
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).

Title VII of the Civil Rights Act of 1964¹ prohibits employers from discriminating against an employee “because of such individual’s . . . sex.”² The Supreme Court has held that this prohibition extends to instances of workplace sexual harassment³ — including “same-sex sexual harassment”⁴ — and that it also bars employers from discriminating on the basis of “sex stereotypes.”⁵ By contrast, courts have repeatedly affirmed that “Title VII does not prohibit harassment or discrimination because of sexual orientation.”⁶ Over the years, lower courts have inconsistently handled cases that required them to determine the nature of the interplay between these various precedents.⁷ Recently, in *EEOC v. Boh Bros. Construction Co.*,⁸ the Fifth Circuit considered allegations of sex stereotyping in a same-sex harassment action.⁹ Avoiding the larger question of whether this theory of recovery is viable under Title VII, the court instead found the plaintiff’s evidence insufficient to demonstrate that the employer had acted on the basis of an impermissible stereotype.¹⁰ In doing so, the Fifth Circuit implicitly adopted a narrow reading of sex-stereotyping doctrine, which allowed it to sidestep the oft-cited concern that plaintiffs will use allegations of sex stereotyping “to ‘bootstrap protection for sexual orientation into Title VII.’”¹¹ However, such a move limits the relief available to victims of sex stereotyping, a form of workplace discrimination considered unlawful under Supreme Court precedent.¹²

¹ 42 U.S.C. §§ 2000e to 2000e-17 (2006 & Supp. V 2011).

² *Id.* § 2000e-2(a)(1).

³ See *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 66 (1986).

⁴ *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 82 (1998).

⁵ *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (plurality opinion).

⁶ *Simonton v. Runyon*, 232 F.3d 33, 35 (2d Cir. 2000); see also Arthur S. Leonard, *Sexual Minority Rights in the Workplace*, 43 BRANDEIS L.J. 145, 152–53 (2005) (“Courts [have] unanimously concluded that sexual orientation discrimination, as such, is not covered by Title VII.”). According to *Simonton*, despite a lack of relevant legislative history, this exclusion of sexual-orientation claims is “informed by Congress’s rejection, on numerous occasions, of bills that would have extended Title VII’s protection to people based on their sexual preferences.” 232 F.3d at 35.

⁷ See Matthew Fedor, Comment, *Can Price Waterhouse and Gender Stereotyping Save the Day for Same-Sex Discrimination Plaintiffs Under Title VII? A Careful Reading of Oncale Compels an Affirmative Answer*, 32 SETON HALL L. REV. 455, 468–69 (2002).

⁸ 689 F.3d 458 (5th Cir. 2012).

⁹ See *id.* at 461.

¹⁰ *Id.* at 463.

¹¹ *Dawson v. Bumble & Bumble*, 398 F.3d 211, 218 (2d Cir. 2005) (quoting *Simonton*, 232 F.3d at 38).

¹² See *Price Waterhouse v. Hopkins*, 490 U.S. 228, 251 (1989) (plurality opinion).

Abriding Title VII's protections in this way is ultimately not necessary to address fears of "bootstrapping": the factual realities of same-sex harassment and a close reading of relevant case law demonstrate that the prohibition on sex stereotyping can be given its full effect in cases like *Boh Bros.* without constructively adding sexual orientation to Title VII's list of protected categories.

From 2005 to 2007, Kerry Woods was employed by Louisiana-based Boh Brothers Construction Company.¹³ In January 2006, Woods began working as a member of an all-male maintenance crew repairing the damaged Twin Spans Bridge between New Orleans and Slidell, Louisiana.¹⁴ Before long, crew superintendent Chuck Wolfe was harassing Woods on a regular basis: calling him names (such as "pussy," "faggot," "homo," "princess," and "queer"),¹⁵ making fun of him for using "Wet Ones" antibacterial wipes in the bathroom,¹⁶ "approach[ing] him from behind to simulate having sexual intercourse while [he] was bent over to perform job duties," and "expos[ing] himself to Woods numerous times."¹⁷ The record included "no evidence that either man was . . . homosexual."¹⁸

In November 2006, Woods was accused of an unrelated disciplinary infraction.¹⁹ At a meeting with Wolfe and Wolfe's supervisor, Wayne Duckworth, "Woods complained in detail about Wolfe's harassment."²⁰ Afterward, Woods was "sent . . . home for three days without pay" and was subsequently reassigned from the Twin Spans crew to a job at Boh Brothers' yard in New Orleans.²¹ Following an investigation of Woods's claims, Duckworth ultimately determined that "Wolfe's behavior . . . did not constitute sexual harassment."²²

Woods filed an intake questionnaire with the Equal Employment Opportunity Commission (EEOC), claiming that Duckworth had fired him from the Twin Spans job and rehired him three days later "to work at a different Boh Brothers location."²³ Later, after being "laid off for lack of work," Woods filed a formal charge of discrimination with the EEOC, accusing Boh Brothers of sexual harassment and re-

¹³ *Boh Bros.*, 689 F.3d at 459–60.

¹⁴ *Id.*

¹⁵ Transcript of Proceedings Before the Honorable Ivan Lemelle, United States District Judge at 310–11, 315, 318, EEOC v. Boh Bros. Constr. Co., No. 09-CV-6460, 2011 WL 1397106 (E.D. La. Mar. 28, 2011) [hereinafter Trial Transcript]; see also *Boh Bros.*, 689 F.3d at 460.

¹⁶ *Boh Bros.*, 689 F.3d at 459; see also Trial Transcript, *supra* note 15, at 303.

¹⁷ *Boh Bros.*, 689 F.3d at 460.

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.* Whether Duckworth sent Woods home as "punishment" or simply needed "time to find him a new job assignment" was "unclear" from the record. *Id.*

²² *Id.*

²³ *Id.*

taliation under Title VII (the latter on the basis of his reassignment).²⁴ In September 2009, the EEOC brought these claims against Boh Brothers on Woods's behalf in the United States District Court for the Eastern District of Louisiana.²⁵ After a three-day trial, the jury found for Woods on the sexual harassment claim and for Boh Brothers on the retaliation claim.²⁶ The court denied Boh Brothers' renewed motion for judgment as a matter of law, and Boh Brothers appealed.²⁷

The Fifth Circuit vacated and remanded for dismissal of the complaint.²⁸ Writing for a unanimous panel, Judge Jolly²⁹ held that "the evidence [was] insufficient to support the jury's verdict that Woods was discriminated against 'because of . . . sex.'"³⁰ According to the court, this defect proved fatal to the EEOC's claim because plaintiffs alleging sexual harassment must show that the harasser's conduct was motivated by the victim's sex.³¹

Judge Jolly began by addressing *Oncale v. Sundowner Offshore Services, Inc.*,³² in which the Supreme Court held that sexual harassment suits are cognizable under Title VII even "when the harasser and the harassed employee are of the same sex."³³ The *Oncale* Court posited three ways that plaintiffs in such suits might satisfy Title VII's "because of . . . sex" requirement: first, by offering "credible evidence that the harasser [is] homosexual";³⁴ second, by "showing that 'the harasser is motivated by general hostility to the presence of [members of the same sex] in the workplace'";³⁵ or third, by providing "direct comparative evidence about how the alleged harasser treated members of both sexes in a mixed-sex workplace."³⁶ Here, the EEOC sought to

²⁴ *Id.*

²⁵ *See id.* at 459, 460.

²⁶ *Id.* at 460. The jury awarded Woods \$450,000 in damages, which the court reduced to \$300,000 in accordance with Title VII's damages cap. *Id.* (citing 42 U.S.C. § 1981a(b)(3)(D) (2006)).

²⁷ *Id.*

²⁸ *Id.* at 459.

²⁹ Judge DeMoss and Judge Stewart joined Judge Jolly.

³⁰ *Boh Bros.*, 689 F.3d at 463 (second alteration in original) (quoting 42 U.S.C. § 2000e-2(a)(1)).

³¹ *See id.* at 462. Such plaintiffs must also show that the conduct was "sufficiently severe or pervasive to create a hostile work environment." *Id.* at 462–63. Because the court concluded that no reasonable jury could find Wolfe's conduct to be sex based, it declined to reach this second question. *See id.*

³² 523 U.S. 75 (1998).

³³ *Boh Bros.*, 689 F.3d at 461; *see also Oncale*, 523 U.S. at 79–80.

³⁴ *Boh Bros.*, 689 F.3d at 461 (quoting *Oncale*, 523 U.S. at 80) (internal quotation mark omitted).

³⁵ *Id.* (alteration in original) (quoting *Oncale*, 523 U.S. at 80).

³⁶ *Id.* (quoting *Oncale*, 523 U.S. at 80–81) (internal quotation mark omitted). In setting forth these three paths to recovery, the *Oncale* Court reaffirmed that plaintiffs "must always prove that the conduct at issue was not merely tinged with offensive sexual connotations, but actually constituted 'discrimin[ation] . . . because of . . . sex.'" 523 U.S. at 81 (alterations in original) (quoting 42 U.S.C. § 2000e-2(a)(1) (2006)).

prove its claim under a fourth evidentiary route by showing that Wolfe's conduct was motivated by "sex stereotyping,"³⁷ a theory of recovery first recognized by the Supreme Court in *Price Waterhouse v. Hopkins*.³⁸ In particular, the EEOC asserted that "Wolfe harassed Woods because Woods did not, in Wolfe's view, conform to the male stereotype."³⁹ By contrast, Boh Brothers argued that recovery in same-sex harassment suits is limited to *Oncale*'s "three evidentiary paths."⁴⁰

Judge Jolly noted that the Fifth Circuit had never considered whether *Oncale*'s three frameworks are exhaustive⁴¹ but asserted that in other circuits there has been "at least some resistance to allowing, in same-sex harassment suits, evidence that does not fall within any *Oncale* category."⁴² The court ultimately found it unnecessary to resolve this dispute in *Boh Bros.*, holding instead that even if the EEOC's theory were viable, there was insufficient evidence that Woods's harassment resulted from sex stereotyping.⁴³

To explain why, Judge Jolly turned to *Price Waterhouse* to examine the genesis of the sex-stereotyping theory. There, the plaintiff claimed that her firm had denied her partnership because, in the words of some of the firm's partners, "she was 'macho,' needed 'a course at charm school,' and should 'walk more femininely, talk more femininely, dress more femininely, wear make-up, have her hair styled, and wear jewelry.'"⁴⁴ A plurality of the Court determined that the plaintiff had stated a valid claim for discrimination because "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."⁴⁵

According to Judge Jolly, the EEOC's case "[stood] in sharp contrast to *Price Waterhouse*, in which there was considerable evidence that the plaintiff did not conform to the female stereotype."⁴⁶ Here, the court found that the only evidence that Wolfe saw Woods as effeminate was the fact that he taunted Woods for using "Wet Ones," something "that [did] not strike [the court] as overtly feminine."⁴⁷ Judge Jolly also noted that Woods was not the "only target" of Wolfe's ha-

³⁷ *Boh Bros.*, 689 F.3d at 461.

³⁸ 490 U.S. 228, 251 (1989) (plurality opinion).

³⁹ *Boh Bros.*, 689 F.3d at 461.

⁴⁰ *Id.*

⁴¹ *See id.*

⁴² *Id.* at 462 (citing *Wasek v. Arrow Energy Servs., Inc.*, 682 F.3d 463, 467–69 (6th Cir. 2012)).

⁴³ *See id.*

⁴⁴ *Id.* (quoting *Price Waterhouse v. Hopkins*, 490 U.S. 228, 235 (1989) (plurality opinion)).

⁴⁵ *Id.* (quoting *Price Waterhouse*, 490 U.S. at 250 (plurality opinion)) (internal quotation marks omitted).

⁴⁶ *Id.*

⁴⁷ *Id.*

hassment and that Wolfe was not “the sole offender” at Boh Brothers.⁴⁸ For these reasons, the court found “insufficient evidence that Wolfe [had] ‘acted on the basis of gender.’”⁴⁹ Thus, even assuming that the EEOC’s sex-stereotyping theory of recovery was viable under *Oncale*, the jury’s verdict could not stand.⁵⁰

As a holding seemingly limited to the sufficiency of the plaintiff’s evidence, *Boh Bros.* does not appear to work any major doctrinal upheavals. Nevertheless, it is important for its treatment of an underlying tension in federal employment discrimination law. As courts struggle to define the contours of the intersection between *Price Waterhouse* and *Oncale* in same-sex discrimination cases, they frequently confront another background principle of Title VII jurisprudence: sexual-orientation discrimination is not actionable under the statute. In particular, courts often “fear that plaintiffs are trying to use the stereotyping language in *Price Waterhouse* to bootstrap sexual orientation and gender nonconformity protection into Title VII contrary to [congressional intent].”⁵¹ Because the Fifth Circuit in *Boh Bros.* applied a narrow construction of the protections afforded by *Price Waterhouse*, it was not forced to confront this issue. However, abridging the prohibition on sex stereotyping is not necessary to avoid bootstrapping. Rather, an examination of the nature of same-sex harassment and the relevant jurisprudence demonstrates that courts can give *Price Waterhouse* its full effect in cases like *Boh Bros.* without constructively adding sexual orientation to Title VII’s list of protected categories.

The prohibition against sex stereotyping in *Price Waterhouse* is a broad one. According to the plurality, by enacting Title VII, “Congress intended to strike at the entire spectrum of disparate treatment of men and women resulting from sex stereotypes.”⁵² Other circuits have rec-

⁴⁸ *Id.* According to Judge Jolly, “misogynistic and homophobic epithets were bandied about routinely among crew members,” and Woods “reciprocated with like vulgarity.” *Id.*

⁴⁹ *Id.* (quoting *Price Waterhouse*, 490 U.S. at 250 (plurality opinion)).

⁵⁰ *Id.* at 463.

⁵¹ Erica Williamson, Note, *Moving Past Hippies and Harassment: A Historical Approach to Sex, Appearance, and the Workplace*, 56 DUKE L.J. 681, 718–19 (2006) (footnote omitted) (noting that courts are “immediately suspicious when plaintiffs” make such arguments); see also, e.g., *Vickers v. Fairfield Med. Ctr.*, 453 F.3d 757, 764–65 (6th Cir. 2006); *Dawson v. Bumble & Bumble*, 398 F.3d 211, 218 (2d Cir. 2005). Post-*Oncale* courts considering “nearly identical facts” have split over whether to allow sex stereotyping-based same-sex harassment claims depending on the degree to which they perceive a bootstrapping threat. Ann C. McGinley, *Creating Masculine Identities: Bullying and Harassment “Because of Sex,”* 79 U. COLO. L. REV. 1151, 1219–22 (2008).

⁵² *Price Waterhouse*, 490 U.S. at 251 (plurality opinion) (quoting *City of L.A. Dep’t of Water & Power v. Manhart*, 435 U.S. 702, 707 n.13 (1978)) (internal quotation mark omitted). The Court has recognized that a “hostile working environment” characterized by sexual harassment, like a discriminatory employment evaluation, constitutes disparate treatment with regard to one of the “terms, conditions, or privileges of employment.” *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 64 (1986) (quoting 42 U.S.C. § 2000e-2(a)(1) (2006)) (internal quotation mark omitted).

ognized the breadth of this language. For example, in *Smith v. City of Salem*,⁵³ the Sixth Circuit noted that “employers who discriminate against men because they . . . wear dresses and makeup, or *otherwise act femininely*, are . . . engaging in sex discrimination, because the discrimination would not occur but for the victim’s sex.”⁵⁴ In short, “[a]fter *Price Waterhouse*, it seems clear that the term ‘sex,’ as used in Title VII, . . . includes one’s physical appearance, language, behavior, manner of interacting with others, and other characteristics that might be labeled ‘masculine’ or ‘feminine.’”⁵⁵ Importantly, *Oncale* “[gave no] indication that the Court had turned its back on *Price Waterhouse*.”⁵⁶

Despite this understanding among commentators and other federal courts, the Fifth Circuit adopted a narrow interpretation of *Price Waterhouse*, a move consistent with efforts to mitigate a perceived bootstrapping threat. First, *Boh Bros.* failed to discuss a majority of Wolfe’s behavior. As the *Price Waterhouse* plurality concluded, “stereotyped remarks can certainly be evidence that gender played a part” in workplace discrimination.⁵⁷ However, although Judge Jolly noted Wolfe’s name-calling, simulation of sex acts, and self-exposure in his recitation of the facts,⁵⁸ he did not once mention this evidence in his analysis of the EEOC’s claim. Failing to explain why this conduct was or was not probative of sex stereotyping is particularly striking given that the entire claim turned on the existence of stereotyping.⁵⁹ Because most of Wolfe’s behavior implicated sexual orientation to some extent, the court was able to avoid the question of bootstrapping by declining to address this conduct.

Moreover, the court also narrowly applied *Price Waterhouse* to the one piece of evidence it did examine in detail: Wolfe’s taunts regarding Woods’s use of “Wet Ones.” Under *Price Waterhouse*, courts typically focus on subjective motivations, asking only whether the employee was harassed for failing to conform to the employer’s sex stereotypes.⁶⁰ By assessing whether Woods’s behavior was “overtly feminine,”⁶¹ and

⁵³ 378 F.3d 566 (6th Cir. 2004).

⁵⁴ *Id.* at 574 (emphasis added).

⁵⁵ Marvin Dunson III, Comment, *Sex, Gender, and Transgender: The Present and Future of Employment Discrimination Law*, 22 BERKELEY J. EMP. & LAB. L. 465, 476 (2001).

⁵⁶ Fedor, *supra* note 7, at 480.

⁵⁷ *Price Waterhouse*, 490 U.S. at 251 (plurality opinion) (emphasis omitted).

⁵⁸ See *Boh Bros.*, 689 F.3d at 460.

⁵⁹ See *id.* at 462.

⁶⁰ See *Price Waterhouse*, 490 U.S. at 250 (plurality opinion) (“In the specific context of sex stereotyping, 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.” (emphasis added)); see also, e.g., *Nichols v. Azteca Rest. Enters.*, 256 F.3d 864, 874–75 (9th Cir. 2001) (noting that “*Price Waterhouse* . . . squarely applies to preclude the harassment” at issue in the case because it “reflected a *belief* that [plaintiff] did not act as a man should act” (emphasis added)).

⁶¹ *Boh Bros.*, 689 F.3d at 462.

thus whether he deviated from some *objective* conception of masculine stereotypes, the Fifth Circuit rejected this subjective test. In doing so, it disregarded parts of Wolfe's trial testimony that provided at least some evidence that the usual subjective standard was satisfied.⁶² Engaging in this objective analysis of Woods's behavior allowed the court to avoid the bootstrapping question by relieving it of the need to examine the murky line between a harasser's sex-stereotypical views and his perception of his victim's sexual orientation.

However, given the factual realities of same-sex harassment, applying *Price Waterhouse* narrowly is not necessary to avoid bringing sexual orientation within the scope of Title VII. First, "[s]imply because harassment is 'rife with references to sexual orientation' does not mean that harassment is because of sexual orientation and not 'because of sex.'"⁶³ In fact, the opposite is often true: men harassing other men frequently use language that "references sexual orientation" in order to "denigrate the masculinity of the victim, to compare the victim to women, and to enhance the masculinity of the harassers in the eyes of their male colleagues."⁶⁴ That is, they do so in order to attack the victim on the basis of sex stereotypes, not sexual orientation.⁶⁵ As Professor Vicki Schultz concludes, such harassment is often carried out in an effort to "perpetuate[] job segregation by sex . . . by perpetuating the belief that only those who possess certain idealized masculine qualities are competent to perform traditionally segregated jobs."⁶⁶ This paradigm could accurately explain the harassment in *Boh Bros.*, where no evidence suggested that either Wolfe or Woods was homosexual.⁶⁷ For these reasons, allowing the verdict for the EEOC to stand under a sex-

⁶² For example, Wolfe agreed that "all the iron workers picked on Mr. Woods for being feminine because he used Wet Ones," Trial Transcript, *supra* note 15, at 303, and agreed that calling Woods "kind of gay for using Wet Ones" was a way of "saying that he was feminine," *id.* at 311.

⁶³ Fedor, *supra* note 7, at 482 (footnote omitted) (quoting Trigg v. N.Y.C. Transit Auth., No. 99-CV-4730, 2001 WL 868336, at *6 (E.D.N.Y. July 26, 2001)).

⁶⁴ McGinley, *supra* note 51, at 1222.

⁶⁵ See *id.* at 1222-27; see also Fedor, *supra* note 7, at 483 ("[M]en are frequently identified as homosexual not because of their sexual behavior, but because of actions that do not conform to the stereotypical heterosexual male.").

⁶⁶ Vicki Schultz, *Reconceptualizing Sexual Harassment*, 107 YALE L.J. 1683, 1776 (1998); see also *Rene v. MGM Grand Hotel, Inc.*, 305 F.3d 1061, 1069 n.3 (9th Cir. 2002) (Pregerson, J., concurring) ("All-male workplaces are common sites for the policing of gender norms and the harassment of men who transgress such norms.").

⁶⁷ *Boh Bros.*, 689 F.3d at 460. Of course, Schultz's paradigm is not limited to cases in which the victimized employee is heterosexual: "[A]ntigay harassment frequently evidences gender stereotyping." Schultz, *supra* note 66, at 1786. Recognizing this fact "does not conflate harassment on the basis of gender with harassment on the basis of sexual orientation" because at least "some forms of outright discrimination based on sexual orientation" may not constitute "gender-based attempts at denigration." *Id.* at 1787. As an example, Schultz offers "discrimination of gay male workers that is rooted in a stereotypical and irrational fear of them as carriers of AIDS" — a form of discrimination that is "not necessarily . . . based on gender." *Id.* at 1787 n.533.

stereotyping theory would not be tantamount to permitting a claim for sexual-orientation discrimination.

Second, even when fears of bootstrapping are considered, other circuits' approaches suggest that the Supreme Court's relevant Title VII jurisprudence does not compel overturning the jury's verdict in *Boh Bros.* Indeed, other courts have reached the opposite result in "factually indistinguishable" cases.⁶⁸ Such courts have reasoned that although Title VII does not cover sexual-orientation discrimination, the mere fact "[t]hat the harasser is, or may be, motivated by hostility based on sexual orientation is . . . irrelevant, and neither provides nor precludes a cause of action."⁶⁹ In general, then, it seems that *Price Waterhouse* allows courts to consider remarks framed in terms of sexual orientation to the extent that these comments indicate an employer's bias against gender nonconformity.⁷⁰ In other words, courts need not "transform[] claims of same-sex sexual harassment based on gender stereotyping into claims of harassment based on sexual orientation" to remain faithful to Title VII's exclusion of sexual orientation as a protected class.⁷¹

Judge Jolly concluded *Boh Bros.* by recalling that "Title VII protects employees against workplace discrimination, not against all forms of mistreatment,"⁷² thus echoing the Supreme Court's admonition that Title VII is not a "general civility code for the American workplace."⁷³ It is possible to believe that Wolfe, rather than acting on the basis of gender, was merely engaging in innocuous "horseplay."⁷⁴ While this is a plausible reading of the evidence, it is not one that is compelled as a matter of law. If courts follow the Fifth Circuit and unnecessarily narrow their application of *Price Waterhouse* in cases like *Boh Bros.*, fewer employees will receive compensation for conduct that, according to the Supreme Court, remains unlawful under Title VII. Because claims like those at issue in *Boh Bros.* are distinct from claims based on sexual orientation — both factually and as a matter of Title VII jurisprudence — courts should recognize that *Price Waterhouse* can be given its full effect without bootstrapping protection against sexual-orientation discrimination into Title VII.

⁶⁸ McGinley, *supra* note 51, at 1221. Common elements of these cases include "virtually all-male environment[s]"; "vulgar verbal taunts as well as physical attacks, often to sexual organs of the victim"; and "comments questioning the victim's masculinity and his sexual orientation." *Id.*

⁶⁹ *Rene*, 305 F.3d at 1063–64; *see also* *Smith v. City of Salem*, 378 F.3d 566, 575 (6th Cir. 2004) ("[A] label, such as 'transsexual,' is not fatal to a sex discrimination claim where the victim has suffered discrimination because of his or her gender non-conformity.").

⁷⁰ *See* Fedor, *supra* note 7, at 482–85.

⁷¹ *Id.* at 482.

⁷² *Boh Bros.*, 689 F.3d at 463.

⁷³ *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 80 (1998).

⁷⁴ *Id.* at 81.