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JUDGING GENDER NORMS IN *EEOC v. BOH BROS. CONSTRUCTION CO.*: WHY THE SUBJECTIVE APPROACH IS NECESSARY WHEN EVALUATING CLAIMS OF SEX DISCRIMINATION BASED ON GENDER STEREOTYPING

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Abstract: On September 27, 2013, the U.S. Court of Appeals for the Fifth Circuit, sitting en banc, held in favor of Kerry Woods, a heterosexual male construction worker who claimed sex discrimination based on gender stereotyping by Chuck Wolfe, his heterosexual male supervisor. In *EEOC v. Boh Bros. Construction Co.*, the majority based its analysis on Wolfe's subjective view of Woods' non-conformance with gender stereotyping in holding there was discrimination. The use of a subjective test ensures that victims of severe or pervasive sex discrimination have a remedy even if they visibly conform to gender stereotypes. Additionally, the majority correctly protected all employees who experience severe or pervasive sex discrimination irrespective of their environments by concluding that the inherently vulgar context of the construction site did not automatically invalidate the claim. The dissenting judges' emphasis on using an objective standard when analyzing claims of sex discrimination based on gender stereotyping would improperly deny victims of severe or pervasive harassment a remedy simply because they appear to comply with the judges' opinions of gender norms.

INTRODUCTION

In 2013, the U.S. Court of Appeals for the Fifth Circuit, sitting en banc, upheld a jury's finding in favor of the Equal Employment Opportunity Commission (EEOC) on a hostile-environment claim based on sexual harassment.¹ In *EEOC v. Boh Bros. Construction Co.*, the EEOC brought a claim on behalf of Kerry Woods, an ironworker employed by the defendant Boh Brothers Construction Company (Boh Brothers), after Woods experienced continual, derogatory, verbal, and physical harassment from the superintendent of the construc-

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¹ *EEOC v. Boh Bros. Const. Co. (Boh Bros. II)*, 731 F.3d 444, 451, 469, 470 (5th Cir. 2013) (en banc) (vacating the award of punitive damages and remanding the issue of compensatory damages to the district court).

tion site where he was employed.² Woods' claim of discrimination was based on sex centered and homophobic comments and actions directed towards him by Chuck Wolfe, the site superintendent, whose comments focused on Woods' perceived "feminine" qualities.³

Following a meeting with the general superintendent of Boh Brothers' Heavy Highway Department in which Woods complained in detail about the harassment, Woods was terminated from his position with the bridge maintenance crew.⁴ Given the nature of the abuse, the EEOC brought an initial claim in the U.S. District Court for the Eastern District of Louisiana, alleging sexual harassment and retaliation under Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination based on sex.⁵ After three days of deliberation, the jury found in favor of Woods on the sexual harassment claim but in favor of Boh Brothers on the retaliation claim.⁶

After the district court entered judgment, Boh Brothers filed a motion for judgment as a matter of law and a motion for a new trial.⁷ The district court denied both motions and Boh Brothers appealed the decision.⁸ A panel for the Fifth Circuit overturned the jury verdict, finding that the evidence was insufficient to demonstrate that Woods had been harassed because of sex and that, therefore, there was no Title VII violation.⁹

Following a rehearing en banc, the Fifth Circuit affirmed the district court's finding of sexual harassment, noting that harassment as a result of an individual's perceived non-conformance with gender stereotypes constituted harassment on the basis of sex, and further confirming that Title VII does not bar complaints in which both parties are of the same sex.¹⁰ In concluding that the abuse was based on gender stereotyping, the Fifth Circuit focused on Wolfe's subjective perception that Woods did not conform to gender norms.¹¹ Additionally, the court acknowledged the requirement to consider the inherently vulgar environment of the construction site, but instead focused on the par-

² *Id.* at 449.

³ *See id.* at 450. Wolfe often called Woods a "princess," "pu—y," and "fa—ot" and would approach Woods from behind to simulate anal intercourse when Woods was bent over to complete a task. *Id.* at 449.

⁴ *See id.* at 450. Prior to Woods' meeting, Wolfe told the general superintendent that he "didn't care for" Woods and that Woods was "different" and he was "done with" him. *Id.*

⁵ 42 U.S.C. § 2000e-2(a)(1) (2012); *Boh Bros. II*, 731 F.3d at 451.

⁶ *Boh Bros. II*, 731 F.3d at 451. Woods was awarded \$201,000.00 in compensatory damages and \$250,000.00 in punitive damages. *Id.* Due to a statutory cap for damages of \$300,000.00 the district court then reduced the compensatory damages to \$50,000.00. *Id.*

⁷ *Id.*

⁸ *Id.*

⁹ *Id.*

¹⁰ *See id.* at 454, 456. The Fifth Circuit then vacated the award of punitive damages, finding that the EEOC had not met the high burden of demonstrating that conduct of the Boh Brothers was "malicious or recklessly indifferent" or that Boh Brothers failed to act in the face of a perceived risk. *Id.* at 468-69.

¹¹ *Id.* at 456.

ticular manner and content of the harassment directed at Woods to conclude that the specific comments by Wolfe were based on Woods' sex.¹² The dissenting opinions of Judges Jolly and Jones argued that the court should take an objective approach to claims of gender stereotyping; accordingly Judges Jolly and Jones would have found in favor of Boh Brothers because Woods appeared to visibly comply with gender norms.¹³ The dissenting judges ignored the evidence of Wolfe's perception of the abuse and incorrectly emphasized the crude atmosphere of the construction site.¹⁴

Part I of this Comment outlines the factual and procedural history of *Boh Bros.* Part II discusses the majority's application of the subjective approach to same-sex gender stereotyping and compares that approach to the analysis of the dissenting opinions, which supports the application of an objective analytical framework. Part III advocates for the majority's subjective test as the best test for determining when harassment constitutes discrimination based on sex in same-sex situations. The majority's approach best protects all victims of sex discrimination in the workplace by focusing on the abuser's mental state and the specific abuse, rather than concentrating on the victim's objective conformance with supposed societal norms.

I. SAME-SEX SEXUAL HARASSMENT AND THE EEOC'S CLAIM

Boh Brothers hired Kerry Woods in November of 2005 as an ironworker for a project repairing the Twin Spans bridges in New Orleans that were damaged during Hurricane Katrina.¹⁵ In January 2006, Woods was transferred to the bridge maintenance team where Chuck Wolfe served as superintendent.¹⁶ While the construction site was perceived as a generally vulgar environment where Wolfe was often the most offensive, Woods soon found himself the target of frequent and targeted abuse from Wolfe.¹⁷ Both Wolfe and Woods recounted a situation during which Woods sat at a lunch table with the group of ironworkers and shared that he brought Wet Ones wipes with him to work because he did not like to use the toilet paper in the bathrooms.¹⁸ Wolfe admitted that he viewed this as "feminine" and "kind of gay" and thought it had been a bad idea for Woods to share this with the rest of the group.¹⁹ Woods claimed that Wolfe would often berate him, calling him "princess," "pu—y," and "fa—

¹² See *id.* at 460–61 (noting that Wolfe admitted to only calling Woods "queer").

¹³ See *id.* at 472 (Jolly, J., dissenting); *id.* at 478–79 (Jones, J., dissenting).

¹⁴ See *id.* at 474 (Jolly, J., dissenting); *id.* at 475, 479 (Jones, J., dissenting).

¹⁵ EEOC v. Boh Bros. Const. Co. (*Boh Bros. II*), 731 F.3d 444, 449 (5th Cir. 2013) (en banc).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.* at 450.

¹⁹ See *id.* at 450, 457–58.

ot.”²⁰ In addition, on numerous occasions, Wolfe stood behind Woods as he bent over to complete a task on the site and simulated engaging in anal sex with him.²¹ Wolfe would also expose himself to Woods while urinating at the worksite and, in one instance, approached the car where Woods was napping on his break and stated “[i]f your door wouldn’t have been locked, my d-ck probably would have been in your mouth,” while zipping up his pants.²² Woods complained to the foreman about Wolfe’s conduct on multiple occasions, but did not specifically recount all of the details of the abuse because he did not want to create more problems.²³

In November 2006, Woods approached an inspector that oversaw the bridge site and asked to see the workers’ timesheets.²⁴ Boh Brothers prohibited the viewing of other workers’ timesheets, and Woods’ inquiry was reported to Wolfe.²⁵ Wolfe then notified the general superintendent for the Boh Brothers’ Heavy Highway Department, Wayne Duckworth, adding that he did not like Woods, that he was “different,” and “didn’t fit in” with the rest of the crew.²⁶ Wolfe told Woods to meet with Duckworth the next morning and during this meeting Woods recounted in detail the harassment he had been experiencing from Wolfe.²⁷ Duckworth ended the meeting by stating he would “look into” the harassment claims, but then sent Woods home without pay.²⁸ As a follow-up to his conversation with Woods, Duckworth spoke directly to Wolfe and a crew foreman and ultimately concluded that, while Wolfe’s conduct had been unprofessional, it did not constitute sexual harassment.²⁹ Due to lack of available work, Boh Brothers laid off Woods in February 2007.³⁰

In response, Woods filed claims of discrimination based on sex and retaliation with the EEOC.³¹ In September 2009, the EEOC brought a Title VII claim based on sex discrimination deriving from a hostile work environment in the U.S. District Court for the Eastern District of Louisiana.³² A jury found in

²⁰ *Id.* at 457.

²¹ *Id.*

²² *Id.* at 450 (internal quotations omitted).

²³ *Id.*

²⁴ *Id.* Woods later told a supervisor that he believed that Wolfe was “shrimping on company time.” *Id.* (internal quotations omitted).

²⁵ *Id.*

²⁶ *Id.*

²⁷ *Id.*

²⁸ *Id.* Believing that he had been fired after his meeting with Duckworth, Woods called the foreman, Tim Carpenter, asking for a new job assignment. *Id.* at 450–51. Woods was then given a position at another job site, the Almonaster yard. *Id.* at 451.

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² *EEOC v. Boh Bros. Const. Co.*, No. 09-6460, 2011 WL 3585599 (E.D. La. Aug. 16, 2011) *aff’d*, 731 F.3d 444, 449 (5th Cir. 2013) (en banc).

favor of Woods and awarded both compensatory and punitive damages.³³ The district court then denied Boh Brothers' motion for judgment as a matter of law and motion for a new trial, and Boh Brothers promptly appealed.³⁴

A panel of the U.S. Court of Appeals for the Fifth Circuit overturned the jury verdict, finding the evidence insufficient to support a claim of sex discrimination.³⁵ The panel focused on the argument that discrimination based on sex is cognizable when harassment occurs as a result of an individual's perceived non-conformance with gender stereotypes.³⁶ In determining that the harassment was not discrimination based on sex, the panel stated that, because Woods did not present as overtly feminine, the harassment could not have been based on Wolfe's perception that Woods did not conform to gender norms.³⁷ The panel acknowledged Woods' use of Wet Ones as the "only evidence" of non-conformance with gender stereotypes, but dismissed this as being insufficient to support the claim.³⁸ The panel broadly concluded that a claim of discrimination based on sex that relies on gender stereotyping is only actionable if the plaintiff in fact did not conform to gender norms.³⁹

The EEOC then appealed for and was granted en banc review.⁴⁰ The EEOC sought review of the panel's decision that the conduct was not sexual discrimination as a matter of law under Title VII.⁴¹ After reversing the panel's decision, the Fifth Circuit, sitting en banc, also determined that the abuse was severe and pervasive enough to qualify as harassment under Title VII.⁴²

II. THE FIFTH CIRCUIT'S DECISION ON GENDER STEREOTYPING AND THE RELEVANCE OF CONTEXT IN TITLE VII CLAIMS

The U.S. Court of Appeals for the Fifth Circuit overturned the panel's decision by affirming the jury finding from the district court that the harassment

³³ *Id.* at 1.

³⁴ *Boh Bros. II*, 731 F.3d at 451.

³⁵ *Id.*

³⁶ *See* EEOC v. Boh Bros. Const. Co. (*Boh Bros. I*), 689 F.3d 458, 461–62 (5th Cir. 2012), *rev'd en banc*, 731 F.3d 444 (5th Cir. 2013).

³⁷ *Id.* at 462. The court stated explicitly that Woods does not "strike us as overtly feminine." *Id.*

³⁸ *Id.* at 463.

³⁹ *Id.* at 462.

⁴⁰ *Boh Bros. II*, 731 F.3d at 451.

⁴¹ *See id.*

⁴² *Id.* at 461. The court also went on to analyze both Boh Brothers' *Ellerth/Faragher* affirmative defense and the award of punitive damages. *Id.* at 462–67. The court ultimately denied the defense, finding that a reasonable juror could determine that Boh Brothers did not have measures in place to prevent or remedy the abuse. *Id.* at 466. The court, however, overturned the award of punitive damages based on a lack of evidence demonstrating that Boh Brothers perceived the risk of a violation, and found that they did not act with malice. *Id.* at 468.

qualified as sex discrimination in violation of Title VII.⁴³ The court relied on precedent from the Supreme Court in determining both that sex discrimination claims can be based on evidence of gender stereotyping and that this behavior can occur between parties of the same sex.⁴⁴ In evaluating the issue of gender stereotyping, the Fifth Circuit emphasized that the harasser's subjective view of the subject's non-conformance with gender stereotypes should be determinative.⁴⁵ The court also held that, despite the abuse occurring in the context of a construction site, the harassment was sufficiently severe and pervasive to satisfy a claim under Title VII.⁴⁶

A. The Fifth Circuit's Emphasis on the Subjective Standard in Gender Stereotyping Claims

The Fifth Circuit sitting en banc affirmed the district court's finding that the harassment of Kerry Woods by his supervisor, Chuck Wolfe, qualified as discrimination based on sex in violation of Title VII.⁴⁷ The en banc court employed a two-step analysis of the claim, noting that affirmative findings at both steps were required to satisfy a claim.⁴⁸ First, the court considered whether the harassment constituted discrimination based on sex.⁴⁹ Second, upon finding that the harassment based on gender stereotyping did qualify as discrimination based on sex, the court analyzed whether the abuse was severe enough to satisfy a claim based on hostile work environment.⁵⁰

The court first looked to Supreme Court precedent set in *Price Waterhouse v. Hopkins*, which confirmed that claims of sex discrimination could be cognizable under a theory of gender stereotyping.⁵¹ The court then looked to precedent set in *Oncale v. Sundowner Offshore Services, Inc.* to confirm that gender stereotyping can be cognizable where both parties are of the same sex.⁵² The en banc court predicated their finding of sexual harassment based on

⁴³ EEOC v. Boh Bros. Const. Co. (*Boh Bros. II*), 731 F.3d 444, 449, 470 (5th Cir. 2013) (en banc). The en banc court also vacated the award of punitive damages and remanded the question of compensatory damages to the district court. *Id.* at 469, 470.

⁴⁴ See *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998); *Price Waterhouse v. Hopkins*, 490 U.S. 228, 241–42 (1989); *Boh Bros. II*, 731 F.3d at 453–54.

⁴⁵ *Boh Bros. II*, 731 F.3d at 456.

⁴⁶ See *id.* at 462.

⁴⁷ See *id.* at 449, 462.

⁴⁸ See *id.* at 453.

⁴⁹ *Id.*

⁵⁰ *Id.* at 460.

⁵¹ *Id.* at 453–54 (stating that “Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes” (quoting *Price Waterhouse*, 490 U.S. at 251)).

⁵² *Id.* at 454. The court noted that the *Oncale* decision provided three ways in which a plaintiff can demonstrate a claim of same-sex sexual harassment, but agreed with every other circuit that had

gender stereotyping on an evaluation of Wolfe's subjective perception of Woods.⁵³ In so doing, the court emphasized that the harasser's perception that a victim did not conform to gender stereotypes did not have to be objectively true to satisfy a claim.⁵⁴

The court relied on Wolfe's perception that Woods' use of Wet Ones was "kind of gay" and "feminine" to ground the theory of gender stereotyping.⁵⁵ The court noted that the specific terms that Wolfe used to denigrate Woods were sex-based terms such as "fa—ot," "pu—y," and "princess."⁵⁶ In conjunction with this terminology, Wolfe regularly simulated sexual acts towards Woods—humping him from behind when he leaned over to complete a task, exposing his genitals towards Woods, and threatening to "put his penis in Woods' mouth."⁵⁷ Given the nature of the abuse, in conjunction with Wolfe's admission that he found the use of Wet Ones to be feminine, the court concluded that the harassment was based on Wolfe's perception, regardless of its truth, that Woods did not conform to gender stereotypes.⁵⁸

B. Same-Sex Discrimination Claims in the Context of an Inherently Vulgar Construction Site

Once the en banc court determined that the harassment qualified as discrimination based on sex, the court went on to reject Boh Brothers' argument that the harassment was not severe or pervasive enough to satisfy a Title VII claim.⁵⁹ Boh Brothers relied on the inherently vulgar environment of the construction site in arguing that the abuse Woods experienced was similarly directed at other workers.⁶⁰ Boh Brothers asserted that Supreme Court precedent prevented Title VII from being used to enforce a "general civility code for the American workplace."⁶¹ The court acknowledged this precedent and, with this in mind, focused on whether the targeted harassment could be so distinguished from the general atmosphere of vulgarity that it rose to the level of severe or pervasive harassment.⁶² The court determined that the testimony from both

considered the issue in concluding that the *Oncale* list was not exhaustive and did not state the exclusive means of proving a same-sex sexual discrimination claim. *Id.* at 455.

⁵³ *Id.* at 456.

⁵⁴ *Id.* at 456–57.

⁵⁵ *See id.* at 450, 457 (quoting testimony given by Wolfe).

⁵⁶ *Id.* at 457.

⁵⁷ *Id.* at 459.

⁵⁸ *See id.* at 459–60 (noting that it was necessary to view "the record as a whole").

⁵⁹ *Id.* at 460–62.

⁶⁰ *See* En Banc Brief on Behalf of Defendant-Appellant, Boh Bros. Construction Co., at 35, EEOC v. Boh Bros. Const. Co. (*Boh Bros. I*), 689 F.3d 458 (5th Cir. 2012) (No. 11-30770), *rev'd en banc*, 731 F.3d 444 (5th Cir. 2013) [hereinafter En Banc Brief on Behalf of Defendant-Appellant].

⁶¹ *Id.* at 36 (citing *Oncale*, 523 U.S. at 77–78) (internal quotations omitted).

⁶² *See Boh Bros. II*, 731 F.3d at 461–62.

Woods and Wolfe confirmed that Woods was uniquely targeted for the type of abuse he endured.⁶³

The court emphasized the continuous nature of the abuse that extended beyond simply the occasional offensive epithet that Wolfe directed towards Woods.⁶⁴ Boh Brothers attempted to minimize the severity of the harassment by dismissing Wolfe's comments as "mere epithets or labels . . ." ⁶⁵ Conversely, the court reasoned that the actions by Wolfe that were directed at Woods—humping and exposing himself—elevated the conduct above simply sexually charged language.⁶⁶ As a result, the en banc court affirmed the district court's denial of judgment as a matter of law in favor of Boh Brothers because the evidence demonstrated that a reasonable juror could find that the harassment was sufficiently severe and pervasive.⁶⁷

C. *The Dissenting Opinions of Judge Jolly and Judge Jones*

In his dissent, Judge Jolly focused on the fact that Woods did not objectively appear to be feminine in order to determine that the abuse could not be characterized as gender stereotyping.⁶⁸ Judge Jolly argued that, absent objective evidence that a victim does not conform to gender stereotypes, there can be no intent by the harasser to discriminate based on their own notions of gender norms.⁶⁹ Additionally, Judge Jolly stated that there was no basis for concluding that Wolfe's targeted harassment of Woods resulted from a lack of conformance with gender norms.⁷⁰

In a separate dissent, Judge Jones echoed Judge Jolly in finding that a heterosexual male cannot have been discriminated against by another heterosexual male through gender stereotyping "which both know not to be true by conduct or appearance."⁷¹ Judge Jones' approach would require a victim to "visibly" not conform to gender stereotypes in order to satisfy a claim of dis-

⁶³ See *id.* The court quoted the testimony of Woods that he had not witnessed Wolfe act the same way towards other workers and that the behavior was not common on other construction sites. *Id.* at 461. The court also noted the admission by Wolfe that Woods was the only worker whom he called "queer." *Id.* Although Boh Brothers introduced evidence that the harassment was not uniquely directed at Woods, the court deferred to the jury in making judgments about both the credibility of witnesses and the context of the construction site. *Id.* at 461–62 nn.17–18.

⁶⁴ *Id.* at 461 ("Wolfe hurled raw sex-based epithets uniquely at Woods two-to-three times a day, almost every day, for months on end.")

⁶⁵ En Banc Brief on Behalf of Defendant-Appellant, *supra* note 60, at 38.

⁶⁶ See *Boh Bros. II*, 731 F.3d at 461.

⁶⁷ *Id.*

⁶⁸ See *id.* at 472 (Jolly, J., dissenting).

⁶⁹ See *id.*

⁷⁰ See *id.* at 473–74.

⁷¹ *Id.* at 477 (Jones, J., dissenting).

crimination based on gender stereotyping.⁷² In examining the specific epithets used, Judge Jones found no evidence of gender stereotyping because words with homosexual connotations (“princess,” “queer,” and “fairy”) were used towards a heterosexual man.⁷³

Judge Jones also continually categorized the harassment as simply verbal, and thus reasoned that it did not rise to the severe or pervasive level required in a Title VII claim.⁷⁴ In so doing, Judge Jones emphasized the inherently crude context of the construction site where such language was considered commonplace.⁷⁵ Judge Jones concluded that allowing a claim of gender stereotyping based on offensive speech in an environment in which such speech is commonplace would lead to the unconstitutional eradication of all vulgar speech in the workplace.⁷⁶ Similarly, Judge Jolly determined that the context of the abuse towards Woods, as well as the fact that Wolfe used somewhat similar language towards other workers, belied a claim of discrimination based on sex.⁷⁷ He relied on the Supreme Court’s decision in *Oncale* to reason that the full context of a workplace environment should be taken into account when considering a case of sex discrimination.⁷⁸ Judge Jolly concluded that the majority erred in not giving more weight to the context of the harassment on the all-male construction site.⁷⁹

III. THE VALIDITY OF THE SUBJECTIVE APPROACH TO SEX DISCRIMINATION CASES BASED ON GENDER STEREOTYPING

Applying a subjective approach to cases of sex discrimination based on gender stereotyping ensures that all victims of severe or pervasive sexual harassment are protected, regardless of their objectively perceived visual conformance with gender norms.⁸⁰ The majority correctly chose to analyze how Wolfe’s view that Woods’ behavior was feminine was the cause of the harassment, and did not evaluate the claim based on the judges’ own opinions of the victim’s objective conformance with gender norms.⁸¹

⁷² *Id.* at 478–79 (noting that this is “[t]he only objective way for courts or juries to grasp” that harassment resulted because of the victim’s sex).

⁷³ *Id.* at 476.

⁷⁴ *See id.* at 475 (concluding that there was “[n]o physical touching, threats, sexual *quid pro quo*, or employment retaliation”).

⁷⁵ *See id.*

⁷⁶ *See id.* (referencing the First Amendment right to free speech).

⁷⁷ *See id.* at 474 (Jolly, J., dissenting).

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *See EEOC v. Boh Bros. Const. Co. (Boh Bros. II)*, 731 F.3d 444, 456–57 (5th Cir. 2013) (en banc).

⁸¹ *See id.* (“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 . . .”).

Whether the judges agreed with Wolfe's stereotypes or not, Wolfe explicitly stated that he regarded Woods' use of Wet Ones to be "feminine" and "kind of gay."⁸² Further, it was possible for a jury to infer that Wolfe's disparate mistreatment of Woods would not have occurred if he had been a woman using Wet Ones.⁸³ This inference illustrates how the mistreatment was based on the sex of the victim and his nonconformance with his harasser's perception of how a man should behave.⁸⁴

Adopting the objective approach suggested by the dissenting judges would ignore the fact that different people have distinctive opinions about what constitutes normal gender behavior.⁸⁵ Using an objective approach, Judges Jolly and Jones both disregarded the evidence pertaining to the use of Wet Ones in concluding that the EEOC failed to demonstrate that Woods did not conform to gender stereotypes.⁸⁶ In concluding that a plaintiff must visibly not conform to gender stereotypes in order to bring a claim of gender stereotyping, Judge Jones ignored critical language from the U.S. Court of Appeals for the Second Circuit in *Dawson v. Bumble & Bumble*, which required a showing of non-gender-conforming behavior or appearance in Title VII sexual harassment cases.⁸⁷

While Woods may have visually conformed to gender stereotypes, his usage of Wet Ones was a basis for Wolfe's sexual harassment towards him.⁸⁸ Requiring that a victim objectively defy stereotypical gender appearances in order to justify a claim would leave victims who experience severe harassment but who do not visibly defy gender stereotypes without a remedy, despite the discriminatory and sexual nature of the harassment that they endure.⁸⁹

Additionally, the majority correctly concluded that the harassment in this case was sufficiently severe or pervasive to satisfy a Title VII claim despite the inherently vulgar nature of the construction site.⁹⁰ The majority considered the totality of the situation, including the homosexual connotations of the name-

⁸² See *id.* at 450, 457.

⁸³ Brief *Amicus Curiae* of Lambda Legal Defense and Education Fund, Inc. Supporting Plaintiff-Appellee EEOC and Urging Affirmance at 12, *EEOC v. Boh Bros. Const. Co. (Boh Bros. I)*, 689 F.3d 458 (5th Cir. 2012) (No. 11-30770), rev'd en banc, 731 F.3d 444 (5th Cir. 2013) [hereinafter Brief of Lambda Legal Defense and Education Fund].

⁸⁴ See *id.*

⁸⁵ See *id.* at 15–16.

⁸⁶ See *Boh Bros. II*, 731 F.3d at 470 (Jolly, J., dissenting); *id.* at 478 (Jones, J., dissenting).

⁸⁷ *Id.* at 479 (Jones, J., dissenting); *Dawson v. Bumble & Bumble*, 398 F.3d 211, 221 (2d Cir. 2005) (noting that "[g]enerally speaking, one can fail to conform to gender stereotypes in two ways: (1) through behavior or (2) through appearance").

⁸⁸ See *Boh Bros. II*, 731 F.3d at 457–58.

⁸⁹ See Brief of Lambda Legal Defense and Education Fund, *supra* note 83, at 13–14.

⁹⁰ See *Boh Bros. II*, 731 F.3d at 461.

calling, the sexual nature of the physical actions and threats, the regularity of the harassment, and the singling out of Woods.⁹¹

When considered in conjunction with Wolfe's opinion of Woods' feminine behavior, the majority properly affirmed the jury's finding of sexual harassment based on gender stereotyping.⁹²

Conversely, the dissenting opinion of Judge Jones disregarded the totality of the evidence in distilling the harassment to simply offensive speech.⁹³ The evidence taken as a whole demonstrated that, although Wolfe did not actually touch Woods, the harassment rose beyond simple verbal epithets to include unwanted physical simulations and threats of oral rape.⁹⁴ In reducing the harassment to vulgar speech, the dissenting opinion improperly relied on the generally crude nature of the construction site to excuse Wolfe's actions.⁹⁵

Further, in concluding that the treatment that Woods experienced was excusable due to the inherent vulgarity on the jobsite and due to the similar treatment that Wolfe directed towards the other men on the site, Judges Jolly and Jones ignored the admitted differences in the manner of the harassment directed at Woods.⁹⁶ While social context in sex discrimination cases should always be considered, no victim of pervasive sexual abuse, threats, and gestures should be denied relief based on a "boys will be boys" social construction.⁹⁷ Reservations about frivolous claims are valid, but this cannot justify foreclosing any possibility of a legal remedy for an entire class of victims of same-sex harassment because they happen to work in an inherently vulgar environment.⁹⁸ Consequently, the majority correctly adopted the subjective approach in analyzing Woods' claim.⁹⁹

CONCLUSION

The U.S. Court of Appeals for the Fifth Circuit, sitting en banc, held that a plaintiff bringing a claim under Title VII could rely on gender stereotyping to prove discrimination based on sex. In affirming the judgment of the district court, the Fifth Circuit correctly relied on evidence of the harasser's subjective

⁹¹ *Id.* at 459, 461–62.

⁹² *See id.* at 459–60, 461–62.

⁹³ *See id.* at 459 n.13; *id.* at 477 (Jones, J., dissenting).

⁹⁴ *Id.* at 449–50 (majority opinion).

⁹⁵ *See id.* at 472–73 (Jolly, J., dissenting) (arguing that Wolfe treated all the men with the "same or similar disrespect"); *id.* at 478 (Jones, J., dissenting).

⁹⁶ *Id.* at 461 n.16 (majority opinion); *id.* at 472 (Jolly, J., dissenting); *id.* at 478 (Jones, J., dissenting).

⁹⁷ *See generally* Kaitrin Vohs, Comment, "I Don't Know the Question, but Sex Is Definitely the Answer:" *The Over-Simplification of Same-Sex Sexual Harassment Since Oncale v. Sundowner Offshore Services, Inc.*, 40 WM. MITCHELL L. REV. 1611, 1644 (2014).

⁹⁸ *See id.* at 1644–45.

⁹⁹ *See Boh Bros. II*, 731 F.3d at 456.

view of the victim's nonconformance with gender norms. Additionally, the court's consideration of the record of abuse as a whole was appropriate in determining that gender stereotyping existed even in the context of an inherently vulgar workplace.

Given the variable opinions of what constitutes stereotypical gender norms, it is necessary for courts to analyze the motivation behind an individual harasser's actions in deciding a case of gender discrimination based on gender stereotyping. Analyzing the abuse based on the harasser's subjective opinion of a victim's nonconforming behavior ensures that victims of sexual discrimination that visually comply with objective gender stereotypes have a remedy. Additionally, while context should be considered, severe harassment should not be discounted because an individual happens to work in a same-sex environment that is inherently crude. When a victim experiences severe sexual harassment—whether from an individual of the opposite or same-sex—that is motivated by a perception of noncompliance with gender norms, the claim should be allowed irrespective of the environment from which it derived. This decision is a positive step towards social justice for all victims who experience sex discrimination in the workplace.