

- ***EEOC v. Harbert-Yeargin***

No. 00-5150 (6th Cir.)
Petition for Reh'g En Banc
Filed November 5, 2001

EEOC contends panel majority erred in ruling that male supervisor's unwanted and offensive touching of male workers is tantamount to "towel-snapping in the locker room."

In this same-sex harassment suit, the EEOC argued that Harbert-Yeargin allowed Carlton and other male employees to be subjected to a hostile work environment in violation of Title VII. A jury found for the EEOC and intervenor Carlton on the claim of sexual harassment and the district court denied the employer's motion for judgment as a matter of law.

On appeal, however, the panel majority reversed the district court's judgment, holding that the behavior in this case was not actionable harassment because of sex. The majority reasoned that the female comparators were not similarly situated because they did not work in the field or have contact with the harasser. Additionally, the majority found that the conduct was merely "gross, vulgar, male horseplay in a male workplace" which, if actionable, could lead to penalizing "towel-snapping in the locker room."

In its petition for rehearing en banc, the Commission argued that the majority rested its decision on a misapprehension and re-evaluation of the facts, misapprehension of the law governing same-sex harassment, and policy considerations not implicated by the facts of the case. These errors culminated in an improper substitution of its judgment for that of the jury. A male employee who is subjected to unwanted and offensive touching by a male supervisor, who targets only men for abuse and has declared that he did not and would never harass female employees, has been subjected to harassment because of sex.