

March 21, 2017

Public Input
U.S. Equal Employment Opportunity Commission
Executive Officer
131 M St., N.E.
Washington, D.C. 20507

Via online submission

Re: Proposed Enforcement Guidance on Unlawful Harassment, EEOC-2016-0009-0001

Thank you for the opportunity to provide comments on the U.S. Equal Employment Opportunity Commission's ("EEOC" or "the Commission") Proposed Enforcement Guidance on Unlawful Harassment ("Proposed Enforcement Guidance"). Protection against workplace harassment, including sex-based harassment, is key to achieving equal treatment. The undersigned organizations committed to workplace equality have joined to express strong support for the Proposed Enforcement Guidance and believe it will promote the reduction of discrimination and harassment in the workforce. The EEOC last issued policy guidance on harassment in 1999; since then, the law has evolved significantly. One-third of all EEOC charges include an allegation of harassment,¹ demonstrating the need for current and robust guidance for employers and EEOC investigators. We write to offer suggestions for further clarifying and strengthening the Proposed Enforcement Guidance.

I. The Proposed Enforcement Guidance Correctly Identifies Multiple Forms of Sex-Based Harassment and Should Provide Additional Examples.

We commend the Proposed Enforcement Guidance's recognition that sex-based harassment includes non-sexual conduct that is based on the targeted employee's gender; harassment "based on an individual's non-conformance with social or cultural expectations of how men and women usually act," including gender-stereotyped assumptions about family responsibilities; harassment based on gender identity; harassment based on sexual orientation; and harassment "based on pregnancy, childbirth, or related medical conditions, including lactation."² We urge the Commission also to explicitly affirm that harassment on the basis of "pregnancy, childbirth, or related medical conditions" includes harassment on the basis of other reproductive health decisions, including the decision to have an abortion, use contraception, or use infertility treatment to start a family. Women continue to be threatened or punished at work for their reproductive health decisions, underscoring the threat of harassment.³ Such explicit recognition in the Final Guidance that harassment based on reproductive health decisions constitutes sex-

¹ U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION (EEOC), ENFORCEMENT AND LITIGATION STATISTICS, ALL CHARGES ALLEGING HARASSMENT FY 2010-FY 2016, https://www.eeoc.gov/eeoc/statistics/enforcement/all_harassment.cfm.

² Proposed Enforcement Guidance, §II.A.

³ Across the country, women have been threatened, punished, or fired for their reproductive health decisions. For examples, *see* NAT'L WOMEN'S LAW CTR., STATES TAKE ACTION TO STOP BOSSES' RELIGIOUS BELIEFS FROM TRUMPING WOMEN'S REPRODUCTIVE HEALTH CARE DECISIONS (Nov. 2016), *available at* <http://nwlc.org/resources/states-take-action-stop-bosses%E2%80%99-religious-beliefs-trumping-women%E2%80%99s-reproductive-health-care-decisions/>.

based harassment under Title VII and the Pregnancy Discrimination Act would conform with case law⁴ and the Commission’s Enforcement Guidance on Pregnancy Discrimination.⁵

II. The Final Guidance Should Clarify the Appropriate Liability Standard for Employees With Supervisory Responsibilities.

The question of whether a harassing employee is a supervisor is critical to determining the appropriate standard for employer liability for harassment. The Proposed Enforcement Guidance defines supervisor as a person with the power to take tangible employment actions against employees, consistent with the Supreme Court’s decision in *Vance v. Ball State University*;⁶ “nonsupervisory employees/coworkers” are defined as “other employees without the authority to take tangible employment actions,”⁷ and employers can be held accountable for negligence of such employees. But the Proposed Enforcement Guidance would be strengthened by more clearly addressing how the negligence standard should be applied in determining employer liability for harassment by nonsupervisory employees who nevertheless wield a substantial amount of authority over their subordinates. There is a significant practical difference between lower-level supervisors who may not have the authority to take tangible employment actions but direct the daily activities of employees, and mere coworkers. Supervisors with the authority to direct daily work activities wield a significant amount of power that they can use to wreak havoc in the lives of their subordinates, particularly in sectors with low-wage jobs and hourly or shift work.⁸

As the Proposed Enforcement Guidance appropriately notes, even with regard to supervisors who do not have the authority to take tangible employment actions against those they supervise, an employer has a heightened responsibility to protect employees against harassment when it has provided a supervising employee with authority over others.⁹ In order to guard against overly broad interpretations of *Vance*, and because the *Vance* decision has encouraged employers to concentrate the power to hire and fire in the hands of a few, while still delegating significant day-to-day authority to lower-level supervisors in an effort to avoid vicarious liability for supervisor harassment, it is important for the Commission’s Final Guidance to make explicit that for non-*Vance* supervisors the supervisory authority wielded by an employee is a factor that must be considered in determining whether an employer has been negligent in permitting harassment to

⁴ *Newport News Shipbuilding & Dry Dock v. EEOC*, 462 U.S. 669 (1983); *Int’l Union, UAW v. Johnson Controls*, 499 U.S. 187, 199, 211 (1991); *Hall v. Nalco*, 534 F.3d 644, 648 (7th Cir. 2008); *Turic v. Holland Hospitality Inc.*, 85 F.3d 1211, 1214 (6th Cir. 1996); *Doe v. C.A.R.S. Protection Plus, Inc.*, 527 F.3d 358, 364 (3d Cir. 2008), *other grounds of order clarified by* 543 F.3d 178 (3d Cir. 2008); *Stocking v. AT&T Corp.*, 436 F. Supp. 2d 1014, 1016-17, *rev’d*, No. 03-0421-CV-W-HFS, 2007 WL 3071825 (W.D. Mo. Oct. 22, 2007); *Cooley v. Daimler-Chrysler Corp.*, 281 F. Supp. 2d 979, 984 (E.D. Mo. 2003) (no longer good law after *In re Union Pac.*, 479 F.3d 936); *Mauldin v. Wal-Mart Stores, Inc.*, No. 01-2755, 2002 WL 20022334 (N.D. Ga. Aug. 23, 2002); *Erickson v. Bartell Drug Co.*, 141 F. Supp. 2d 1266, 1271 (W.D. Wash. 2001); *Pacourek v. Inland Steel Co.*, 858 F. Supp. 1393, 1397 (N.D. Ill. 1994).

⁵ EEOC, ENFORCEMENT GUIDANCE ON PREGNANCY DISCRIMINATION AND RELATED ISSUES §§ I.A.3 & 4, I.B.1.a (June 25, 2015), available at https://www.eeoc.gov/laws/guidance/pregnancy_guidance.cfm.

⁶ Proposed Enforcement Guidance, §IV.A; 133 S.Ct. 2434 (2013).

⁷ Proposed Enforcement Guidance, §IV.A & B.

⁸ See NAT’L WOMEN’S LAW CTR., REALITY CHECK: SEVENTEEN MILLION REASONS LOW-WAGE WORKERS NEED STRONG PROTECTIONS FROM HARASSMENT (2014), available at https://nwlc.org/wp-content/uploads/2015/08/final_nwlc_vancereport2014.pdf.

⁹ Proposed Enforcement Guidance, §IV.B.3.a.

occur. In light of courts' inconsistent determinations of who is a supervisor under the *Vance* standard, the Proposed Enforcement Guidance could be strengthened to include a more detailed discussion clarifying the determination of supervisor status and the appropriate liability standard, complete with examples of harassment by employees with various types and degrees of actual or effectively delegated authority.

III. The Proposed Enforcement Guidance's Discussion of Harassment by Non-Employees Should Be Expanded.

The Proposed Enforcement Guidance's discussion of employer liability for harassment affirms that employees are protected against unlawful harassment by non-employees such as independent contractors, customers, hospital patients, nursing home residents, and client employees.¹⁰ Yet there is a conspicuous lack of detailed discussion of this issue, or indeed any examples of harassment by non-employees, in the Proposed Enforcement Guidance. Customer and client harassment of low-wage workers -- particularly in service and retail industries -- is a widespread and persistent problem.¹¹ The Proposed Enforcement Guidance would be strengthened by further discussion and examples, illustrating common factual situations involving customer and client harassment in low-wage industries, and the ways in which employers may incur liability for actively discouraging employee complaints, ignoring employee complaints, and/or failing to take corrective steps to address and prevent the harassment.

Additionally, courts have recognized that employers may be liable for hostile work environment harassment pursuant to Title VII where they negligently failed to address harassment of teachers by non-employees -- namely, students.¹² The Commission should strengthen the Proposed

¹⁰ *Id.*, §V.A.3.

¹¹ See REST. OPPORTUNITIES CTRS. UNITED & FORWARD TOGETHER, THE GLASS FLOOR: SEXUAL HARASSMENT IN THE RESTAURANT INDUSTRY 13 (2014), available at http://rocunited.org/wp-content/uploads/2014/10/REPORT_The-Glass-Floor-Sexual-Harassment-in-the-Restaurant-Industry2.pdf (78 percent of women, and 55 percent of men, surveyed reported being sexually harassed by customers); UNITE HERE LOCAL 1, HANDS OFF, PANTS ON: SEXUAL HARASSMENT IN CHICAGO'S HOSPITALITY INDUSTRY (July 2016), available at <https://www.handsoffpantson.org/wp-content/uploads/HandsOffReportWeb.pdf> (58 percent of hotel workers and 77 percent of casino workers surveyed reported being sexually harassed by a guest); *EEOC v. Costco Wholesale Corp.*, Civ. Act. No. 14-cv-6653 (N.D. Ill. Dec. 22, 2016) (jury verdict in favor of retail employee on hostile work environment sexual harassment claims where employee told employer customer repeatedly subjected her to unwelcome touching and advances, and stalking, and employer failed to take action), <https://www.eeoc.gov/eeoc/newsroom/release/12-22-16.cfm>; *Swiderski v. Urban Outfitters, Inc.*, No. 14cv6307 (S.D.N.Y. June 4, 2015) (denying retail employer's motion to dismiss employee's hostile work environment sexual harassment and retaliation claims, where employee alleged employer ignored her complaints that one customer made sexual comments and took photos under her skirt, and another customer physically assaulted her), <http://law.justia.com/cases/federal/district-courts/new-york/nysdce/1:2014cv06307/430988/18/>.

¹² See *Berger-Rothberg v. City of New York*, 803 F. Supp. 155, 164 (E.D.N.Y. 2011) (denying employer's motion for summary judgment on special education teacher's Title VII race, gender and religion hostile work environment claims alleging verbal harassment, sexual advances and physical assault by students); *Mongelli v. Red Clay Consol. Sch. Dist. Bd. of Ed.*, 491 F. Supp. 2d 467, 478 (D. Del. 2007) (recognizing that "liability for hostile work environment claims under Title VII may attach to schools that fail to address teachers' claim of harassment by students," but granting employer's motion for summary judgment); *Plaza-Torres v. Rey*, 376 F.Supp.2d 171, 182 (D.P.R. 2005) (denying employer's motion for summary judgment on public school teacher's Title VII hostile work environment claim alleging sexual harassment by student); *Peries v. N.Y.C. Bd. of Ed.*, 97-CV-7109 (ARR), 2001 WL 1328921, at *6, 2001 U.S. Dist. LEXIS 23393, at *19 (E.D.N.Y. Aug. 6, 2001) (denying employer's motion for summary judgment on special education teacher's hostile work environment claim alleging national origin and racial verbal harassment by students). Additionally, the Seventh Circuit has addressed the issue tangentially in the context

Enforcement Guidance by explicitly extending Title VII protection to teachers harassed by students, and clarifying the application of the negligence standard to employers through illustrative examples.

IV. The Proposed Enforcement Guidance Correctly Recognizes That Conduct That Occurs in a Non-work Related Context May Constitute Harassment.

We commend the recognition in Section III.D.2.c of the Proposed Enforcement Guidance that conduct by supervisors or coworkers that occurs in a non-related work context can have impacts in the workplace and constitute harassment, such as the use of private social media accounts, or a physical assault. For some working women, particularly those in low-wage jobs or working in traditionally male-dominated industries, sex-based harassment may take the form of sexual assault that occurs outside the workplace. For this reason, we urge the Commission to include additional examples of such conduct in the Final Guidance to clarify that even one such severe incident, even if in a non-related work context, can establish a hostile work environment.

V. The Final Guidance Should Provide Further Clarity Regarding Employee Training.

The Proposed Enforcement Guidance’s Promising Practices section suggests that training for managers and supervisors should include “[i]nformation about how to prevent, identify, stop, report and correct harassment.” While we agree such training is vital to preventing harassment, we believe it should be extended to all employees, not just managers and supervisors. Coworkers are often present when harassing conduct occurs, and can take immediate, direct action to stop or deter it. Accordingly, we urge the Commission to include an explicit suggestion that employers implement bystander intervention training for employees to augment harassment prevention efforts.

* * *

Thank you for the opportunity to submit comments on the Proposed Enforcement Guidance.

Sincerely,

9to5, National Association of Working Women

American Association of University Women (AAUW)

Building Pathways Inc.

Coalition of Labor Union Women

Equal Pay Today!

Equal Rights Advocates

of an Equal Protection claim, explaining that in a Title VII context, a school district could be liable to a teacher if it “knew he was being harassed and failed to take reasonable measures to prevent it.” *Schroeder v. Hamilton Sch. Dist.*, 282 F.3d 946, 951 (7th Cir. 2002).

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