate federal antidiscrimination laws, apparently believing that the associated human resources costs stand to outweigh any corresponding reduction in their legal exposure.¹³

Because *Boh Brothers* ostensibly represents the first faithful application of the gender-stereotyping theory in the context of same-sex harassment litigation, however, additional courts may elect to abandon the objective-evidence standard in favor of adopting the Fifth Circuit's subjective-perception test. Indeed, the Supreme Court has indicated that the critical inquiry in gender-stereotyping cases is whether the defendant—based on the defendant's own idiosyncratic beliefs as to the proper roles for men and women—regarded the plaintiff as gender nonconforming and discriminated against the plaintiff on that basis.¹⁴ The standard articulated in *Boh Brothers* thus appropriately seeks to reorient the focus in these cases to whether the harasser subjectively perceived the harassee as failing to conform to gender norms regardless of whether the harassee may be said to contravene gender stereotypes in some objective sense.

For employers, the subjective-perception test would seem to herald a significant expansion of liability. Consider the following hypothetical: Bill is a forty-five-year-old man who works at a manufacturing plant. He has been married to the same woman for twenty years, and he and his wife have two children together. Bill has a deep, commanding voice evocative of Charlton Heston and a steady, self-assured demeanor reminiscent of John Wayne. His interests include hunting, fishing, home improvement, auto repair, and amateur boxing. An impressive specimen physically, Bill stands over six feet, two inches tall and weighs 185 pounds. Although he has lost some strength since his high school football days, he can still curl 60 pounds, bench press 210 pounds, and squat 290 pounds. Bill has a thick, full beard and his tanned, leathery skin is covered with tattoos. He has had the same short, military-style haircut ever since his three-year stint in the Marines and the only clothes he ever wears are jeans, cowboy boots, and a plain white t-shirt.

Recently, Bill's foreman at the plant has been giving him a hard time. Steve, the foreman, has started referring to Bill as "Baby Doll," "Princess," and

¹² Jessica A. Clarke, *Inferring Desire*, 63 DUKE L.J. 525, 536–38 (2013).

¹³ Gary Namie & Ruth Namie, *Workplace Bullying: How to Address America's Silent Epidemic*, 8 EMP. RTS. & EMP. POL'Y J. 315, 315–17 (2004).

¹⁴ *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250 (1989).

“Sweetheart.” If Bill appears to be tired or in a bad mood, Steve will ask him, “Is it that time of the month again?” or “What’s the matter? Did you run out of Pamprin?”¹⁵ Additionally, one to two times per week Steve will steal Bill’s sandwich out of his lunchbox, press the sandwich against his groin, and call out Bill’s name as he thrusts his hips against the sandwich in a provocative manner. Worst of all, whenever Steve notices Bill step into a bathroom stall, Steve will stand just outside the door, periodically rattle the latch, and whisper for Bill to unlock the door so that Steve can show him “what it’s like to be with a real man.”

Bill and Steve have worked together for the last ten years, but Steve only began giving Bill trouble after Bill acknowledged that the Pittsburgh Steelers were his favorite professional football team. Steve dismissed the Steelers as “a bunch of damned sissies” and asserted “only teenage girls like the Steelers.” In addition to the aforementioned conduct, Steve will periodically warn Bill that if “Ben Roethlisberger asks you out on a date this weekend make sure you take your pepper spray.”¹⁶

If Bill were to file a charge of discrimination with the Equal Employment Opportunity Commission (EEOC), a court applying the subjective-perception test would likely find that he had a viable same-sex harassment claim given that the harassing conduct was ostensibly motivated by Steve’s perception of Bill as a gender-nonconforming man. Bill’s inability to furnish objective proof of his gender nonconformity would have no bearing on the court’s analysis. The fact that Bill outwardly conforms to stereotypical male gender norms in terms of his appearance and behavior would be equally irrelevant. Rather, the court would limit its analysis to whether Steve subjectively perceived Bill as effeminate once Bill identified the Pittsburgh Steelers as his favorite NFL team. In jurisdictions utilizing a subjective-perception test, Steve’s use of sexist epithets, obscene gestures, and sexualized remarks would almost certainly support an inference of sex-based discrimination sufficient to withstand an employer’s summary judgment motion.

Slight variations to the fact pattern illustrate that an objectively gender-conforming individual may be perceived as contravening gender stereotypes for an almost infinite variety of reasons. Assume that Steve was indifferent to Bill’s affinity for the Steelers and instead began mistreating Bill after observing him order a Miller-brand beer at a local bar. If Bill could show that Steve, for whatever reason, subjectively perceived Miller to be an effeminate brand of beer—perhaps on the belief that “real men” drink Budweiser—a court would likely find that Bill had a cognizable same-sex harassment claim. Alternatively, assume that Steve began mistreating Bill only after Bill disclosed that he had never been unfaithful to his

¹⁵ Pamprin is an over-the-counter drug designed to alleviate menstrual pain. PAMPRIN, <http://www.pamprin.com/product/multi-symptom.html> [<https://perma.cc/29A8-G4L9>] (last visited March 11, 2016).

¹⁶ See Judy Battista, *Roethlisberger Isn’t Charged, But the N.F.L. Could Act*, N.Y. TIMES, Apr. 13, 2010, at B11 (reporting that Pittsburgh Steelers quarterback Ben Roethlisberger would not face criminal charges for allegedly raping a female college student).

wife. If Bill could prove that Steve regarded marital fidelity in men as an effeminate characteristic¹⁷—perhaps on the belief that “real men” have such voracious sexual appetites that they necessarily must seek out sexual encounters with women who are not their wives—a court would likely find that Bill had a viable same-sex harassment claim. Conversely, assume that Steve only began mistreating Bill after Bill acknowledged that he wears a beard because he likes “the hipster look.”¹⁸ Whereas Steve may generally regard beards as a potent symbol of masculinity, if Bill could show that Steve perceived Bill’s motivation for wearing a beard as effeminate to the extent it was based on fashion considerations, a court would likely find that Bill had a cognizable same-sex harassment claim.

Thus, by eliminating the requirement that harasses exhibit readily observable, objectively gender-nonconforming characteristics in the workplace while at the same time mandating that courts conduct a rigorous, fact-intensive inquiry into the subjective beliefs and perceptions of individual harassers, the subjective-perception test would seem to portend a significant expansion of employer liability. Yet, employers in jurisdictions utilizing a subjective-perception test need not resign themselves to paying out multimillion-dollar settlements anytime they are confronted with a same-sex harassment claim.

This Article examines the subjective-perception test’s implications for same-sex harassment jurisprudence and concludes that while the test seemingly reflects a correct application of the law so that additional courts may elect to follow the Fifth Circuit’s lead, employers in these jurisdictions can take steps to prevent same-sex harassment and limit their legal exposure post-*Boh Brothers*. Part II discusses the “because of sex” requirement in the context of same-sex harassment litigation generally, and as applied to gender-stereotyping evidence specifically. Part III traces *Boh Brothers*’ progression from the initial jury verdict in the plaintiff’s favor to the vacatur of that judgment by a panel of the Fifth Circuit Court of Appeals and finally to the affirmance of that portion of the judgment imposing liability by an en banc panel of the Fifth Circuit. Part IV demonstrates that *Boh Brothers* stands to bring doctrinal consistency to the Supreme Court’s same-sex harassment and gender-stereotyping jurisprudence so that other circuits may abandon the objective-evidence standard in favor of adopting the subjective-perception test. Part V considers the subjective-perception test’s implications for employers and observes that, in the absence of remedial measures, employers’ legal exposure is likely to increase markedly. Part VI then proposes a series of reforms designed to deter employees

¹⁷ See Nina Bahadur, *Muscle Dysmorphia and Male Anorexia Linked to Gender Role Endorsements, Study Finds*, HUFFINGTON POST (Mar. 30, 2013), http://www.huffingtonpost.com/2013/03/28/muscle-dysmorphia-male-anorexia-gender-role_n_2972757.html [https://perma.cc/HS3Z-ZPDP] (identifying “sexual fidelity” as a feminine gender trope).

¹⁸ See Steven Kurutz, *Caught in the Hipster Trap*, N.Y. TIMES, Sept. 15, 2013, at SR9 (identifying beards as the hallmark of male hipsters); see also John Kass, *Beard Transplants Killed the Hipster*, CHI. TRIB., Feb. 28, 2014, at D5 (contending that the popularity of beard transplants among urban males suggests the hipster phenomenon is primarily a fashion trend rather than a broader social movement).

from engaging in same-sex harassment on the basis of gender stereotypes in the first instance while mitigating the likelihood of employer liability should such harassment nevertheless occur.

II. THE “BECAUSE OF SEX” REQUIREMENT

The amount of proof that is necessary to satisfy the “because of sex” requirement varies depending on whether the harasser and harassee are of the same or opposite sex. In cases of opposite-sex harassment, “courts have readily inferred the requisite sex-based causal nexus from the nature of the harassment itself when the harassment invokes gender-stereotypes or entails sexualized interactions that reinforce and perpetuate gender hierarchies.”¹⁹ Indeed, Katherine Franke has observed that “[i]n the traditional scenario, where a man has engaged in unwelcome and offensive sexual conduct toward a woman in the workplace . . . many courts intone the ‘because of sex’ element and then never discuss it again.”²⁰ Conversely, the “because of sex” requirement often assumes dispositive significance in same-sex harassment cases. As noted by Andrea Kirshenbaum, “[w]ith the inference implicit in the traditional paradigm no longer available to do the heavy lifting, the ‘because of sex’ requirement . . . loom[s] large as a major obstacle to success for plaintiffs alleging same-sex sexual harassment.”²¹ Thus, the “because of sex” requirement constitutes a significant evidentiary hurdle in same-sex harassment cases that few plaintiffs are able to overcome, whereas courts are generally prepared to assume that opposite-sex harassment is a necessary consequence of the victim’s sex.

The origins of this disparity are traceable to *Oncale v. Sundowner Offshore Services, Inc.*,²² the 1998 case wherein the Supreme Court first held that same-sex harassment is actionable under Title VII.²³ Justice Scalia, writing for a unanimous Court, identified three evidentiary routes by which plaintiffs in same-sex harassment cases may satisfy the “because of sex” requirement: first, through credible evidence that the harasser was homosexual so as to permit an inference the harassment was motivated by sexual desire; second, by showing that the harasser was generally hostile to the presence of the plaintiff’s sex in the workplace; or third, via direct comparative evidence demonstrating that the harasser treated men and women differently.²⁴ Justice Scalia was careful to note that “[w]hatever evidentiary route the

¹⁹ Hilary S. Axam & Deborah Zalesne, *Simulated Sodomy and Other Forms of Heterosexual “Horseplay”*: Same Sex Sexual Harassment, Workplace Gender Hierarchies, and the Myth of the Gender Monolith Before and After *Oncale*, 11 YALE J.L. & FEMINISM 155, 164 (1999).

²⁰ Katherine M. Franke, *What’s Wrong with Sexual Harassment?*, 49 STAN. L. REV. 691, 718 (1997).

²¹ Andrea Meryl Kirshenbaum, *“Because of . . . Sex”*: Rethinking the Protections Afforded Under Title VII in the Post-*Oncale* World, 69 ALB. L. REV. 139, 160 (2006).

²² 523 U.S. 75 (1998).

²³ *Id.* at 79.

²⁴ *Id.* at 80–81.

plaintiff chooses to follow, he or she must always prove that the conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted ‘discrimination because of sex.’”²⁵

Although Justice Scalia acknowledged that harassing conduct need not be motivated by sexual desire to support an inference of sex discrimination, an examination of fifteen years’ worth of case law confirms that most of the plaintiffs who have satisfied the “because of sex” requirement relied on evidence of the harasser’s real or perceived homosexuality.²⁶ Of the 236 opinions issued between March 1998 and March 2013 in which a federal court made a specific determination on the “because of sex” requirement, plaintiffs in forty-one cases prevailed under *Oncale*’s first evidentiary route, plaintiffs in five cases prevailed under *Oncale*’s second evidentiary route, and plaintiffs in sixteen cases prevailed under *Oncale*’s third evidentiary route.²⁷ Thus, approximately one quarter of plaintiffs in same-sex harassment cases have been able to satisfy the “because of sex” requirement using one of the three evidentiary routes listed in *Oncale*, with two thirds of these plaintiffs having relied on credible evidence of the harasser’s homosexuality. This has led one commentator to deride *Oncale* as “providing valuable protection to the straight . . . population from the predatory desires of gay[s and lesbians].”²⁸

Justice Scalia did not include “evidence of gender stereotyping” among his proffered routes, but a growing number of courts are willing to consider such evidence as proof that the harassment constituted discrimination “because of sex.”²⁹ This is not altogether surprising given that every circuit court of appeals to consider the issue has found that the *Oncale* categories were intended to be illustrative rather

²⁵ *Id.* at 81.

²⁶ Clarke, *supra* note 12, at 536–37.

²⁷ *Id.*

²⁸ Chris Diffie, *Going Offshore: Horseplay, Normalization, and Sexual Harassment*, 24 COLUM. J. GENDER & L. 302, 315 (2013).

²⁹ *E.g.*, *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 765 (6th Cir. 2006); *Medina v. Income Support Div., N.M.*, 413 F.3d 1131, 1134–35 (10th Cir. 2005); *Nichols v. Azteca Rest. Enters.*, 256 F.3d 864, 874–75 (9th Cir. 2001); *Bibby v. Phila. Coca-Cola Bottling Co.*, 260 F.3d 257, 262–64 (3d Cir. 2001); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 259–60, 261 n.4 (1st Cir. 1999); *Doe v. City of Belleville*, 119 F.3d 563, 581 (7th Cir. 1997). Significantly, “[n]o court of appeals has held that a plaintiff alleging same-sex harassment cannot meet the because-of-sex requirement with gender-stereotyping evidence.” Brief of Appellee at 31, *EEOC v. Boh Bros. Constr. Co.*, 689 F.3d 458 (5th Cir. 2012), *rev’d en banc*, 731 F.3d 444 (5th Cir. 2013) (No. 11-30770).

than exhaustive.³⁰ Even so, outside of gender stereotyping, “very few cases have looked beyond the three evidentiary routes listed in *Oncale*”³¹

The Supreme Court first recognized the gender-stereotyping theory of sex discrimination in the 1989 case of *Price Waterhouse v. Hopkins*.³² Following an unsuccessful partnership bid, Ann Hopkins was encouraged by her employer to “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.”³³ Hopkins responded by suing her employer on a gender-stereotyping theory of sex discrimination, and the Supreme Court thereafter ruled in her favor, stating:

[W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for “[i]n forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.”³⁴

Because *Oncale* did not reference the gender-stereotyping theory of sex discrimination generally or the *Price Waterhouse* decision specifically, lower courts have struggled to determine when and under what circumstances victims of same-sex harassment may rely on evidence of gender stereotyping to satisfy the “because of sex” requirement. Most courts have opted to pursue a relatively conservative approach to the extent they would define the gender-stereotyping theory’s outer bounds in terms of the specific factual circumstances of *Price Waterhouse*.³⁵ These courts utilize the objective-evidence standard and require proof that an individual contravened gender norms in some highly visible, objective sense even where there

³⁰ *E.g.*, *Vickers*, 453 F.3d at 762–65; *Pedroza v. Cintas Corp.*, 397 F.3d 1063, 1068 (8th Cir. 2005); *Bibby*, 260 F.3d at 262–64; *Shepherd v. Slater Steels Corp.*, 168 F.3d 998, 1007–09 (7th Cir. 1999). *See also* Matthew Clark, *Stating a Title VII Claim for Sexual Orientation Discrimination in the Workplace: The Legal Theories Available After Rene v. MGM Grand Hotel*, 51 UCLA L. REV. 313, 318 n.45 (2003) (asserting that “the text of *Oncale* makes clear . . . that its evidentiary routes are not exclusive”); Clare Diefenbach, *Same-Sex Sexual Harassment After Oncale: Meeting the “Because of . . . Sex” Requirement*, 22 BERKELEY J. GENDER L. & JUST. 42, 74 (2007) (noting “many courts have agreed [that] this list of example routes was not meant to be exhaustive”).

³¹ Diefenbach, *supra* note 30, at 70.

³² 490 U.S. 228, 250–51 (1989).

³³ *Id.* at 231–35.

³⁴ *Id.* at 251.

³⁵ *See, e.g.*, *Medina v. Income Support Div., N.M.*, 413 F.3d 1131, 1135 (10th Cir. 2005) (finding that a female plaintiff was not entitled to relief on a gender-stereotyping theory of sex discrimination where she failed to introduce evidence that she “did not dress or behave like a stereotypical woman”).

is evidence the harasser subjectively perceived the individual as gender nonconforming and discriminated against the individual on that basis.³⁶

In contrast, the Fifth Circuit Court of Appeals ostensibly has taken a more holistic approach in seeking to harmonize the gender-stereotyping theory of same-sex harassment with the Court's broader antidiscrimination jurisprudence. This latter approach is reflected in the Fifth Circuit's adoption of the subjective-perception test, which absolves plaintiffs of having "to prop up [their] employer's subjective discriminatory animus by proving that it was rooted in some objective truth."³⁷ The subjective-perception test has its origins in *Equal Employment Opportunity Commission v. Boh Brothers Construction Company*, which is the focus of Part III below.

III. *EEOC v. BOH BROTHERS CONSTRUCTION COMPANY*

In *Equal Employment Opportunity Commission v. Boh Brothers Construction Company*,³⁸ the Fifth Circuit Court of Appeals rejected the prevailing objective-evidence standard for assessing gender-stereotyping evidence in same-sex harassment litigation and concluded that the proper focus in such cases is on the harasser's subjective perception of the victim, and more specifically, whether the harasser subjectively perceived the victim as contravening gender norms.³⁹ The Fifth Circuit's ruling was far from unanimous, however, with six of the sixteen judges signing onto a series of blistering dissents.

A. *Facts and Procedural Posture*

Kerry Woods was hired by Boh Brothers Construction Company to work as a structural welder on an all-male bridge repair crew.⁴⁰ The crew superintendent was a man named Chuck Wolfe, and he oversaw a worksite in which he and his crew used "very foul language" and were prone to "locker room talk."⁴¹ Wolfe was "a primary offender" when it came to vulgarity, with crew members describing him as "rough" and "mouthy."⁴²

³⁶ See cases cited *supra* note 4.

³⁷ *EEOC v. Boh Bros. Constr. Co.*, 731 F.3d 444, 456–57 (5th Cir. 2013) (en banc).

³⁸ 731 F.3d 444 (5th Cir. 2013) (en banc).

³⁹ *Id.* at 471–72.

⁴⁰ *Id.* at 449.

⁴¹ *Id.*

⁴² *Id.* Boh Brothers described Wolfe as "an equal opportunity boor" who "was crass and rude to everyone in the workplace." Original Brief of Defendant-Appellant at 29, *EEOC v. Boh Bros. Constr. Co.*, 689 F.3d 458 (5th Cir. 2012) (No. 11-30770) [hereinafter *Boh Brothers' Original Brief*]. In seeking to depict Wolfe as an equal opportunity harasser, the company asserted that his abusive conduct was "equally distributed among gender, nationality, and sexual orientation." *Id.* See also Michael E. Chaplin, *Workplace Bullying: The Problem and the Cure*, 12 U. PA. J. BUS. L. 437, 449 (2010) (noting that "equal

Within a few months, however, Wolfe began to direct his abuse almost exclusively at Woods.⁴³ Approximately two to three times per day Wolfe would refer to Woods as “pu--y,” “princess,” or “fa--ot,” and approximately two to three times per week, Wolfe would approach Woods from behind and simulate anal sex.⁴⁴ Additionally, Wolfe exposed his penis to Woods on approximately ten occasions while urinating off of bridges, sometimes waving at Woods and smiling as he did so.⁴⁵ On another occasion, Woods awoke from a nap in his car to find Wolfe standing just outside the driver’s side door.⁴⁶ According to Woods, Wolfe appeared to be zipping up his pants and, upon seeing that Woods was awake, said something to the effect of “if your door wouldn’t have been locked, my d-ck probably would have been in your mouth.”⁴⁷

This more targeted form of abuse began after Woods acknowledged that he preferred to use Wet Ones⁴⁸ rather than toilet paper, an inclination Wolfe viewed as “kind of gay” and “feminine.”⁴⁹ Wolfe explained the basis for this belief in a subsequent EEOC interview:

Mr. Woods sat at a table with a bunch of iron workers and told us that he brought, you know, feminine wipes—not feminine wipes—but Wet Ones or whatever to work with him because he didn’t like it, didn’t like to use toilet paper. It’s [not] the kind of thing you’d want to say in front of a bunch [of] rough iron workers. They all picked on him about it. They said that’s kind of feminine to bring these, that’s for girls. To bring Wet Ones to work to wipe your ass, you damn sure don’t sit in front of a bunch of iron workers and tell them about it. You keep that to yourself if in fact that’s what you do.⁵⁰

opportunity harassers (i.e., those who are jerks regardless of race, sex, etc.) may harass with impunity”).

⁴³ *Boh Bros.*, 731 F.3d at 449.

⁴⁴ *Id.* Boh Brothers asserted that “Wolfe and other witnesses provided undisputed evidence that Wolfe referred to other members of the crew in the same manner” and offered “undisputed evidence that Wolfe [feigned anal intercourse with] at least three other members of the crew.” Reply Brief of Defendant-Appellant at 2, *EEOC v. Boh Bros. Constr. Co.*, 689 F.3d 458 (5th Cir. 2012) (No. 11-30770) [hereinafter *Boh Brothers’ Reply Brief*].

⁴⁵ *Boh Bros.*, 731 F.3d at 449–450.

⁴⁶ *Id.* at 450.

⁴⁷ *Id.* Wolfe characterized the incident as a joke. Boh Brothers’ Original Brief, *supra* note 42, at 26.

⁴⁸ Wet Ones Fresh ‘n Flush personal hygiene wipes were manufactured by Playtex Products until their discontinuation in 2013. Wet Ones Fresh ‘n Flush, <http://web.archive.org/web/20130905031159/http://www.wetones.com/FreshandFlush.aspx> [https://perma.cc/B79U-ARF5] (last visited June 1, 2014).

⁴⁹ *Boh Bros.*, 731 F.3d at 450.

⁵⁰ *Id.* The manufacturer’s advertisement for Wet Ones Fresh ‘n Flush read as follows: “Try the refreshing way to wipe. Sensitive areas deserve gentle handling. Wet Ones Fresh ‘n Flush personal hygiene wipes are large and soft, soothing as they thoroughly clean. Alcohol-

Approximately one year after being hired, Woods was laid off for lack of work.⁵¹ Woods thereafter filed a charge of discrimination with the EEOC, accusing Boh Brothers of sexual harassment.⁵² Following a three-day trial, a jury found in favor of Woods on his sexual harassment claim and awarded him \$201,000 in compensatory damages and \$250,000 in punitive damages.⁵³ Boh Brothers then filed a renewed motion for judgment as a matter of law and a motion for a new trial, both of which were denied.⁵⁴

B. The Panel Decision

On appeal, Boh Brothers argued that the district court had erred in denying its renewed motion for judgment as a matter of law.⁵⁵ The company maintained that the three evidentiary routes of *Oncale* were the exclusive means by which plaintiffs in same-sex harassment cases may satisfy the “because of sex” requirement.⁵⁶ The district court, therefore, allegedly committed reversible error in allowing the EEOC to rely on gender-stereotyping evidence to demonstrate the sex-based nature of the harassment.⁵⁷ Alternatively, Boh Brothers argued that the EEOC’s gender-stereotyping evidence was insufficient to sustain the jury verdict in Woods’s favor.⁵⁸

In regard to Boh Brothers’ first argument, the Panel noted that “although other circuits uniformly have allowed evidence of sex stereotyping in considering discrimination claims under Title VII, there is at least some resistance to allowing, in same-sex harassment suits, evidence that does not fall within any *Oncale* category.”⁵⁹ The Panel then traced the origins of the gender-stereotyping theory and

free and hypoallergenic, they deliver an ultra-smooth combination of Witch Hazel, Vitamin E and Aloe so they won’t irritate your skin.” Wet Ones Fresh ‘n Flush, <http://www.wetones.com/FreshandFlush.aspx> [<https://perma.cc/B79U-ARF5>] (last visited June 1, 2016).

⁵¹ *Boh Bros.*, 731 F.3d at 451.

⁵² *Id.*

⁵³ *Id.* (“The District Court reduced the compensatory damages award to \$50,000 to comply with the \$300,000 statutory damages cap.”).

⁵⁴ *Id.*

⁵⁵ Boh Brothers’ Original Brief, *supra* note 42, at 8.

⁵⁶ *Id.* at 11–16.

⁵⁷ *Id.* at 16–23.

⁵⁸ *Id.* at 24–38.

⁵⁹ *EEOC v. Boh Bros. Constr. Co.*, 689 F.3d 458, 461–62 (5th Cir. 2012). In support of this proposition, the Panel cited one Sixth Circuit opinion: *Wasek v. Arrow Energy Services, Inc.*, 682 F.3d 463 (6th Cir. 2012). Although *Wasek* seemingly regarded the three *Oncale* routes as the exclusive means of satisfying the “because of sex” requirement, the Sixth Circuit did not address the issue directly because the plaintiff’s claim was found to implicate *Oncale*’s first category. *Id.* at 467–68. Additionally, *Wasek* was an unreported decision, whereas *Vickers v. Fairfield Medical Center*, 453 F.3d 757, 763–65 (6th Cir. 2006), a case in which the Sixth Circuit acknowledged the availability of additional evidentiary routes beyond those identified in *Oncale*, was a reported decision and is therefore controlling under

observed that “[t]he case before us stands in sharp contrast to *Price Waterhouse*, in which there was considerable evidence that the plaintiff did not conform to the female stereotype.”⁶⁰ Indeed, the only indication that Woods did not adhere to traditional notions of masculinity was that he preferred to use Wet Ones rather than toilet paper, a fact that did “not strike [the Panel] as overtly feminine.”⁶¹ Because there was insufficient evidence of gender stereotyping to establish Woods’s same-sex harassment claim, the Panel declined to address the broader question of whether plaintiffs may rely on gender-stereotyping evidence to satisfy the “because of sex” requirement.⁶²

Accordingly, the Panel vacated the judgment and remanded the case to the district court with instructions that the complaint be dismissed.⁶³ The EEOC thereafter sought and obtained en banc review.⁶⁴

C. *The En Banc Decision*

The Fifth Circuit, sitting en banc, rejected Boh Brothers’ argument that the EEOC could not, as a matter of law, rely on gender-stereotyping evidence to establish a same-sex harassment claim.⁶⁵ The court noted that every circuit to consider the issue had determined that *Oncale*’s evidentiary routes were meant to be illustrative rather than exhaustive.⁶⁶ After independently examining the opinion’s text, the Fifth Circuit agreed with this interpretation and held that plaintiffs in same-sex harassment cases are not restricted to the three evidentiary routes identified in *Oncale*.⁶⁷ Moreover, because *Oncale* did not purport to overturn or otherwise restrict the relevancy of *Price Waterhouse* in the context of same-sex harassment litigation, the Fifth Circuit found that the EEOC was entitled to rely on gender-stereotyping evidence to prove that Woods was subjected to sex discrimination.⁶⁸

circuit rules. 6TH CIR. R. 206(c).

⁶⁰ *Boh Bros.*, 689 F.3d at 462.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.* at 463.

⁶⁴ *EEOC v. Boh Bros. Constr. Co.*, 712 F.3d 883, 884 (5th Cir. 2013).

⁶⁵ *EEOC v. Boh Bros. Constr. Co.*, 731 F.3d 444, 453 (5th Cir. 2013) (en banc).

⁶⁶ *Id.* at 455.

⁶⁷ *Id.* at 455–56. The Fifth Circuit noted that the Supreme Court used the phrase “for example” when identifying the second evidentiary route as an instance in which the sex-based nature of the harassment could be inferred notwithstanding the absence of sexual desire. *Id.* Additionally, the court found it significant that the Supreme Court, after listing the three evidentiary paths, stressed that “[w]hatever evidentiary route the plaintiff chooses to follow, he or she must *always* prove that the conduct at issue . . . actually constituted *discrimina[tion]* . . . because of . . . sex.” *Id.* at 455 (alteration in original) (internal quotation marks omitted) (citing *Oncale v. Sundowner Offshore Serv., Inc.*, 523 U.S. 75, 80–81 (1998)).

⁶⁸ *Id.* at 456.

In regard to Boh Brothers' second argument—that the evidence was insufficient to sustain a finding of sex-based harassment—the Fifth Circuit stated:

In conducting this intent-based inquiry, we focus on the alleged harasser's subjective perception of the victim . . . We do not require a plaintiff to prop up his employer's subjective discriminatory animus by proving that it was rooted in some objective truth; here, for example, that Woods was not, in fact, "manly." Rather, in considering the motivation behind a harasser's behavior, we look to evidence of the harasser's subjective view of the victim.⁶⁹

Applying these principles here, and drawing all reasonable inferences in the light most favorable to the verdict, there is enough evidence to support the jury's conclusion that Wolfe harassed Woods because of sex. Specifically, the EEOC offered evidence that Wolfe, the crew superintendent, thought that Woods was not a manly-enough man and taunted him tirelessly. Wolfe called Woods sex-based epithets like "fa—ot," "pu—y," and "princess," often "two to three times" per day[, and] Wolfe himself admitted that these epithets were directed at Woods's masculinity.⁷⁰

....

In addition to this name-calling, Wolfe mocked Woods with several other sexualized acts. For example, Woods testified that Wolfe would approach him from behind and "hump" him two to three times per week (which equates to more than 60 instances of simulated anal sex), that Wolfe exposed his genitals to Woods (sometimes while smiling and waving) about ten times, and that Wolfe suggested that he would put his penis in Woods's mouth.⁷¹

A reasonable juror, therefore, could have viewed Wolfe's behavior as an attempt to denigrate Woods for not adhering to Wolfe's stereotypical notions of masculinity,⁷² leading the Fifth Circuit to affirm the judgment for Woods on the issue of liability.⁷³

⁶⁹ *Id.* at 456–57.

⁷⁰ *Id.* at 457.

⁷¹ *Id.* at 459. Judge Jolly's dissent and Judge Jones's dissent were found to "operate from a different record" in that "they either ignore this evidence, or construe it against—not in favor of—the jury verdict." *Id.* at 459 n.13.

⁷² *Id.* at 459–60.

⁷³ *Id.*

D. The Dissents

The six judges in the minority authored a series of dissents that were especially pointed in their criticism of the majority's rationale and holding. Judge Jolly, for instance, accused the majority of "untether[ing] Title VII from its current mooring in sexual discrimination" so that "[i]ts application now veers from the realm of valid action against actual *sexual* harassment to a new world, in which Title VII prevents not only sexual harassment, but also myriad other undesirable conduct—regardless of whether that conduct, in fact, even resembles *sexual discrimination*."⁷⁴ Although Judge Jolly conceded that evidence of gender stereotyping may in some instances satisfy the "because of sex" requirement, he asserted that "there is simply no evidence, garnered from Woods, Wolfe, or any of the other men who testified, that Woods failed objectively to conform to traditional 'male gender norms.'"⁷⁵

Judge Jones wrote a separate dissent highlighting the economic harms that stood to befall employers under the majority's subjective-perception test.⁷⁶ She began by observing that "[v]ulgar speech is ubiquitous in today's culture and is everywhere else protected from government diktat by the First Amendment," whereas "vulgar or offensive speech [in the workplace] 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."⁷⁷

Judge Jones went so far as to prepare a faux memorandum setting forth various rules and policies employers may wish to adopt in light of the majority's decision.⁷⁸ The memorandum is written in an overtly sarcastic tone and is designed to imply that, notwithstanding the Supreme Court's admonitions to the contrary, the majority would seek to transform Title VII into a general civility code. For example, one of the proposed rules for all-male worksites warns that "some workers may be put off by jokes about personal grooming, scented deodorant, chest hair, or clothing as a form of gender hostility" and goes on to suggest that "[p]oking fun at a worker for drinking a diet soda, not being able to eat a raw jalapeno, using 'Wet Ones' or 'Purell' to clean himself, or calling someone a 'wimp' or 'wuss' or 'geek' may get us sued"⁷⁹ The memorandum concludes with a recommendation that employees

⁷⁴ *Id.* at 470 (Jolly, J., dissenting).

⁷⁵ *Id.* at 471–72. Boh Brothers never argued that objective evidence of Woods's gender nonconformity was necessary for the EEOC to prevail. Rather, the company acknowledged that "[t]he EEOC had to establish that Wolfe had a specific discriminatory animus against Woods based on sex because of Woods' gender non-conformity to Wolfe's view of what a man should be like." Brief of Appellant at 29, *EEOC v. Boh Bros. Constr. Co.*, 731 F.3d 444 (5th Cir. 2013) (No. 11-30770), 2011 WL 5154957, at *29.

⁷⁶ *Boh Bros.*, 731 F.3d at 475 (Jones, J., dissenting).

⁷⁷ *Id.* at 475–76.

⁷⁸ *See id.* at 482–84 (attaching "Etiquette for Ironworkers" memorandum).

⁷⁹ *Id.* at 484.

be advised to contact the company's "newly hired Sex Stereotype Counsellor in the HR Department" with any questions.⁸⁰

Shifting her attention to the majority's legal analysis, Judge Jones argued that Wolfe's use of derogatory epithets and obscene gestures was insufficient to sustain the jury verdict.⁸¹ She openly mocked the majority's contention that the critical inquiry is whether the harasser subjectively perceived the victim as violating gender norms given that "all of the gender stereotyping same-sex harassment cases to date have regarded the nongender-conforming behavior or appearance of the plaintiff . . . as crucial to raising an inference of illegal discrimination."⁸² Judge Jones went on to assert that objective proof of an individual's gender nonconformity is essential to raise an inference of sex-based discrimination, and she condemned the majority's subjective-perception test as "foster[ing] an entirely protean, standardless cause of action."⁸³ Judge Jones and her colleagues, therefore, would have adopted the objective-evidence standard and vacated the district court's judgment for Woods.⁸⁴

E. Boh Brothers' Impact

Prior to the Fifth Circuit's ruling in *Boh Brothers*, every circuit court to consider the issue had determined that a plaintiff's exhibition of objectively gender-nonconforming characteristics was necessary to raise an inference of actionable sex discrimination.⁸⁵ These courts reasoned that a plaintiff alleging same-sex harassment on the basis of gender stereotypes must provide objective evidence of his or her purported gender nonconformity because without such evidence, "there would appear to be no basis for an alleged harasser to possess a subjective intent to discriminate against that victim because of nonconformance," i.e., on the basis of the victim's sex.⁸⁶ In *Boh Brothers*, however, the Fifth Circuit opted to pursue a more integrative approach to the "because of sex" requirement by seeking to harmonize the gender-stereotyping theory of same-sex harassment with the Supreme Court's broader antidiscrimination jurisprudence.

As discussed in greater detail in the next section, the standard articulated in *Boh Brothers* appropriately seeks to reorient the focus in same-sex harassment cases to whether the harasser subjectively perceived the harassee as failing to conform to gender norms regardless of whether the harassee may contravene gender stereotypes in some objective sense. Indeed, the Supreme Court has indicated that the critical inquiry in gender-stereotyping cases is whether the defendant—based on the defendant's own idiosyncratic beliefs as to the proper roles of men and women—

⁸⁰ *Id.*

⁸¹ *Id.* at 477.

⁸² *Id.*

⁸³ *Id.*

⁸⁴ *Id.* at 470–87.

⁸⁵ See cases cited *supra* note 4.

⁸⁶ *Boh Bros.*, 731 F.3d at 472 (Jolly, J., dissenting).

regarded the plaintiff as gender nonconforming and discriminated against the plaintiff on that basis.⁸⁷ Additional courts, therefore, may elect to abandon the objective-evidence standard in favor of adopting the Fifth Circuit's subjective-perception test.

IV. *BOH BROTHERS* AS PERSUASIVE AUTHORITY

Presently, only courts within the Fifth Circuit are required to examine a harasser's subjective perception of the victim in evaluating whether gender-stereotyping evidence is sufficient to establish a same-sex harassment claim.⁸⁸ Because *Boh Brothers* ostensibly represents the first faithful application of the gender-stereotyping theory in the context of same-sex harassment litigation, other courts may choose to adopt the Fifth Circuit's subjective-perception test. Employers, therefore, should resist the temptation to dismiss *Boh Brothers* as a legal aberration confined to the Fifth Circuit and instead recognize the possibility of a legal environment in which overtly masculine men and patently feminine women may assert viable same-sex harassment claims.

A. *Lower Courts' Misapplication of Price Waterhouse*

Notwithstanding Justice Brennan's admonition in *Price Waterhouse* that, "[b]y focusing on Hopkins' specific proof . . . [.] we do not suggest a limitation on the possible ways of proving that stereotyping played a motivating role in an employment decision,"⁸⁹ every circuit court to consider gender-stereotyping evidence in a same-sex harassment case has required the plaintiff to prove that he or she exhibited readily observable, objectively gender-nonconforming characteristics in a manner reminiscent of Ann Hopkins.⁹⁰ The Sixth Circuit, for example, dismissed a male plaintiff's same-sex harassment claim notwithstanding the existence of a question of fact as to whether his harassers subjectively perceived him as effeminate.⁹¹ Although the plaintiff alleged that his male coworkers often referred to him by the nickname "Kiss" and on various occasions remarked that he had "titties," hinted that he experienced menstrual cycles, and implied that he assumed a traditionally feminine role in his sexual practices,⁹² the Sixth Circuit found these allegations deficient on the grounds that:

The Supreme Court in *Price Waterhouse* focused principally on characteristics that were readily demonstrable in the workplace, such as the plaintiff's manner of walking and talking at work, as well as her work attire and her hairstyle. Later cases applying *Price Waterhouse* have

⁸⁷ *Price Waterhouse v. Hopkins*, 490 U.S. 228, 250 (1989).

⁸⁸ See *Boh Bros.*, 731 F.3d at 444.

⁸⁹ *Price Waterhouse*, 490 U.S. at 251–52.

⁹⁰ See, e.g., *supra* cases in note 4.

⁹¹ See *Vickers*, 453 F.3d at 764.

⁹² *Id.* at 759, 763, 769.

interpreted it as applying where gender non-conformance is demonstrable through the plaintiff's appearance or behavior. By contrast, the gender non-conforming behavior which Vickers claims supports his theory of sex stereotyping is not behavior observed at work or affecting his job performance. Vickers has made no argument that his appearance or mannerisms on the job were perceived as gender non-conforming . . . and provided the basis for the harassment he experienced.⁹³

Conversely, in finding that a male plaintiff adduced sufficient evidence of his gender nonconformity to state a prima facie claim of same-sex harassment, the Third Circuit emphasized that the plaintiff openly contravened male gender norms to the extent he

had a high voice and did not curse; was very well-groomed; . . . crossed his legs and had a tendency to shake his foot “the way a woman would sit”; walked and carried himself in an effeminate manner; . . . talked about things like art, music, interior design, and decor; and pushed the buttons on his [work equipment] with “pizzazz.”⁹⁴

These courts seemingly regard a plaintiff's exhibition of readily observable, objectively gender-nonconforming characteristics as proof that the harasser was sufficiently aware of the plaintiff's membership in a protected class—i.e., gender-nonconforming persons⁹⁵—to formulate a subjective intent to discriminate on that basis.⁹⁶ At first blush, this would appear to be consistent with rulings in other disparate treatment cases where courts have required plaintiffs whose membership in a protected class was not otherwise apparent to prove that the employer had direct knowledge of their protected status.⁹⁷

⁹³ *Id.* at 763 (citations omitted).

⁹⁴ *Prowel*, 579 F.3d at 287.

⁹⁵ *See Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (“[W]e are beyond the day when an employer could evaluate employees by assuming or insisting that they matched the stereotype associated with their group, for ‘in forbidding employers to discriminate against individuals because of their sex, Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.’” (quoting *City of L.A. Dep’t of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978))).

⁹⁶ *See EEOC v. Boh Bros. Constr. Co.*, 731 F.3d 444, 472 (5th Cir. 2013) (Jolly, J., dissenting) (“When . . . the subjective discriminatory animus of the employer is itself in question, objective evidence [of the plaintiff's gender nonconformity] may be necessary to demonstrate the presence or absence of such an intent.”).

⁹⁷ Angela Clements, *Sexual Orientation, Gender Nonconformity, and Trait-Based Discrimination: Cautionary Tales from Title VII & an Argument for Inclusion*, 24 BERKELEY J. GENDER L. & JUST. 166, 192 (2009) (“Several federal circuit courts and the Supreme Court have held that in a disparate treatment case a plaintiff must put forth evidence that the employer had knowledge of the plaintiff's membership in a protected class.”); *see also Geraci v. Moody-Tottrup, Int’l, Inc.*, 82 F.3d 578, 581 (3d Cir. 1996) (noting that an

Under the *McDonnell Douglas Corporation v. Green*⁹⁸ framework, a plaintiff bears the burden of establishing a prima facie case of intentional discrimination by showing, among other things, that the plaintiff is a member of a protected class.⁹⁹ Although certain characteristics, such as race and sex, are often readily apparent so that no additional proof as to the plaintiff's protected class status is necessary, a plaintiff alleging discrimination on the basis of nonobvious characteristics, such as religion, disability, or pregnancy must, as a threshold matter, prove that they informed their employer of their protected status. As the Third Circuit observed:

The traditional *McDonnell Douglas–Burdine* presumption quite properly makes no reference to the employer's knowledge of membership in a protected class because, in the vast majority of discrimination cases, the plaintiff's membership is either patent (race or gender), or is documented on the employee's personnel record (age). This case, however, is different [because the plaintiff did not inform her employer that she was pregnant and was not showing signs of pregnancy at the time she was terminated]. We cannot presume that an employer most likely practiced unlawful discrimination when it did not know that the plaintiff even belonged to the protected class. The employer's knowledge, in this class of cases, is a critical element of the plaintiff's prima facie case

In other cases involving personal attributes not obvious to the employer, courts have regularly held that the plaintiff cannot make out a prima facie case of discrimination unless he or she proves that the employer knew about the plaintiff's particular personal characteristic. An employee's religion, for example, is often unknown to the employer, and we have accordingly required that employees had informed their employers of their religious beliefs prior to the alleged discriminatory

employer cannot intentionally discriminate “on the basis of a condition of which it [is] wholly ignorant”). “Title VII allows plaintiffs to contest intentional discrimination on a disparate treatment theory . . . ,” Alex Reed, *Abandoning ENDA*, 51 HARV. J. ON LEGIS. 277, 280–81 (2014), and the Supreme Court “has recognized that a ‘hostile working environment’ characterized by sexual harassment . . . constitutes disparate treatment.” Recent Case, *Employment Law — Title VII — Fifth Circuit Holds Evidence of Sex Stereotyping Insufficient in Same-Sex Harassment Action* — EEOC v. Boh Bros. Construction Co., 689 F.3d 458 (5th Cir. 2012), 126 HARV. L. REV. 1699, 1703 n.52 (2013) (quoting *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1989)).

⁹⁸ 411 U.S. 792 (1973). The *McDonnell Douglas* framework “allows plaintiffs lacking direct evidence [of discrimination] initially to create a circumstantial inference of discrimination and then rebut any legitimate explanations articulated by the employer.” Robert S. Whitman, *Clearing the Mixed-Motive Smokescreen: An Approach to Disparate Treatment Under Title VII*, 87 MICH. L. REV. 863, 864 (1989).

⁹⁹ Victoria Schwartz, *Title VII: A Shift from Sex to Relationships*, 35 HARV. J.L. & GENDER 209, 215 (2012).

action in order to make out a prima facie case of discrimination based on failure to make reasonable accommodations

Likewise, disabilities are often unknown to the employer, and, because of that, the plaintiff must demonstrate that the defendant employer knew of the disability to state a prima facie case of unlawful discharge

Pregnancy, of course, is different in that its obviousness varies, both temporally and as between different affected individuals. It is difficult to imagine that an employer would not be aware that an employee is in the later stages of her pregnancy, at least if the employer sees the employee. When the pregnancy is apparent, or where plaintiff alleges that she has disclosed it to the employer, then a question of the employer's knowledge would likely preclude summary judgment. If the pregnancy is not apparent and the employee has not disclosed it to her employer, she must allege knowledge and present, as part of her prima facie case, evidence from which a rational jury could infer that the employer knew that she was pregnant.¹⁰⁰

Similarly, courts confronted with same-sex harassment claims predicated on gender-stereotyping evidence seem to regard an individual's ostensible gender nonconformity as being equivalent to a person's nonobvious protected class status. Unlike undisclosed religious beliefs, imperceptible disabilities, or undetectable pregnancies, however, individuals alleging same-sex harassment on the basis of gender stereotypes are not permitted to rely on direct evidence that a harasser subjectively perceived them as belonging to a protected class and discriminated against them on that basis.¹⁰¹ Rather, courts have regarded an individual's exhibition of readily observable, objectively gender-nonconforming characteristics as an additional element plaintiffs must prove in order to prevail on a same-sex harassment claim when, in reality, the extremity of an individual's visible gender nonconformity merely suggests that the harasser was likely aware of—and therefore could have

¹⁰⁰ *Geraci*, 82 F.3d at 581 (citations omitted).

¹⁰¹ Cf. D. Wendy Greene, *Categorically Black, White, or Wrong: "Misperception Discrimination" and the State of Title VII Protection*, 47 U. MICH. J.L. REFORM 87, 99 (2013) (observing that "some courts are now rigidly applying . . . the 'membership prong' [of *McDonnell Douglas*] . . . to hold that misperception discrimination plaintiffs are not protected under Title VII," where "misperception discrimination" refers to situations in which an employer misperceives an individual as belonging to a particular race, religion, sex, or ethnicity and then discriminates on the basis of that misperception). See also Andrew M. Carlon, *Racial Adjudication*, 2007 B.Y.U. L. REV. 1151, 1190 (noting that courts adjudicating racial discrimination claims must assess whether the "defendant's knowledge of the plaintiff's race" is sufficient to establish the membership prong of *McDonnell Douglas*, which requires courts to examine "the plaintiff's 'subjective' race, in the eyes of his employer, not his 'objective' race, what he 'really is' [in some empirical sense]").

been motivated by—the individual’s protected status. This confusion of evidentiary means and ends is confirmed by a plain-text reading of *Price Waterhouse*.

*B. Reconciling Price Waterhouse with the Supreme Court’s Broader
Disparate-Treatment Jurisprudence*

Prior to *Boh Brothers*, courts consistently seized on the fact that Ann Hopkins was advised to “walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry”¹⁰² as indicating that plaintiffs in same-sex harassment cases must display objectively gender-nonconforming characteristics in the workplace if they are to prevail on a gender-stereotyping theory.¹⁰³ Yet, these statements were relevant only to the extent they revealed a subjective perception among the partnership that Ann Hopkins was macho or insufficiently feminine.¹⁰⁴ This interpretation is confirmed by Justice Brennan’s observation that:

It takes no special training to discern sex stereotyping in a description of an aggressive female employee as requiring “a course in charm school.” Nor . . . does it require expertise in psychology to know that, if an employee’s flawed “interpersonal skills” can be corrected by a soft-hued suit or a new shade of lipstick, perhaps it is the employee’s sex and not her interpersonal skills that has drawn the criticism.¹⁰⁵

Rather, it was the partners’ stereotype-laden remarks that were dispositive of the liability issue in *Price Waterhouse* as they revealed the existence of an illegitimate discriminatory motive.¹⁰⁶ In finding that sex stereotyping influenced Hopkins’s partnership prospects, the Supreme Court observed,

Hopkins showed that the partnership solicited evaluations from all of the firm’s partners; that it generally relied very heavily on such evaluations in making its decision; that some of the partners’ comments were the product

¹⁰² *Price Waterhouse v. Hopkins*, 490 U.S. 228, 235 (1989) (quoting *Hopkins v. Price Waterhouse*, 618 F. Supp. 1109, 1117 (D.D.C. 1985)).

¹⁰³ *See, e.g., Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 763 (6th Cir. 2006) (“The Supreme Court in *Price Waterhouse* focused principally on characteristics that were readily demonstrable in the workplace, such as the plaintiff’s manner of walking and talking at work, as well as her work attire and her hairstyle.”).

¹⁰⁴ *See* Marcia L. McCormick, *The Truth Is Out There: Revamping Federal Antidiscrimination Enforcement for the Twenty-First Century*, 30 BERKELEY J. EMP. & LAB. L. 193, 212 (2009) (recognizing that an individual’s “state of mind is not itself observable but can only be inferred from the [individual’s] statements and actions”).

¹⁰⁵ *Price Waterhouse*, 490 U.S. at 256.

¹⁰⁶ *Id.* at 251, 256.

of stereotyping; and that the firm in no way disclaimed reliance on those particular comments¹⁰⁷

Based on these facts, the Court found that “a plausible—and, one might say, inevitable—conclusion to draw . . . is that the [firm’s management team] in making its decision did in fact take into account all of the partners’ comments, including the comments that were motivated by stereotypical notions about women’s proper deportment.”¹⁰⁸ Thus, the Court did not address whether Hopkins contravened gender norms in some objective, empirical sense, but instead limited its analysis to the subjective beliefs and perceptions of the individual partners as manifested through their written remarks.

A “subjective perception” interpretation of *Price Waterhouse*, moreover, renders the gender-stereotyping theory of sex discrimination consistent with the larger body of disparate-treatment jurisprudence.¹⁰⁹ The Supreme Court has repeatedly held that the critical inquiry in disparate treatment cases is whether the employer possessed a “subjective intent to discriminate”¹¹⁰ and has emphasized that the employer’s “state of mind” is to remain the focus in such cases.¹¹¹ Indeed, in

¹⁰⁷ *Id.* at 256.

¹⁰⁸ *Id.*

¹⁰⁹ See Alex Reed, *Abandoning ENDA*, 51 HARV. J. ON LEGIS. 277, 280–81 (2014) (“Title VII allows plaintiffs to contest intentional discrimination on a disparate treatment theory.”); Recent Case, *Employment Law — Title VII — Fifth Circuit Holds Evidence of Sex Stereotyping Insufficient in Same-Sex Harassment Action — EEOC v. Boh Bros. Construction Co.*, 689 F.3d 458 (5th Cir. 2012), 126 HARV. L. REV. 1699, 1703 n.52 (2013) (noting the Supreme Court “has recognized that a ‘hostile working environment’ characterized by sexual harassment . . . constitutes disparate treatment”).

¹¹⁰ *E.g.*, *Raytheon Co. v. Hernandez*, 540 U.S. 44, 52–53 (2003).

¹¹¹ *U.S. Postal Serv. Bd. of Governors v. Aikens*, 460 U.S. 711, 716–17 (1983). Various circuit courts of appeals, moreover, have found a viable Title VII claim where an employer misperceived an individual’s race or ethnicity and then discriminated on the basis of that misperception. See, e.g., *Jones v. UPS Ground Freight*, 683 F.3d 1283, 1299 (11th Cir. 2012) (“[A] harasser’s use of epithets associated with a different ethnic or racial minority than the plaintiff will not necessarily shield an employer from liability for a hostile work environment.”); *EEOC v. WC&M Enters., Inc.* 496 F.3d 393, 401 (5th Cir. 2007) (“[A] party is able to establish a discrimination claim based on its own national origin even though the discriminatory acts do not identify the victim’s actual [i.e., correct] country of origin.”); see also *Employment Discrimination Based on Religion, Ethnicity, or Country of Origin*, U.S. EQUAL EMP. OPPORTUNITY COMM’N, http://www.eeoc.gov/facts/fs-relig_ethnic.html [https://perma.cc/L77S-GMLV] (last visited Oct. 8, 2014) (noting that Title VII prohibits “[h]arassing or otherwise discriminating because of the perception or belief that a person is a member of a particular racial, national origin, or religious group whether or not that perception is correct”); Greene, *supra* note 101, at 140 (“Title VII extends protection and relief to individuals suffering invidious, differential treatment perpetrated by a covered employer because of the statute’s forbidden criteria, regardless of whether such categorical discrimination derives from an accurate or inaccurate categorization of an individual’s racial, ethnic, gender, or religious identity.”).

formally recognizing the gender-stereotyping theory, the Supreme Court famously observed that, “an employer who acts on the basis of a *belief* that a woman cannot be aggressive, or that she must not be, has acted on the basis of gender.”¹¹² Courts adjudicating gender-stereotyping claims outside of the same-sex harassment context, therefore, “typically focus on subjective motivations, asking only whether the employee was harassed for failing to conform to the employer’s sex stereotypes.”¹¹³

The standard articulated in *Boh Brothers* thus appropriately reorients the focus in same-sex harassment cases to whether the harasser subjectively perceived the harasser as failing to conform to gender stereotypes, irrespective of whether the harasser may be said to transgress gender norms in some objective sense.¹¹⁴ While evidence a plaintiff displayed readily observable gender-nonconforming characteristics in the workplace will continue to provide circumstantial evidence that a harasser perceived the individual as contravening gender stereotypes, a plaintiff who seemingly conforms to established gender norms will nonetheless have a viable same-sex harassment claim if she can show—via direct evidence—that the harasser regarded her as macho or insufficiently feminine and discriminated against her on that basis.

V. *BOH BROTHERS*’ IMPLICATIONS FOR EMPLOYERS

The Fifth Circuit Court of Appeals’ decision in *Equal Employment Opportunity Commission v. Boh Brothers Construction Company*¹¹⁵ would seem to herald a significant expansion of employer liability. Whereas in the past individuals who outwardly conformed to gender norms were unable to rely on gender-stereotyping evidence to establish a same-sex harassment claim, overtly masculine men and patently feminine women will now be able to assert viable harassment claims in jurisdictions utilizing a subjective-perception test so long as they are able to show

¹¹² *Price Waterhouse*, 490 U.S. at 250 (emphasis added).

¹¹³ Recent Case, *Employment Law – Title VII – Fifth Circuit Holds Evidence of Sex Stereotyping Insufficient in Same-Sex Harassment Action* – EEOC v. Boh Bros. Construction Co., 689 F.3d 458 (5th Cir. 2012), 126 HARV. L. REV. 1699, 1704 (2013).

¹¹⁴ See Greene, *supra* note 101, at 102 (“[A]n employer’s misperception of an individual’s protected status does not negate an employer’s related animus, stereotyping, stigmatization, or the attendant malicious treatment” so that misperception discrimination is properly actionable under Title VII.); Craig Robert Senn, *Perception over Reality: Extending the ADA’s Concept of “Regarded As” Protection Under Federal Employment Discrimination Law*, 36 FLA. ST. U. L. REV. 827, 856–57 (2009) (asserting that “erroneous discriminators”: those who incorrectly perceive or determine a person to be within a certain protected group or class and then discriminate . . . based on that trait” are as culpable as “accurate discriminators” given that they “are each motivated to act based on a protected trait, and each actually manifests that intent in the form of a tangible, adverse employment action” such that Title VII should not be interpreted to provide a safe harbor for erroneous discriminators).

¹¹⁵ 731 F.3d 444 (5th Cir. 2013) (en banc).

that at least one person in a supervisory capacity perceived them as contravening gender norms. Employers in these jurisdictions must, therefore, seek to differentiate permissible same-sex teasing and horseplay from prohibited same-sex harassment by attempting to discern whether the actor's conduct is motivated by his or her idiosyncratic beliefs regarding the proper roles of men and women or is instead a benign attempt to relieve boredom and foster collegiality in the workplace.¹¹⁶

Given the varied and irrational nature of gender stereotypes, however, characteristics that might be perceived as gender conforming by one person may be regarded as gender nonconforming by someone else.¹¹⁷ Complicating matters further is the possibility that the same characteristic could be perceived as either gender conforming or gender nonconforming based on the specific context in which the characteristic is exhibited and the beliefs or motivations of the individual exhibiting the characteristic.¹¹⁸ Consider the following hypothetical: Donna is a forty-five-year-old woman who works at an advertising agency. She has been married to the same man for twenty years, and she and her husband have one child together—a daughter named Katie. Donna has a sweet, musical voice evocative of Julie Andrews and an elegant, graceful demeanor reminiscent of Jackie Kennedy. Her interests include yoga, interior design, poetry, fashion, and volunteering at her local animal shelter. Exhibiting a classic hour-glass shape, Donna stands five feet, five inches tall and weighs 140 pounds. She has curly, shoulder-length hair, high cheekbones, and long, delicate eyelashes. Although many of her female colleagues prefer to wear pants and flats to work, Donna can always be found in a dress and heels. She usually complements her work attire with a pair of earrings, a necklace, and a couple of rings, along with a dab of perfume on each of her wrists.

Recently, Donna's supervisor at the agency has been giving her a hard time. Jennifer, the supervisor, has started calling her "Don" instead of Donna and "Mr. Smith" instead of Mrs. Smith. Two to three times per week, moreover, Jennifer will refer to Donna as "Butch" or "Mrs. Doubtfire"¹¹⁹ in front of her colleagues. If Donna appears to be tired or in a bad mood, Jennifer will ask, "What's the matter? Erectile dysfunction got you down?" or "Uh-oh, Low T again?"¹²⁰ On several occasions,

¹¹⁶ *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 81–82 (1998).

¹¹⁷ See Jaimie Leaser, *The Causal Role of Sex in Sexual Harassment*, 88 CORNELL L. REV. 1750, 1790 (2003) (recognizing "that gender stereotypes are many and varied"); *An Open Discussion with Justice Ruth Bader Ginsburg*, 36 CONN. L. REV. 1033, 1037 (2004) (observing "that gender stereotypes are often irrational").

¹¹⁸ Cf. *EEOC v. Boh Bros. Constr. Co.*, 731 F.3d 444, 485 (5th Cir. 2013) (Smith, J., dissenting) (noting the EEOC conceded at oral argument that if a male supervisor were to harass a male subordinate for wearing a pink shirt, the employer's liability would depend on whether the harasser does not like pink shirts generally or does not like pink shirts on men specifically).

¹¹⁹ *Mrs. Doubtfire* is the title of a 1993 comedic film in which the male lead is forced to present himself as an elderly woman in order to secure employment. *MRS. DOUBTFIRE* (Twentieth Century Fox Film Corp. 1993).

¹²⁰ The term "Low T" refers to a medical condition known as low testosterone. John La

Jennifer has left pictures of men in drag on Donna's desk with notes stating, "This is such a good picture of you!" or "Now I know where you get your beauty tips!" During the firm's annual diversity training on LGBT issues, Jennifer identified Donna as belonging to an "alternative family" and joked that Donna's daughter "has two daddies." Jennifer has even written a song called "Katie Has Two Daddies" that she sings or hums whenever she walks past Donna's office.

Although Donna and Jennifer have worked together for the last ten years, their relationship did not become strained until Jennifer discovered that Donna practices yoga. Jennifer asserted that "Only men and lesbians do yoga" and then asked Donna, "So which one are you?" Jennifer suggested that Donna should practice Pilates instead because "Pilates emphasizes weight loss and flexibility" whereas "yoga is just about increasing strength."

If Donna were to file a charge of discrimination with the EEOC, a court applying the subjective-perception test would likely find that she has a viable same-sex harassment claim. Donna's inability to furnish objective proof of her gender nonconformity would have no bearing on the court's analysis. The fact that Donna outwardly conforms to stereotypical female gender norms in terms of her appearance and behavior would be equally irrelevant. Rather, the court would limit its analysis to whether Jennifer subjectively perceived Donna as macho once Donna acknowledged that she practices yoga. In jurisdictions utilizing a subjective-perception test, Jennifer's use of masculine epithets together with her references to male medical conditions and her characterization of Donna's family as a "two-daddy household" would almost certainly support an inference of sex-based discrimination sufficient to withstand an employer's summary judgment motion.

Slight variations to the fact pattern illustrate that an objectively gender-conforming individual may be perceived as contravening gender stereotypes for an almost infinite variety of reasons. Assume that Jennifer was indifferent to Donna's affinity for yoga and that the mistreatment instead began after Donna identified Banana Republic as her favorite clothing brand. If Donna could show that Jennifer, for whatever reason, subjectively perceived Banana Republic to be a masculine clothing brand—perhaps because Banana Republic makes clothes for both men and women rather than catering exclusively to female fashions—a court would likely find that Donna had a cognizable same-sex harassment claim. Alternatively, assume that Jennifer only began mistreating Donna upon learning that Donna and her husband have just one child. If Donna could prove that Jennifer regarded a woman not having multiple children as signaling a lack of femininity, a court would likely find that Donna had a viable same-sex harassment claim. Conversely, assume that Jennifer only began mistreating Donna after Donna acknowledged that she cooks dinner for her family every night because she considers dining out to be a waste of money. Whereas Jennifer may normally regard a woman preparing dinner for her family as a hallmark of femininity, if Donna could show that Jennifer regarded

Puma, *Don't Ask Your Doctor About 'Low T'*, N.Y. TIMES, Feb. 3, 2014, http://www.nytimes.com/2014/02/04/opinion/dont-ask-your-doctor-about-low-t.html?_r=0. [<https://perma.cc/9F7X-ZRPV>].

Donna's motivation for cooking as being insufficiently feminine to the extent it was driven by financial considerations rather than the health and happiness of her family, a court would likely find that Donna had a cognizable same-sex harassment claim. Thus, each of the foregoing vignettes would represent a significant liability threat to employers operating in a subjective-perception test jurisdiction whereas none of these scenarios would provide a basis for employer liability under the objective-evidence standard.

The subjective-perception test's potential to increase employer liability is similarly evident from a review of various circuit court decisions dismissing same-sex harassment claims on the basis of gender stereotypes.¹²¹ Many of the plaintiffs who were unsuccessful under the prevailing objective-evidence standard would appear to have cognizable Title VII claims in a jurisdiction utilizing the subjective-perception test.¹²² Consequently, employers can no longer afford to be complacent when confronted with allegations of same-sex harassment on the basis of gender stereotypes, but must instead seek to deter such conduct *ab initio*.

VI. PROPOSED EMPLOYER REFORMS

Although the subjective-perception test would seem to herald a significant expansion of employer liability for instances of same-sex harassment, employers are not without recourse.

A. Employers Should Adopt a Comprehensive Antiharassment Policy

First, and most importantly, employees must be made to understand that conduct need not be motivated by sexual desire to constitute sexual harassment.¹²³

¹²¹ *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 758 (6th Cir. 2006); *Dawson v. Bumble & Bumble*, 398 F.3d 211, 211–12 (2nd Cir. 2005); *Spearman v. Ford Motor Co.*, 231 F.3d 1080, 1085 (7th Cir. 2000); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 259 (1st Cir. 1999).

¹²² *E.g.*, *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 759–61 (6th Cir. 2006) (noting that the harassers referred to the male victim as “Kiss,” remarked that he had “titties,” suggested that he experienced menstrual cycles, and implied that he assumed a traditionally feminine role in his sexual practices); *Dawson v. Bumble & Bumble*, 398 F.3d 211, 215 (2nd Cir. 2005) (observing that the harassers referred to the female victim as “Donald” rather than her given name of “Dawn” and suggested that she “needed to have sex with a man”); *Spearman v. Ford Motor Co.*, 231 F.3d 1080, 1083–85 (7th Cir. 2000) (acknowledging that the harassers called the male victim “bitch,” referred to him as “RuPaul” or “RuSpearman,” and assigned him tasks “traditionally reserved for women”); *Higgins v. New Balance Athletic Shoe, Inc.*, 194 F.3d 252, 257 (1st Cir. 1999) (noting that the harassers mocked the male victim “by using high-pitched voices” and “gesturing in stereotypically feminine ways” while suggesting that he assumed a traditionally feminine sexual role).

¹²³ *See Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998).

This is especially true for supervisors, i.e., those individuals authorized to take tangible employment actions against subordinates.¹²⁴

Under Title VII, an employer's liability for [workplace] harassment may depend on the status of the harasser. If the harassing employee is the victim's co-worker, the employer is liable only if it was negligent in controlling working conditions. In cases in which the harasser is a "supervisor," however, different rules apply. If the supervisor's harassment culminates in a tangible employment action, [i.e., precipitates a significant change in the plaintiff's employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits,] the employer is strictly liable. But if no tangible employment action is taken, the employer may escape liability by establishing, as an affirmative defense, that (1) the employer exercised reasonable care to prevent and correct any harassing behavior and (2) that the plaintiff unreasonably failed to take advantage of the preventative or corrective opportunities that the employer provided [(commonly referred to as the "*Ellerth/Faragher*" defense).]¹²⁵

Thus, plaintiffs seeking to prevail on a gender-stereotyping theory of same-sex harassment perpetrated by coworkers must show that the employer knew or should have known of the harassing conduct and failed to take appropriate corrective action.¹²⁶ Where a supervisor is involved, however, the employer will either be strictly liable or liable subject to an affirmative defense.¹²⁷

A restrictive, desire-based model of sexual harassment was critical to the imposition of liability in *Boh Brothers*. In finding that *Boh Brothers* was not entitled to the *Ellerth/Faragher* defense, the Fifth Circuit observed that neither of Kerry Woods's supervisors were aware "that conduct unmotivated by sexual desire could constitute sexual harassment," or more specifically, "that male-on-male sexual harassment, based on something other than sexual desire, was sufficient to violate federal law."¹²⁸

The court found the supervisors' professed lack of knowledge credible given that *Boh Brothers* had promulgated an unduly vague corporate nondiscrimination policy and failed to provide adequate training to its supervisory personnel.¹²⁹

¹²⁴ *Vance v. Ball State Univ.*, 133 S. Ct. 2434, 2439 (2013).

¹²⁵ *Id.*

¹²⁶ Notes, *Notice in Hostile Environment Discrimination Law*, 112 HARV. L. REV. 1977, 1978 (1999).

¹²⁷ David J. Walsh, *Small Change: An Empirical Analysis of the Effect of Supreme Court Precedents on Federal Appeals Court Decisions in Sexual Harassment Cases, 1993–2005*, 30 BERKELEY J. EMP. & LAB. L. 461, 471–72 (2009).

¹²⁸ *EEOC v. Boh Bros. Constr. Co.*, 731 F.3d 444, 464–68 (5th Cir. 2013) (en banc).

¹²⁹ *Id.* at 463–65.

Although Boh Brothers claimed to have a comprehensive policy vis-à-vis equal employment opportunity, the policy did not provide any explicit guidance regarding sexual harassment.¹³⁰ Rather, the policy merely “offered generic statements such as ‘[a]ll personnel actions including, but not limited to, compensation, benefits, transfers, [and] layoffs . . . , will be administered without regard to race, color, religion, disability, sex, or national origins’ and ‘[a]ll working conditions will be maintained in a non-discriminatory manner.’”¹³¹ With regard to training, the Fifth Circuit noted that Boh Brothers did not provide Chuck Wolfe with any employment-nondiscrimination training despite his status as a supervisor.¹³² While Mr. Wolfe’s boss received “about five minutes of sexual-harassment training per year,” the training focused exclusively on instances of desire-based harassment notwithstanding the fact that “the three *Oncale* evidentiary routes—two of which have nothing to do with sexual desire—were recognized about eight years before” Woods began working at Boh Brothers.¹³³

Employers, therefore, should make certain they have promulgated a comprehensive sex-based harassment policy, either as part of a larger antiharassment/nondiscrimination policy or as an independent, stand-alone policy. In seeking to define the scope of prohibited conduct, employers should avoid lengthy catch-all provisions in favor of three distinct paragraphs corresponding to the various forms of sexual harassment. The following language is offered as a model:

Sex-based harassment is a form of sex discrimination and is prohibited.

Harassment of a Sexual Nature. Unwelcome sexual advances, requests for sexual favors, and other verbal or physical conduct of a sexual nature constitutes prohibited sex-based harassment when (1) an individual’s tolerance or acceptance of such conduct is either directly or indirectly made a term or condition of that individual’s employment; (2) an individual’s acceptance or rejection of such conduct impacts employment decisions affecting that individual; or (3) an individual’s ability to perform his or her job is disrupted by such conduct or such conduct creates an intimidating, hostile, or offensive working environment. For harassment of a sexual nature, the sex of the harasser and the victim are irrelevant, and the harasser and the victim may be of the same sex.

Harassment Motivated by Hostility Toward a Particular Sex. Harassment does not have to be of a sexual nature to violate this policy. Disparaging comments and unwelcome conduct regarding an individual’s sex generally or status as a member of a particular sex constitutes prohibited sex-based harassment when (1) an individual’s tolerance or acceptance of such

¹³⁰ *Id.* at 463.

¹³¹ *Id.*

¹³² *Id.* at 465.

¹³³ *Id.* at 465 n.24.

conduct is either directly or indirectly made a term or condition of that individual's employment; (2) an individual's acceptance or rejection of such conduct impacts employment decisions affecting that individual; or (3) an individual's ability to perform his or her job is disrupted by such conduct or such conduct creates an intimidating, hostile, or offensive working environment. For harassment motivated by hostility toward a particular sex, the sex of the harasser and the victim are irrelevant, and the harasser and the victim may be of the same sex.

Harassment on the Basis of Gender Stereotypes. Harassment does not have to be motivated by hostility toward a particular sex or of a sexual nature to violate this policy. Disparaging comments and unwelcome conduct based on a subjective belief that an individual does not conform to the gender stereotype for his or her sex (i.e., that a man is effeminate or insufficiently masculine or that a woman is macho or insufficiently feminine) constitutes prohibited sex-based harassment when (1) an individual's tolerance or acceptance of such conduct is either directly or indirectly made a term or condition of that individual's employment; (2) an individual's acceptance or rejection of such conduct impacts employment decisions affecting that individual; or (3) an individual's ability to perform his or her job is disrupted by such conduct or such conduct creates an intimidating, hostile, or offensive working environment. For harassment on the basis of gender stereotypes, the sex of the harasser and the victim are irrelevant, and the harasser and the victim may be of the same sex.¹³⁴

Because some employees may have difficulty discerning the scope of prohibited conduct from definitions alone, employers should include examples of the type of conduct that would constitute sex-based harassment for each category and should do so in the context of both opposite-sex and same-sex harassment. These examples should be as realistic as possible and reflect sensitivity to employees' actual working conditions.

Thus, for employees working in an office environment, an employer might want to include the following scenarios as examples of same-sex harassment on the basis of gender stereotypes:

(1) Anthony thinks that men should be aggressive negotiators. Brandon, one of Anthony's direct reports, is not an aggressive negotiator. On that basis, Anthony routinely refers to Brandon as a "timid bitch" and a "d-ckless wonder," often advises Brandon to just get pregnant and quit already, and denies certain opportunities to Brandon on the grounds that "this is a job for a man."

¹³⁴ The proposed definition is modeled on existing EEOC guidance. *See* 29 C.F.R. § 1604.11(a) (2015) (equating sex-based harassment with harassment of a sexual nature).

(2) Wendy believes that women should always eat a salad for lunch. Jessica, one of Wendy's subordinates, prefers to have a sandwich for lunch. As a result, Wendy shouts "Hey, this isn't the men's room," whenever Jessica enters the women's restroom, routinely suggests that Jessica supplement her income by becoming a sperm donor, and occasionally touches Jessica's breasts while commenting on the odd shape of her "peccs."

(3) Mark thinks that men should be proficient in Microsoft Excel. Steven, one of Mark's direct reports, is not proficient in Microsoft Excel. Consequently, Mark habitually refers to Steven as "Stephanie," tells Steven that "women should be seen and not heard" when Steven attempts to speak during meetings, and occasionally emails pictures of his erect penis to Steven along with text implying that Steven should find the photos sexually arousing as a woman.

Examples of this sort would make clear that conduct need not be motivated by sexual desire or general hostility to the presence of a particular sex in the workplace to constitute prohibited sex-based harassment.¹³⁵

B. Employers Should Prohibit the Use of Antigay Slurs and Epithets

Second, employees must be made to understand that antigay slurs and epithets will not be tolerated in the workplace as they are often predicated on gender stereotypes.¹³⁶ The Seventh Circuit was the first federal appellate court to make this observation and did so in the 1997 case of *Doe v. City of Belleville*.¹³⁷ In *Belleville*, the defendant asserted that the plaintiff had failed to state a cognizable same-sex

¹³⁵ Employers should also consider amending their antiharassment policies to conform to the injunctive relief imposed by the U.S. District Court for the Eastern District of Louisiana. *See* EEOC v. Boh Bros. Constr. Co., No. 09-6460, 2011 WL 3648483, at *1-4 (E.D. La. Aug. 18, 2011) (requiring Boh Brothers to adopt a written sexual harassment policy defining the terms "severe" and "pervasive" in the context of sexual harassment, stating that "no employee who complains of sexual harassment will be subjected to retaliation" and explaining "what unlawful retaliation and protected activity are," and requiring that copies of the policy be provided to all employees, posted on the company's website "in a reasonably conspicuous location," and that the internet address for the policy be published at least once per year in the company's employee newsletter).

¹³⁶ Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1786 (1998); *see also* Axam & Zalesne, *supra* note 19, at 198 (asserting that "the homosexuality-centered epithets and insinuations that pervade so many same-sex sexual harassment cases do not reflect animus toward homosexuals per se, but rather reflect the harasser's aversion to males who fail to conform to idealized notions of masculinity and male sexuality" and, concomitantly, to females who fail to conform to idealized notions of femininity and female sexuality).

¹³⁷ 119 F.3d 563 (7th Cir. 1997).

harassment claim because the harasser's use of epithets such as "fag" and "queer" ostensibly indicated that the discrimination was predicated on the plaintiff's perceived homosexuality rather than his failure to conform to gender norms.¹³⁸ The Seventh Circuit rejected this argument, concluding that the presence of antigay epithets was not necessarily fatal to the plaintiff's sex discrimination claim.¹³⁹ The court recognized that:

There is . . . a considerable overlap in the origins of sex discrimination and homophobia, and so it is not surprising that sexist and homophobic epithets often go hand in hand. Indeed, a homophobic epithet like "fag" . . . may be as much a disparagement of a man's perceived effeminate qualities as it is of his perceived sexual orientation.¹⁴⁰

Because the Supreme Court vacated *Belleville*, without opinion, nine months later,¹⁴¹ the Seventh Circuit's observations regarding the interplay between sexism and homophobia have been viewed with skepticism by later courts.¹⁴² In fact, courts adjudicating same-sex harassment claims post-*Oncale* have consistently seized on a harasser's use of antigay epithets as proof that the offending conduct was motivated by the plaintiff's actual or perceived homosexuality rather than his or her ostensible gender nonconformity.¹⁴³ These courts often warn that the gender-stereotyping theory of sex discrimination cannot be used to bootstrap sexual orientation protection into Title VII and then dismiss plaintiffs' same-sex harassment claims as permissible instances of sexual orientation discrimination.¹⁴⁴

In *Boh Brothers*, however, the use of antigay slurs and homophobic epithets was found to provide crucial support for Woods's claim of sex-based discrimination. Chuck Wolfe routinely referred to Kerry Woods using a mixture of homophobic and

¹³⁸ *Id.* at 592–93.

¹³⁹ *Id.* at 593–94.

¹⁴⁰ *Id.* at 593 n.27.

¹⁴¹ *City of Belleville v. Doe*, 523 U.S. 1001 (1998).

¹⁴² *See, e.g., Higgins v. New Balance Athletic Shoe, Inc.*, 21 F. Supp. 2d 66, 74–76 (D. Me. 1998) (noting that the vacatur of the Seventh Circuit's decision in *Belleville* suggests the Supreme Court may favor a strict interpretation of the term "sex" that does not include concepts of "sexuality" or "sexual orientation"); *see also Axa & Zalesne, supra* note 19, at 222 ("Regardless of the Court's intent in vacating *Doe*, its vacatur has the effect of casting doubt on the precedential value of *Doe*'s reasoning, thereby limiting the influence of this opinion, which represents one of the few judicial attempts to conduct a careful examination of the sex-discriminatory significance of gender stereotyping and sexually degrading conduct among males.").

¹⁴³ *See Sheerine Alemzadeh, Protecting the Margins: Intersectional Strategies to Protecting Gender Outlaws from Workplace Harassment*, 37 N.Y.U. REV. L. & SOC. CHANGE 339, 351 n.60 (2013) (collecting cases).

¹⁴⁴ *E.g., Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 764–65 (6th Cir. 2006); *Bibby v. Phila. Coca-Cola Bottling Co.*, 260 F.3d 257, 261–65 (3d Cir. 2001); *Simonton v. Runyon*, 232 F.3d 33, 37–38 (2d Cir. 2000).

sexist epithets such as “fa--ot,” “pu--y,” and “princess,” and Wolfe admitted on cross-examination that these epithets were directed at Woods’s masculinity:¹⁴⁵

Q: Now, when you said that Mr. Woods was kind of gay for using Wet Ones, you were saying that he was feminine; is that correct?

A: I didn’t say he was gay. Said it . . . seemed kind of gay

Q: So you wouldn’t say that he was gay, but you say his conduct was kind of gay?

A: Yes, sir[.]

Q: By saying that, you were saying he was feminine; correct?

A: Yes.

Q: You meant he was not being manly; is that correct?

A: Yes, sir.

Q: When you said that Mr. Woods’ conduct sounded like a homo, that again refers to Mr. Woods being feminine for using Wet Ones; is that correct?

A: Yes, sir

Q: So the only iron worker that you ever called queer was Mr. Woods?

A: I’m thinking so.

Q: And was Mr. Woods the only iron worker that you called fa—ot?

A: I’m not sure.

Q: Do you understand the word queer to be a slang for homosexual?

A: Yes, I do. I just don’t remember if I used it for anyone else, too. I may have.

Q: And you understand that the word fa—ot is a slang for homosexual?

A: Yes.

¹⁴⁵ EEOC v. Boh Bros. Constr. Co., 731 F.3d 444, 457–58 (5th Cir. 2013) (en banc).

Q: And you called Mr. Woods those words because you thought he was feminine; correct?

A: No, sir. I was just playing with him. I did not think he was queer or homosexual. Never did, do not now.

Q: You called him those words because you thought his using wet wipes was feminine; correct?

A: Yes, sir.¹⁴⁶

Given that Woods was subjected to homophobic and sexist epithets approximately two to three times per day, every day, for approximately one year, the Fifth Circuit held there was sufficient evidence of sex-based harassment to sustain the jury verdict.¹⁴⁷

Employers, therefore, should prohibit the use of antigay slurs in the workplace just as they already do racial, ethnic, and religious epithets. A list of the most common homophobic slurs should be included in the employer's antiharassment policy alongside examples of conduct constituting same-sex harassment on the basis of gender stereotypes.¹⁴⁸ The list should be prefaced by a statement indicating that the terms are designed to be illustrative rather than exhaustive such that employees should not view the omission of any particular slur as an indication that it is permissible to use that slur in the workplace. Employees, moreover, should be encouraged to use common sense and err on the side of caution if they are unsure as to whether a particular term is prohibited under the policy as an antigay epithet. The policy should conclude by noting that the speaker's intent is irrelevant such that a goal to amuse or entertain rather than demean or disparage will not excuse a violation.

C. Employers Should Revise Their Internal Grievance Procedures

Third, employers should make certain they have established a formal grievance process for receiving, investigating, and resolving complaints of same-sex harassment predicated on gender stereotypes.¹⁴⁹ An employer's adoption of a "sensible complaint procedure,"¹⁵⁰ together with the promulgation of a comprehensive antiharassment policy, will often be found to fulfill the first prong of

¹⁴⁶ *Id.*

¹⁴⁷ *Id.* at 461.

¹⁴⁸ *See supra* text accompanying notes 134–135.

¹⁴⁹ U.S. EQUAL EMP'T OPPORTUNITY COMM'N, ENFORCEMENT GUIDANCE ON VICARIOUS EMPLOYER LIABILITY FOR UNLAWFUL HARASSMENT BY SUPERVISORS, EEOC NOTICE NO. 915.002 (1999) [hereinafter ENFORCEMENT GUIDANCE], <http://www.eeoc.gov/policy/docs/harassment.html> [<https://perma.cc/6GLF-H3T3>].

¹⁵⁰ *Faragher v. City of Boca Raton*, 524 U.S. 775, 809 (1998).

the *Ellerth/Faragher* defense.¹⁵¹ Recall that in the absence of a tangible employment action, the *Ellerth/Faragher* defense allows an employer to escape liability for a supervisor's harassment of a subordinate provided, "(1) the employer exercised reasonable care to prevent and correct any harassing behavior and (2) that the plaintiff unreasonably failed to take advantage of the preventative or corrective opportunities that the employer provided."¹⁵² The existence of a formal grievance process, moreover, will often satisfy the second prong of the defense as well:

Based on the presumption that complaint procedures are reasonable, many courts also presume that employee failure to use complaint procedures is unreasonable. Accordingly, once successful on the first prong, employers often prevail on prong two of the affirmative defense . . . by showing that the employee did not complain, delayed in complaining, or complained to an official within the company who was not specified in the complaint procedure.¹⁵³

The absence of a formal grievance process was critical to the imposition of liability in *Boh Brothers*. Although Boh Brothers' nondiscrimination policy identified one of the company's officers as the individual responsible for "coordinat[ing] Company efforts" in the area of equal employment opportunity, the Fifth Circuit observed that "[t]his language . . . says nothing regarding how or to whom an employee should report a harassment claim."¹⁵⁴ Boh Brothers, moreover, "failed to provide its supervisors with any guidance regarding how to investigate, document, and resolve harassment complaints once they were reported."¹⁵⁵

The Fifth Circuit contrasted the company's belated and perfunctory investigation of Woods's same-sex harassment claim with its prompt and thorough investigation into Wolfe's alleged property theft.¹⁵⁶ The individual responsible for overseeing both investigations, Wayne Duckworth, "took no notes and asked no questions during his meeting with Woods," after which Woods was sent home—without pay—for three days.¹⁵⁷ Moreover, "a few months" passed before Duckworth

¹⁵¹ Joshua C. Polster, *Workplace Grievance Procedures: Signaling Fairness but Escalating Commitment*, 86 N.Y.U. L. REV. 638, 647–48 (2011); see also Anne Lawton, *Operating in an Empirical Vacuum: The Ellerth and Faragher Affirmative Defense*, 13 COLUM. J. GENDER & L. 197, 214–15 (2004) ("[F]ederal courts in virtually every circuit interpret the employer's obligation to prevent workplace harassment under prong one of the affirmative defense as satisfied by proof of a sexual harassment policy and grievance procedure.").

¹⁵² *Vance v. Ball State Univ.*, 133 S. Ct. 2434, 2439 (2013) (citations omitted).

¹⁵³ Polster, *supra* note 151, at 648–49 (footnotes omitted).

¹⁵⁴ *EEOC v. Boh Bros. Constr. Co.*, 731 F.3d 444, 464 (5th Cir. 2013) (en banc).

¹⁵⁵ *Id.*

¹⁵⁶ *Id.* at 465–66. Wolfe was accused of "stealing company gas and shrimping on company time." *Id.* at 450.

¹⁵⁷ *Id.* at 465.

took any steps to investigate Woods's harassment claim and that action was limited to speaking with Wolfe and one other individual for approximately ten minutes each.¹⁵⁸ Conversely, Duckworth hired a private detective to look into allegations Wolfe was stealing company resources.¹⁵⁹ The detective's investigation spanned 84.75 hours and culminated in two written reports to management.¹⁶⁰ Although Duckworth demoted Wolfe for suspicion of misusing company property and "safety issues," he did not take any disciplinary action against Wolfe for harassing Woods.¹⁶¹ Given the disparate nature of the investigations and certain other factors, the Fifth Circuit determined that Boh Brothers failed to establish the first prong of the *Ellerth/Faragher* defense.¹⁶²

Employers, therefore, should revise their internal grievance procedures to facilitate the submission, investigation, and remediation of same-sex harassment claims predicated on gender stereotypes.¹⁶³ Grievance procedures must be designed in a manner that encourages victims of same-sex harassment to come forward and complain.¹⁶⁴ Because "a complaint process is not effective if employees are always required to complain first to their supervisors . . . since the supervisor may be the harasser," employers should identify several individuals as being eligible to receive employee complaints.¹⁶⁵ Employers should ensure that these designees include members of both sexes and that employees understand they are free to file a complaint with a designee of their choosing.

Allowing employees to complain to someone of the opposite sex would encourage victims of same-sex harassment on the basis of gender stereotypes to take action where they might otherwise elect to remain silent. Victims of same-sex harassment may be reluctant to file complaints with members of the same sex for fear their claims will not be taken seriously or out of concern same-sex designees will view the victim's harassment as justified in light of the victim's implicit or explicit gender nonconformity.¹⁶⁶ By alleviating the possibility that same-sex designees will dismiss otherwise legitimate complaints of same-sex harassment as "boys being boys" or "girls being girls" while at the same time allowing opposite-sex designees to serve as objective, third-party arbiters of same-sex harassment,

¹⁵⁸ *Id.* at 466.

¹⁵⁹ *Id.*

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ ENFORCEMENT GUIDANCE, *supra* note 149.

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ See Ann C. McGinley, *Creating Masculine Identities: Bullying and Harassment "Because of Sex,"* 79 U. COLO. L. REV. 1151, 1179 (2008) (observing that men are more inclined to downplay bullying-type harassment as "horseplay" or "management techniques," and "may be more reluctant to intervene" as a result).

employers would likely be found to have established effective complaint procedures for the purposes of the *Ellerth/Faragher* defense.¹⁶⁷

An effective grievance process must also provide for the prompt and impartial investigation of all same-sex harassment complaints.¹⁶⁸ Studies have shown that an employer's "prompt investigation" of harassment allegations reduces "the odds of the plaintiff prevailing on the liability issue by over 90%"¹⁶⁹ This is consistent with EEOC guidance advising that fact-finding investigations "be launched immediately" upon receipt of a complaint.¹⁷⁰

In the absence of physical evidence conclusively establishing or refuting the veracity of the complainant's allegations, employers must rely on information obtained during interviews of the relevant parties to determine if a violation of the employer's antiharassment policy has occurred.¹⁷¹ Although the EEOC has promulgated "examples of questions that may be appropriate to ask the parties and potential witnesses" during such interviews, the questions are phrased in exceedingly general terms.¹⁷² Consequently, employers relying exclusively on EEOC guidance may fail to elicit information relevant to claims of same-sex harassment on the basis of gender stereotypes. Employers, therefore, should incorporate additional, gender-stereotyping specific questions into the EEOC's proffered script.

For the complainant, these questions might include: (1) Did the alleged harasser ever call you antigay slurs¹⁷³ or refer to you with sex-based epithets? (2) Did the alleged harasser ever touch you in a sexual or provocative manner, threaten to touch you in such a manner, or act as though such a touching were imminent? (3) Did the alleged harasser say or do anything to indicate that he or she perceives you as gender nonconforming in terms of your appearance, behavior, beliefs, preferences, romantic interests, etc.?

For the alleged harasser, these questions might include: (1) Did you ever call the complainant antigay slurs or refer to the complainant using sex-based epithets? (2) Did you ever touch the complainant in a manner that might be perceived as sexual or provocative, threaten to touch the complainant in such a manner, or act as though such a touching were imminent? (3) Did the complainant ever say or do anything to make you think the complainant is effeminate/insufficiently masculine (if the complainant is a man) or macho/insufficiently feminine (if the complainant is a woman)?

¹⁶⁷ See Lawton, *supra* note 151, at 210 (noting that the ability to bypass a harassing supervisor often provides sufficient evidence of an effective grievance procedure to satisfy the first prong of the *Ellerth/Faragher* defense).

¹⁶⁸ ENFORCEMENT GUIDANCE, *supra* note 149.

¹⁶⁹ Walsh, *supra* note 127, at 517.

¹⁷⁰ ENFORCEMENT GUIDANCE, *supra* note 149.

¹⁷¹ See *id.*

¹⁷² See *id.* (recommending that complainants be asked to provide the "who, what, when, where, and how" of the alleged harassment).

¹⁷³ See *supra* Part VI.B.

VII. CONCLUSION

Because *Equal Employment Opportunity Commission v. Boh Brothers Construction Company* ostensibly represents the first faithful application of the gender-stereotyping theory in the context of same-sex harassment litigation, additional courts may elect to abandon the objective-evidence standard in favor of adopting the Fifth Circuit's subjective-perception test. Employers, therefore, must resist the temptation to dismiss *Boh Brothers* as a legal aberration confined to the Fifth Circuit and instead take steps to prepare for the possibility of a legal environment in which overtly masculine men and patently feminine women may assert viable same-sex harassment claims. By eliminating the requirement that harasses exhibit readily observable, objectively gender-nonconforming characteristics in the workplace while at the same time mandating that courts conduct a rigorous, fact-intensive inquiry into the idiosyncratic beliefs and perceptions of individual harassers, the subjective-perception test would seem to portend a significant expansion of employer liability.

Employers are not wholly without recourse, however. First, employers should make certain they have promulgated a comprehensive antiharassment policy that specifically prohibits same-sex harassment on the basis of gender stereotypes while providing realistic, workplace-specific examples of the types of conduct that would be found to violate the policy. Second, employers should prohibit the use of antigay slurs and epithets in the workplace as such terms are often predicated on gender stereotypes. Third, employers should revise their internal grievance procedures to facilitate the submission, investigation, and remediation of complaints alleging same-sex harassment on the basis of gender stereotypes. Ideally, such measures would ensure that individuals designated to receive employee complaints include members of both sexes and mandate that all employee interviews include gender-stereotyping-specific questions. Collectively, these proposals will serve to deter employees from engaging in same-sex harassment on the basis of gender stereotypes in the first instance while allowing employers to successfully invoke the *Ellerth/Faragher* affirmative defense should such harassment nevertheless occur.