
Enforcement Guidance on Harassment in the Workplace

Agency: Equal Employment Opportunity Commission

Comment Period Opens: October 2, 2023

Comment Period Closes: November 1, 2023

Comment Submitted: October 31, 2023

Landmark Legal Foundation (“Landmark”) submits this comment on the Equal Employment Opportunity Commission’s (“EEOC” or “the Commission”) proposal, **Enforcement Guidance on Harassment in the Workplace** (“Proposal”). For the reasons set forth in this comment, EEOC should immediately revoke and revise the current proposal.

The Proposal:

1. Infringes on the free speech of employees through an incorrect interpretation of Title VII of the Civil Rights Act.
2. Infringes on the religious liberty of employees through an incorrect interpretation of Title VII of the Civil Rights Act.

Introduction

EEOC has been tasked with “enforcing federal laws that make it illegal to discriminate against a job applicant or an employee because of the person's race, color, religion, sex (including pregnancy and related conditions, gender identity, and sexual orientation), national origin, age (40 or older), disability or genetic information.” U.S. Equal

Employment Opportunity Commission website, <https://www.eeoc.gov/overview> (Accessed October 30, 2023). As such, EEOC promulgates regulations and guidelines for employers to prevent discrimination and harassment in the workplace and ensure compliance with the Civil Rights Act of 1964.

On October 2, 2023, EEOC released its proposed guidance for harassment in the workplace. EEOC's Proposal uses Title VII to justify its definitions of harassment. Title VII states:

"It shall be an unlawful employment practice for an employer -

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin." 42 U.S.C. 2000e-2

EEOC has identified a variety of standard legally protected characteristics, including race, sex, age, sexual orientation, and disability, among others. Further, EEOC identified standard forms of conduct which would constitute harassment on such bases, such as unwanted sexual remarks or racial epithets. Proposed Guidance, October 2, 2023, <https://www.eeoc.gov/proposed-enforcement-guidance-harassment-workplace#> (Accessed October 30, 2023).

The Proposal includes questionable forms of sex-based harassment. It states "Sex-based harassment...can include harassment based on a woman's reproductive decisions, such as decisions about contraception or abortion," and "discrimination based on sexual orientation and gender identity." *Id.* The latter can include "intentional and repeated use of a name or pronoun inconsistent with the individual's gender identity (misgendering)." *Id.*

These examples demonstrate the problems with the Proposal. In the first part the EEOC attempts to censor free speech and coerce it in the second. By defining "misgendering" an individual as harassment, EEOC forces employees to use language that may violate their conscience. And classifying discussions about "abortion" and

“contraception” as harassment, EEOC is forcing employees to stay silent on contentious political issues. The Proposal also violates an employee’s right to freedom of religion. Many religions teach that abortion, contraception, and transgenderism are immoral, and compelling employees to affirm these actions would infringe upon that right. For these reasons, the Proposal should be revoked and revised.

1. The Proposal violates the First Amendment right to freedom of speech.

A. Discussions of abortion and contraception are not forms of sex-based harassment and including these topics in the Proposal unconstitutionally restricts speech.

In Section II (A) of the Proposal, EEOC notes “The federal EEO laws prohibit workplace harassment if it is shown to be based on one or more of a complainant’s characteristics that are protected by these statutes.” Proposed Guidance, October 2, 2023, <https://www.eeoc.gov/proposed-enforcement-guidance-harassment-workplace#> (Accessed October 30, 2023). For an action to constitute sexual harassment, it must be shown to have been based on the sex of the person harassed. The proposal includes examples of this, such as an employer using sex-based insults or unwanted sexual contact.

While these activities may constitute sexual harassment, discussion of abortion and contraception do not, for “when an employer's action is not based on a sex classification, it is not a sex-based violation of Title VII.” *Standridge v. Union Pac. R.R. Co. (In re Union Pac. R.R. Emp't Practices Litig.)*, 479 F.3d 936, 944 (8th Cir. 2007) The Supreme Court has previously held that “[o]pposition to abortion cannot reasonably be presumed to reflect a sex-based intent; there are common and respectable reasons for opposing abortion other than a derogatory view of women as a class.” *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 266, 113 S. Ct. 753, 757 (1993). Justice Scalia, writing the majority opinion, further stated, “opposition to voluntary abortion cannot possibly be considered such an irrational surrogate for opposition to (or paternalism towards) women.” *Id.* This argument is buttressed by the presence of several women’s organizations which oppose abortion, such as Sisters of Life, Women Exploited by Abortion, and Susan B. Anthony Pro-Life America.

Scalia noted this, stating “[w]hatever one thinks of abortion, it cannot be denied that there are common and respectable reasons for opposing it, other than hatred of...women as a class -- as is evident from the fact that men and women are on both sides of the issue.” *Id.*

Standridge held that an employer failing to pay for prescribed contraception did not constitute a Title VII violation. Discussion of the issue should not be considered a more grievous violation than failing to provide access to contraception. It is again difficult to argue that vocalizing opposition to such practices would be based on sex for reasons much like those expressed by Justice Scalia in *Bray*. Men and women both oppose contraception as they do abortion; for example, Roman Catholic men’s and women’s organizations both openly oppose use of contraceptives. Furthermore, unlike abortion, men and women are both capable of using contraceptives. It is unlikely, therefore, that any given opposition to contraception is in anyway motivated by animus towards one sex or another.

Given this, EEOC’s Proposal appears to be an attempt to censor discussion on these topics. The Proposal would penalize speech in the workplace on highly contentious political issues, which violates the First Amendment. As has been noted previously by Justice Alito, “There is no categorical “harassment exception” to the First Amendment’s free speech clause.” *Saxe v. State Coll. Area Sch. Dist.*, 240 F.3d 200, 204 (3d Cir. 2001). Discussion of abortion and contraception is not sex-based and thus cannot be considered harassment under Title VII by definition. But, even more importantly, labeling it as such violates one of the most important rights held by American citizens.

B. “Misgendering” is not a form of sex-based harassment and considering it such compels speech.

The inclusion of “misgendering” individuals as a form of sexual harassment is unique in this Proposal. The Supreme Court stated the following:

“[W]hen the workplace is permeated by discriminatory intimidation, ridicule, and insult that is sufficiently severe or pervasive as to alter the conditions of a victim’s employment and to create an abusive working environment, Title VII is violated; this standard takes a middle path between making actionable any conduct that is merely offensive and requiring the conduct to

cause a tangible psychological injury; the mere utterance of an epithet which engenders offensive feelings in an employee does not sufficiently affect the conditions of employment to implicate Title VII; conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment--an environment that a reasonable person that would find hostile or abusive--is beyond Title VII's purview." *Harris v. Forklift Sys.*, 114 S. Ct. 367, 369 (1993).

It is hard to believe that "misgendering" an individual would meet this standard. Using the pronoun "he" to refer to someone who self-identifies as a woman, or vice versa, hardly rises to the level of discriminatory intimidation or ridicule, nor does it create an abusive working environment. "Misgendering" may offend an employee, but this does not rise to the level of a Title VII offense.

And what of the implications this section of the Proposal has for free speech? "Title VII targets conduct and only incidentally burdens speech." *Pernell v. Fla. Bd. of Governors of the State Univ. Sys.*, 641 F. Supp. 3d 1218, 1274 (N.D. Fla. 2022). That said, the Sixth Circuit has stated that "titles and pronouns carry a message." *Meriwether v. Hartop*, 992 F.3d 492, 507 (6th Cir. 2021). And as the Supreme Court has ruled, "[T]he government 'may not compel affirmance of a belief with which the speaker disagrees.'" *Meriwether v. Hartop*, 992 F.3d 492, 507 (6th Cir. 2021) (Quoting *Hurley v. Irish-American Gay*, 515 U.S. 557 (1995)).

For many, the message conveyed by the use of "preferred pronouns" is a belief with which they strongly disagree. 42 percent of Americans have a "somewhat unfavorable" or "very unfavorable" view towards people identifying their preferred pronouns, 21 percent more than those with a "somewhat favorable" or "very favorable" view. The Wall Street Journal, *WSJ-NORC Poll*, March 2023 https://s.wsj.net/public/resources/documents/WSJ_NORC_ToplineMarc_2023.pdf (Accessed October 31, 2023). Mandating the use of preferred pronouns, under threat of harassment lawsuit, would impose a significant burden on the speech of these people. This section of the Proposal would constitute an apparent unconstitutional restriction on freedom of speech by compelling speech which is both unpopular and part of larger on-going public debate. Title VII does not extend so far as to force Americans to affirm, through their speech, messages and beliefs which they oppose,

2. The Proposal violates employees' First Amendment right to freedom of religion.

The Proposal violates the First Amendment right to freedom of speech. The Proposal also violates the First Amendment right to freedom of religion. Consider the example of religious sects such as Catholics and Evangelical Christians, the two largest in the United States, representing 46.2 percent of the population. Pew Research Center, *Religious Landscape Study*, 2014, <https://www.pewresearch.org/religion/religious-landscape-study/> (Accessed October 31, 2023). The Roman Catholic Church publicly teaches that abortion, contraception, and transgenderism are sinful. Evangelical Christians are overwhelmingly opposed to abortion. Pew Research Center, *Public Opinion on Abortion*, May 17, 2022, <https://www.pewresearch.org/religion/fact-sheet/public-opinion-on-abortion/> (Accessed October 31, 2023). This Proposal would force both groups, as well as others, to violate their religious beliefs and right of conscience in some way in the workplace.

This Proposal runs contrary to the idea that “[f]reedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law.” *Wallace v. Jaffree*, 472 U.S. 38, 50, 105 S. Ct. 2479, 2486 (1985). The right to free exercise of religion includes the right to state their beliefs as well as not to speak or act in a way which would violate their religious principles. This Proposal would prevent many religious Americans from exercising this right, under threat of harassment lawsuits. Title VII does not supersede the Establishment Clause of the First Amendment.

Conclusion

For these reasons, the Equal Employment Opportunity Commission should rescind and revise the Proposal immediately.

Respectfully submitted,

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