

March 21, 2017

VIA ELECTRONIC SUBMISSION  
Department of Labor  
Equal Employment Opportunity Commission  
**Attention: EEOC-2016-0009**  
200 Constitution Avenue N.W.  
Washington, DC 20210

Re: Proposed Enforcement Guidance on Unlawful Harassment

We respectfully submit the following comments on the Proposed Enforcement Guidance on Unlawful Harassment. The mission of the Public Rights/Private Conscience Project (PRPCP) is to bring legal academic expertise to bear on the multiple contexts in which religious liberty rights conflict with or undermine other fundamental rights to equality and liberty. As such, we write to express our support for the balance struck in the proposed regulations between accommodating employees' sincerely-held religious beliefs and practices, and protecting employees from unwanted proselytizing or religious harassment. This careful balance is especially important as the administration contemplates adopting a broad religious exemption that could affect the liberty and equality rights of other private persons. We do, however, suggest that the guidance be amended slightly to clarify that out-of-workplace harassment should be considered within the "scope of employment" where this harassment has consequences in the workplace. Finally, we commend the agency for making clear that religious harassment includes harassment based on a complainant's atheism or lack of religious belief.

The proposed guidance correctly acknowledges that an overzealous attempt to protect employees from unwanted religious speech may in fact violate Title VII of the Civil Rights Act, which requires employers to reasonably accommodate the religious practices of their employees. It states, "employers may violate Title VII if they try to avoid potential coworker objections to religious expression by preemptively banning all religious communications in the workplace."<sup>1</sup> Thus workers may not be prohibited entirely from sharing and discussing their religious beliefs and practices with co-workers.

The guidance also stresses, however, that employers "have a duty to protect workers against religious harassment" and are "not [] required to accommodate religious expression that creates, or threatens to create, a hostile work environment."<sup>2</sup> This provision is an essential restraint on religious speech in the workplace, and is vital to protecting workers, including lesbian, gay, transgender, bisexual, transgender, and queer (LGBTQ) workers, from religiously-motivated harassment.

LGBTQ workers, particularly transgender workers and LGBTQ workers of color, face significant discrimination, harassment, and mistreatment in obtaining and maintaining

---

<sup>1</sup> Proposed Enforcement Guidelines on Unlawful Harassment, EEOC-2016-0009 at 65 (Jan 10, 2017) <https://www.regulations.gov/docket?D=EEOC-2016-0009>.

<sup>2</sup> *Id.*

employment. According to the largest survey of transgender people in the country, nearly one in three respondents who had a job in the past year reported being fired, denied a promotion, or otherwise discriminated against because of their gender identity or expression.<sup>3</sup> Lesbian, gay, and bisexual people also report high levels of workplace bias; studies show that anywhere from 15 to 43 percent have experienced some form of workplace discrimination or harassment.<sup>4</sup> These experiences are at least partially responsible for the disproportionately high rates of poverty in LGBTQ communities, and especially in LGBTQ communities of color.<sup>5</sup> For example, transgender people are twice as likely—and transgender people of color are three times as likely—to be living in poverty as their non-transgender peers.<sup>6</sup>

In some instances, LGBTQ workplace discrimination has been motivated by religious belief.<sup>7</sup> The proposed guidelines appropriately explain that Title VII's duty to accommodate religion does not amount to an official sanctioning of religiously-motivated harassment—including against LGBTQ employees, who already face pervasive discrimination in the workplace.

This limitation on the scope of permissible religious accommodations is not only crucial to maintaining a safe and constructive work environment for all employees, it is also essential to avoiding serious constitutional issues. In a clear line of cases, the Supreme Court has held that the government may not, consistent with the Establishment Clause of the First Amendment, provide religious accommodations that result in discrete and significant harms to other private citizens.<sup>8</sup> If the EEOC were to instruct employers to

---

<sup>3</sup> NATIONAL CENTER FOR TRANSGENDER EQUALITY, *The Report of the 2015 U.S. Transgender Survey* at 16 (Dec. 2016) <http://www.transequality.org/sites/default/files/docs/usts/USTS%20Full%20Report%20-%20FINAL%201.6.17.pdf> (“Overall, 30% of respondents who had a job in the past year reported being fired, denied a promotion, or experiencing some other form of mistreatment related to their gender identity or expression.”).

<sup>4</sup> Crosby Burns & Jeff Krehely, *Gay and Transgender People Face High Rates of Workplace Discrimination and Harassment*, CENTER FOR AMERICAN PROGRESS (June 2, 2011) <https://www.americanprogress.org/issues/lgbt/news/2011/06/02/9872/gay-and-transgender-people-face-high-rates-of-workplace-discrimination-and-harassment/>.

<sup>5</sup> CENTER FOR AMERICAN PROGRESS & MOVEMENT ADVANCEMENT PROJECT, *Paying an Unfair Price: The Financial Penalty for Being LGBT in America* (Nov. 2014) <http://www.lgbtmap.org/file/paying-an-unfair-price-full-report.pdf>.

<sup>6</sup> The Report of the 2015 U.S. Transgender Survey, *supra* note 3 at 4.

<sup>7</sup> See, e.g., *Equal Employment Opportunity Commission v. R.G. & G.R. Harris Funeral Homes, Inc.*, 2016 WL 4396083 (E.D. Mich. 2016).

<sup>8</sup> See, *Estate of Thornton v. Caldor*, 472 U.S. 703, 709 (1985) (finding that a Connecticut statute giving workers the absolute right to a Sabbath day of rest impermissibly advanced religion in violation of the Establishment Clause by “impos[ing] on employers and employees an absolute duty to conform their business practices to the particular religious practices of the [observing] employee.”); *Texas Monthly, Inc. v. Bullock*, 489 U.S. 1, 14 (1989) (finding that a state tax exemption for religious periodicals violated the Establishment Clause by forcing non-religious publications to “become indirect and vicarious donors” to religious entities) (internal quotations omitted); *Cutter v. Wilkinson*, 544 U.S. 709, 726 (2005) (upholding a broad religious accommodation law while explaining that accommodations need not be granted where they “impose unjustified burdens” on third parties or the State); *Burwell v. Hobby Lobby Stores, Inc.* 134 S.Ct. 2751, 2759 (2014) (granted a religious accommodation to employers under the Religious Freedom Restoration Act but emphasized repeatedly in its opinion the fact that employees’ rights and interests would, according to the Court, not be harmed). See also Frederick Mark Gedicks & Rebecca G. Van

accommodate religious employees at the expense of their co-workers' safety and productivity, it would raise significant constitutional concerns. Accordingly, we support the agency's effort to draw a careful distinction between accommodating religious speech and prohibiting speech that is itself discriminatory.

It is particularly important to strike this careful balance at a time when the administration is considering expanding the availability of religious accommodations, including for federal workers and contractors. An Executive Order on Religious Freedom that was recently leaked to the press would, if signed, require agencies to reasonably accommodate federal employees, contractors, and grantees who speak or act in accordance with four particular religious beliefs: that "marriage is or should be recognized as the union of one man and one woman, sexual relations are properly reserved for such a marriage, male and female and their equivalents refer to an individual's immutable biological sex as objectively determined by anatomy, physiology, or genetics at or before birth, and that human life begins at conception and merits protection at all stages of life."<sup>9</sup>

Without additional guidance, this provision could be interpreted by agencies to protect religiously-motivated speech about sex, gender, and marriage, even if this speech would constitute harassment. We strongly urge the agency to adopt these proposed guidelines, which clarify that any duty to "reasonably accommodate" religious practice does not include a duty to tolerate religious harassment, including harassment based on sex, sexual orientation, or gender identity.

The leaked Executive Order would additionally prohibit agencies from taking adverse action against an employee, contractor, or grantee who speaks or acts in accordance with the four aforementioned religious beliefs "while outside the scope of their employment, contract, or grant."<sup>10</sup> While in most circumstances actions taken outside the scope of employment do not constitute harassment, in some cases they may.

The proposed guidelines offer clarification on the permissible scope of workplace harassment claims with regards to conduct that occurs outside the regular workplace. They note that a hostile work environment claim may include conduct that occurs "in a work-related context outside an employee's regular workplace," conduct that "is conveyed using work-related communications systems," or in certain cases conduct that "does not occur in a work-related context [but] can have consequences in the workplace

---

Tassell, *RFRA Exemptions from the Contraception Mandate: An Unconstitutional Accommodation of Religion*, 49 HARV. C.R.-C.L. L. REV. 343, 357 (2014); Frederick Mark Gedicks & Andrew Koppelman, *Invisible Women: Why an Exemption for Hobby Lobby Would Violate the Establishment Clause*, 67 VAND. L. REV. EN BANC 51 (2014); *Board of Education of Kiryas Joel Village School District*, 512 U.S. at 725 ("There is a point, to be sure, at which an accommodation may impose a burden on nonadherents so great that it becomes an establishment") (Kennedy, J., concurring).

<sup>9</sup> Sarah Posner, *Leaked Draft of Trump's Religious Freedom Order Reveals Sweeping Plans to Legalize Discrimination*, THE NATION (Feb. 1, 2017) <https://www.thenation.com/article/leaked-draft-of-trumps-religious-freedom-order-reveals-sweeping-plans-to-legalize-discrimination/>.

<sup>10</sup> *Id.*

and therefore contribute to a hostile work environment.”<sup>11</sup> While these guidelines are helpful, the proposed regulations should be amended to clarify that such out-of-workplace harassment should be considered within the “scope of employment.”

Finally, we support the agency’s choice to note that religious harassment includes harassment based on a complainant’s atheism or lack of religious belief. According to data from the Pew Research Center, over one in five Americans now identify as religiously unaffiliated—a group that includes atheists, agnostics, and “nothing in particular”—making this category the second largest religious group in the country, after Christians.<sup>12</sup> At the same time, atheists are viewed in a far more negative light than other religious groups.<sup>13</sup> It is therefore important to stress to employers that their responsibility to protect against religious harassment includes a duty to protect the large and growing number of non-believers or religiously unaffiliated Americans.

Harassment of employees should not be tolerated merely because this harassment is motivated by religious belief. Unfortunately, there is a long history of pernicious discrimination in the U.S. that has been justified on theological grounds.<sup>14</sup> The EEOC is correct to recognize that accommodation of religious belief, while essential to preventing religious discrimination, does not justify allowing harassment in the workplace. Moreover, prohibiting harassment does not infringe upon the right of religious employees to express their religious beliefs in a respectful manner both within and outside the scope of employment. The proposed regulations strike the correct legal and constitutional balance between accommodation of religion and the right to a fair, equal, and harassment-free work environment.

Thank you for the opportunity to provide these comments. If you have any questions, please do not hesitate to contact us at 212-854-0167.

Sincerely,

Katherine Franke  
Faculty Director

Elizabeth Reiner Platt  
Director

Public Rights/Private Conscience Project  
Center for Gender and Sexuality Law  
Columbia Law School

---

<sup>11</sup> Proposed Enforcement Guidelines on Unlawful Harassment, *supra* note 1 at 37.

<sup>12</sup> PEW RESEARCH CENTER, *Religious Landscape Survey* (last visited Mar. 6, 2017), <http://www.pewforum.org/religious-landscape-study/>.

<sup>13</sup> PEW RESEARCH CENTER, *How Americans Feel About Religious Groups* (July 16, 2014), <http://www.pewforum.org/2014/07/16/how-americans-feel-about-religious-groups/>

<sup>14</sup> *See, e.g.,* Newman v. Piggie Park Enterprises, Inc. 390 U.S. 400 (1968); Bob Jones University v. United States, 461 U.S. 574 (1983); E.E.O.C. v. Freemont Christian School, 781 F.2d 1362 (9th Cir. 1986).