



November 1, 2023

Charlotte A. Burrows, Chair  
U.S. Equal Employment Opportunity Commission  
131 M Street, NE  
Washington, DC 20507

*Submitted via regulations.gov*

**RE: RIN 3046–ZA02, Proposed Enforcement Guidance on Harassment in the Workplace**

Dear Chair Burrows:

The Leadership Conference on Civil and Human Rights, a coalition charged by its diverse membership of more than 240 national organizations to promote and protect the civil and human rights of all persons in the United States, submits these comments in support of the Equal Employment Opportunity Commission’s (“EEOC”) Proposed Enforcement Guidance on Harassment in the Workplace (“Proposed Guidance”).<sup>1</sup>

The Leadership Conference is the nation’s oldest, largest, and most diverse civil and human rights coalition and provides a powerful unified voice for the many constituencies we represent. As an organization dedicated to advancing civil and human rights, we are committed to reducing all forms of discrimination — including harassment — in the workplace. Our coalition understands that strong enforcement of the federal laws prohibiting workplace harassment is one the most important civil rights issues of our day. Efforts to make the workplace safer and more inclusive for all people will in turn lead to a more open and just society — an America as good as its ideals.

We thank the EEOC for issuing this Proposed Guidance, which we believe will promote strong enforcement of the federal laws prohibiting workplace harassment. Our comments below express support for many elements of the Proposed Guidance and offer suggestions for further clarifying and strengthening the Final Guidance.

**I. The Proposed Guidance Will Promote Stronger Enforcement of Laws Prohibiting Workplace Harassment.**

Robust and thoughtful guidance is a critical tool for the effective enforcement of anti-discrimination law. We appreciate the EEOC’s significant work in 2016-2017 to propose workplace harassment guidance and are grateful the EEOC has continued this important work by issuing the Proposed Guidance, as well as

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<sup>1</sup> 88 Fed. Reg. 67750 (proposed Oct. 2, 2023); U.S. EQUAL EMP. OPPORTUNITY COMM’N, PROPOSED ENFORCEMENT GUIDANCE ON HARASSMENT IN THE WORKPLACE, <https://downloads.regulations.gov/EEOC-2023-0005-0001/content.pdf> [hereinafter Proposed Guidance].

including within its strategic priorities preventing and remedying systemic harassment and protecting vulnerable workers and people from underserved communities from harassment.

We strongly support the Proposed Guidance and the significant positive impact it would have on the enforcement of laws prohibiting workplace harassment. We believe the Proposed Guidance effectively supports these goals by providing in-depth information and specific, relevant examples in a straightforward and clearly structured manner. In particular, we applaud the Proposed Guidance for thoughtfully reflecting and responding to recent notable legal and cultural changes related to workplace harassment, including by incorporating learnings from the #MeToo Movement and the EEOC's 2016 Select Task Force on the Study of Harassment in the Workplace.<sup>2</sup> While the EEOC has been enforcing workplace harassment law for decades, we recognize the nuance and evolution of both law and culture that are reflected in the proposed guidance. We particularly commend the EEOC making explicit that the definition of sex-based harassment includes discriminatory conduct based on pregnancy, childbirth, or related conditions, as well as sexual orientation and gender identity, as recognized in the U.S. Supreme Court's ruling in *Bostock v. Clayton County*<sup>3</sup> and related cases. We also appreciate the Proposed Guidance's attention to virtual harassment, harassment in non-work settings, a robust understanding of stereotypes, and the impacts of systemic harassment.

The Leadership Conference is committed to advancing civil rights in the workplace. When employers remove unfair barriers, seek out applicants from all racial and ethnic backgrounds, and create a workplace culture that fosters respect, people are able to thrive in their jobs. We know that people holding multiple marginalized identities continue to face unique and pernicious forms of discrimination that are constantly evolving. Efforts to address this discrimination must prioritize the workers who are most vulnerable to harassment and least able to enforce their rights, which includes low wage workers and workers experiencing harassment based on sexual orientation and gender identity. Harassment along the lines of sex, race, disability, and other protected characteristics remains a widespread problem in U.S. workplaces, and we welcome the EEOC's continued recognition of and engagement with these often intersectional forms of discrimination. Once finalized, the Proposed Guidance will provide vital detail and clarity about the EEOC's enforcement of federal equal employment opportunity laws that will benefit employees, employers, and enforcement officials alike.

## **II. The Final Guidance Should Provide Additional Examples of Sex-Based and Other Forms of Harassment.**

### **A. Pregnancy, Childbirth, or Related Medical Conditions**

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<sup>2</sup> Chai R. Feldblum & Victoria A. Lipnic, U.S. Equal Emp. Opportunity Comm'n, *Select Task Force on the Study of Harassment in the Workplace, Report of Co-Chairs Chai R. Feldblum & Victoria A. Lipnic* (2016), [https://www.eeoc.gov/sites/default/files/migrated\\_files/eeoc/task\\_force/harassment/report.pdf](https://www.eeoc.gov/sites/default/files/migrated_files/eeoc/task_force/harassment/report.pdf).

<sup>3</sup> 140 S. Ct. 1731 (2020).

While the Proposed Guidance appropriately recognizes that sex-based harassment includes harassment on the basis of “pregnancy, childbirth, or related medical conditions,” including harassment based on an employee’s reproductive decisions,<sup>4</sup> the Final Guidance should provide more examples of this form of sex harassment. In particular, and in light of the new Pregnant Workers Fairness Act,<sup>5</sup> we recommend that the Final Guidance include an example of a worker who is harassed because of their request for, or receipt of, a reasonable accommodation related to pregnancy, childbirth, or a related medical condition. In addition, as workers continue to be threatened or punished at work for their reproductive health decisions,<sup>6</sup> we recommend that the Final Guidance include examples that illustrate how such harassment may manifest — for example, an unmarried woman who becomes pregnant and faces harassment based on the gendered expectation that women should not have sex outside of marriage, or a worker who faces harassment based on their decision to have or not to have an abortion or to use infertility treatment to start a family. We further urge the EEOC to explicitly recognize that transgender men and nonbinary people assigned female at birth also experience sex-based harassment related to reproductive health decisions. In light of the continued attacks both at the federal and state level on access to abortion and reproductive health care, it is deeply important to our coalition that these examples are embedded within the Final Guidance.

## **B. Sexual Orientation, Gender Identity, and Sex Characteristics**

We strongly support the Proposed Guidance’s express recognition that LGBTQI+ people maintain the right to go to work as themselves, without the threat of discrimination and harassment. A record breaking 580+ anti-LGBTQ state bills have been introduced in 2023. Many of these bills threaten workers’ rights to feel safe in a work environment free from harassment.

We are glad to see that the EEOC’s Proposed Guidance recognizes the prevalence of these forms of discrimination and the need to protect LGBTQ workers who face discrimination on the basis of sexual orientation and gender identity. The Proposed Guidance follows the Supreme Court’s *Bostock* decision, and the decisions of various lower courts before and after *Bostock*,<sup>7</sup> which affirm that Title VII’s

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<sup>4</sup> Proposed Guidance at 9-10. Case law and the EEOC’s Enforcement Guidance on Pregnancy Discrimination make clear that Title VII’s prohibition of discrimination on the basis of sex includes discrimination on the basis of pregnancy, childbirth, and related medical conditions, including the use of contraceptives, infertility and/or the use of fertility treatment, abortion, and the decision not to have an abortion. *See generally* U.S. Equal Emp. Opportunity Comm’n, *Enforcement Guidance on Pregnancy Discrimination and Related Issues* (2015), <https://www.eeoc.gov/laws/guidance/enforcement-guidance-pregnancy-discrimination-and-related-issues#> (discussing the EEOC’s interpretation of the coverage of the PDA and citing federal case law similarly holding that discrimination based on lactation, infertility treatment, use of contraception, and abortion or the decision not to have an abortion violate the PDA).

<sup>5</sup> 42 U.S.C. § 2000gg et seq. (employers must provide reasonable accommodations for workers who have limitations related to pregnancy, childbirth, or related medical conditions, unless the accommodation would impose an undue hardship).

<sup>6</sup> *See, e.g., States Take Action to Stop Discrimination Based on Reproductive Health Care Decisions*, NAT’L WOMEN’S LAW CTR. (Mar. 2022), [https://nwlc.org/wp-content/uploads/2022/03/NWLC\\_FactSheet\\_State-Laws-Against-Employment-Discrimination-Based-on-Reproductive-Health-Decisions-3.25.22.pdf](https://nwlc.org/wp-content/uploads/2022/03/NWLC_FactSheet_State-Laws-Against-Employment-Discrimination-Based-on-Reproductive-Health-Decisions-3.25.22.pdf) (describing examples in which employers fired or threatened to fire workers who used assisted reproductive technology, became pregnant outside of marriage, had an abortion, or used birth control).

<sup>7</sup> *See* Proposed Guidance at n.29 & n.33.

prohibition against sex discrimination includes discrimination based on sexual orientation and gender identity.<sup>8</sup>

We urge the EEOC to include additional examples of harassment based on sexual orientation and gender identity in its Final Guidance, especially because of nationwide reports of increasing violence and harassment against LGBTQI+ people.<sup>9</sup> Many LGBTQI+ employees live and work in states, counties, and towns that have or are actively working to implement policies that undermine existing legal protections for LGBTQI+ people.<sup>10</sup> Employers would benefit from precise and clear guidance regarding the type of conduct and practices federal anti-discrimination law prohibits. Additionally, some workplaces are implementing transgender- and nonbinary-inclusive policies for the first time. More detailed examples and explanations of harassment based on gender identity would answer employers' questions as they adopt these employment policies.

The Proposed Guidance already includes some helpful examples regarding LGBTQI+ people. For example, it clarifies intentionally and repeatedly referring to someone with the incorrect name, pronouns, or gendered language inconsistent with the employee's gender identity constitutes harassment.<sup>11</sup> But the EEOC must provide additional examples of harassment based on sexual orientation and gender identity throughout its Final Guidance to address LGBTQI+ employees' range of experiences and the many forms that anti-LGBTQI+ animosity takes in the workplace, including through verbal, physical, and sexual harassment.<sup>12</sup>

We also urge the EEOC to address harassment based on sex characteristics, including intersex traits. Approximately 1.7 percent of the world population has intersex traits — i.e., physical, hormonal, or genetic attributes that do not fit binary notions of sex.<sup>13</sup> Intersex people face distinct forms of prejudice

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<sup>8</sup> For years, the EEOC has recognized harassment based on sexual orientation and gender identity violates Title VII, but its guidance has not consistently reflected this fact. See, e.g., *Fact Sheet: Notable EEOC Litigation Regarding Title VII & Discrimination Based on Sexual Orientation and Gender Identity*, U.S. Equal Emp. Opportunity Comm'n, <https://www.eeoc.gov/fact-sheet-notable-eeoc-litigation-regarding-title-vii-discrimination-based-sexual-orientation-and> (last visited Oct. 25, 2023). The Proposed Guidance is therefore a long-needed update to the EEOC's Title VII enforcement guidelines.

<sup>9</sup> See HUMAN RIGHTS CAMPAIGN, *LGBTQ+ AMERICANS UNDER ATTACK: A REPORT AND REFLECTION ON THE 2023 STATE LEGISLATIVE SESSION* (2023), <https://hrc-prod-requests.s3-us-west-2.amazonaws.com/Anti-LGBTQ-Legislation-Impact-Report.pdf>; see also *FBI Releases 2022 Crime in the Nation Statistics*, FBI (Oct. 16, 2023), <https://www.fbi.gov/news/press-releases/fbi-releases-2022-crime-in-the-nation-statistics> (the most recent hate crimes data compiled by the FBI, showing that anti-LGBTQ+ hate crimes increased sharply compared to the prior year with a 13.8% increase in reports based on sexual orientation and a 32.9% increase in reported hate crimes based on gender identity).

<sup>10</sup> See, e.g., HUMAN RIGHTS CAMPAIGN, *LGBTQ+ AMERICANS UNDER ATTACK: A REPORT AND REFLECTION ON THE 2023 STATE LEGISLATIVE SESSION* (2023), <https://hrc-prod-requests.s3-us-west-2.amazonaws.com/Anti-LGBTQ-Legislation-Impact-Report.pdf>.

<sup>11</sup> We likewise commend the EEOC for correctly noting that derogatory comments about LGBTQI+ people made within the workplace are facially discriminatory and subject LGBTQI+ employees to impermissible harassment even if they are not the subject of those comments. Proposed Guidance at 22.

<sup>12</sup> See, e.g., BRAD SEARS ET AL., WILLIAMS INST., *LGBT PEOPLE'S EXPERIENCES OF WORKPLACE DISCRIMINATION AND HARASSMENT* (2021), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Workplace-Discrimination-Sep-2021.pdf>.

<sup>13</sup> Melanie Blackless et al., *How Sexually Dimorphic Are We? Review And Synthesis*, 12 AM. J. HUMAN BIOLOGY 151 (2000).

and harassment that should be directly addressed by this guidance. The reasoning of *Price Waterhouse v. Hopkins*<sup>14</sup> and *Bostock* clarify that Title VII's prohibition against sex discrimination applies to intersex discrimination.<sup>15</sup> Indeed, courts have recognized similar anti-discrimination laws to prohibit intersex discrimination.<sup>16</sup> Moreover, the EEOC should clarify the application of the Genetic Information Nondiscrimination Act (GINA) to intersex discrimination.<sup>17</sup> The EEOC's Final Guidance must recognize these protections and include a discussion of intersex people and people with sex variations in the workplace.

### C. Intersectional Harassment

We appreciate that the Proposed Guidance properly recognizes that an attack on the civil rights of one group is an attack on the civil rights of all — and that often, harassment is amplified for those at the intersection of multiple protected identities. The Proposed Guidance makes clear that harassment may be based on one's intersectional identity, such as one's identity as a Muslim woman or a Black woman.<sup>18</sup> The report of the co-chairs of the EEOC's Select Task Force on the Study of Harassment in the Workplace cites research highlighting the “intersectional nature of harassing behavior” and indicating that “targets of harassment often experience mistreatment in multiple forms, such as because of one's race and gender, or ethnicity and religion.”<sup>19</sup> Recognizing that harassment is often intersectional<sup>20</sup> — and that

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<sup>14</sup> 490 U.S. 228, 251 (1989) (emphasizing Title VII “intended to strike at the entire spectrum of disparate treatment of [individuals] resulting from sex stereotypes.”), quoting *City of Los Angeles Dep't of Water & Power v. Manhart*, 435 U.S. 702, 707 n.3 (1978), and *Sprogis v. United Airlines, Inc.*, 444 F.2d 1194, 1198 (7th Cir. 1971).

<sup>15</sup> Even before *Hopkins* and *Bostock*, the Court clarified Title VII's sex stereotyping framework rejects an employer's assumptions about any generalization about sex, whether the assumption involves a physical characteristic, behavior, or statistical findings about life expectancy. See, e.g., *Manhart*, 435 U.S. at 708 (striking pension plan where cost to women was more, even though it was based on actuarial mortality differences among the sexes, and observing, “Even a true generalization about a class is an insufficient reason to disqualify an individual to whom the generalization does not apply.”); see *id.* at 709 (stressing Title VII rejects “[p]ractices that classify employees in terms of . . . sex” because they ordinarily preserve generalized and “traditional assumptions” about sex “rather than thoughtful scrutiny of individuals.”); accord *Arizona Governing Comm. v. Norris*, 463 U.S. 1073, 1079-86 (1983); *id.* at 1085 n.15 (Title VII “clearly would not permit” an employer's use of sex as a proxy for an employment qualification, “regardless of whether a statistical correlation could be established.”).

<sup>16</sup> See, e.g., *A.C. v. Metro. Sch. Dist. of Martinsville*, 75 F.4th 760, 2023 U.S. App. LEXIS 19785, \*21-22 (7th Cir. Aug. 1, 2023) (in dicta); *Grimm v. Gloucester County School Board*, 972 F.3d 586, 596, 615 (4th Cir. 2020) (in dicta); *Hughes v. Home Depot, Inc.*, 804, F.Supp.2d 223 (D.N.J. 2011); *Kastl v. Maricopa County Community College District*, No. 02-1531, 2004 WL2008954 (D. Ariz. June 3, 2004), *summ. judg. granted on other grounds*, No. CV-02-1531-PHX-SRB (D. Ariz. Aug. 22, 2006); see also *Hecox v. Little*, 2023 U.S. App. LEXIS 21541 (9th Cir. Aug. 17, 2023) (recognizing that the concept of “biological sex” includes intersex variations); *Schroer v. Billington*, 424 F. Supp. 2d 203, 213 n.5 (D.D.C. 2006) (same).

<sup>17</sup> 42 U.S.C. § 2000ff et. seq.

<sup>18</sup> Proposed Guidance at 17.

<sup>19</sup> See Chai R. Feldblum & Victoria A. Lipnic, U.S. Equal Emp. Opportunity Comm'n, *Select Task Force on the Study of Harassment in the Workplace, Report of Co-Chairs Chai R. Feldblum & Victoria A. Lipnic* 13-14 (2016), [https://www.eeoc.gov/sites/default/files/migrated\\_files/eeoc/task\\_force/harassment/report.pdf](https://www.eeoc.gov/sites/default/files/migrated_files/eeoc/task_force/harassment/report.pdf).

<sup>20</sup> See generally Joan C. Williams, *Double Jeopardy? An Empirical Study with Implication for the Debates over Implicit Bias and Intersectionality*, 37 HARV. J. L. & GENDER 185 (2014) (describing how experiences of gender discrimination and harassment in the workplace vary by race); AMANDA ROSSIE ET. AL, NAT'L WOMEN'S LAW CTR., OUT OF THE SHADOWS: AN ANALYSIS OF SEXUAL HARASSMENT CHARGES FILED BY WORKING WOMEN 8 (2018), <https://nwlc.org/wp-content/uploads/2018/08/SexualHarassmentReport.pdf> (analyzing sexual harassment charges filed with the EEOC between 2012 and 2016, and noting that “The sexual harassment charge data also suggests that many women experience racialized sexual harassment, or harassment based not only on their sex but also their race.”); NAT'L WOMEN'S LAW CTR. & TIME'S UP LEGAL

many employers and courts still do not understand this distinct but common and pernicious variant of harassment — we encourage the EEOC to provide additional examples that illustrate the dynamics of intersectional harassment. These could include examples of harassment involving racialized sexual references or slurs based on stereotypes about both race and gender.<sup>21</sup>

#### **D. Survivors of Gender-Based Violence**

We also urge that the Final Guidance clarify the scope of harassment to include harassment based on sex-based assumptions of victims of domestic violence, dating violence, sexual assault, and stalking. In its Strategic Enforcement Plan for FY 2024-2028, the EEOC expanded its list of vulnerable workers and persons from underserved communities to include survivors of gender-based violence (GBV).<sup>22</sup> In some instances, harassment involving survivors of GBV may violate Title VII because it is rooted in stereotyping and sex-based assumptions (and/or stereotypes against another protected class). Harassment against survivors of GBV may also violate the Americans with Disabilities Act (ADA).<sup>23</sup> In the last several decades, some jurisdictions have gone even further to protect victims of gender-based violence from discrimination and harassment in the workplace. In particular, 10 states and Washington, D.C. have adopted laws that prohibit employment discrimination against victims of domestic violence based on their status as victims of these crimes.<sup>24</sup>

As employers react to and manage the effects of gender-based violence in the workplace, sex-based stereotypes against survivors of violence lead to harassment and discrimination, including retaliation. We urge the EEOC to include language and further examples in the Final Enforcement Guidance of prohibited harassment against victims of gender-based violence consistent with its Question & Answer guidance issued in 2012.<sup>25</sup>

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DEFENSE FUND, COMING FORWARD: KEY TRENDS AND DATA FROM THE TIME'S UP LEGAL DEFENSE FUND 4, 16-17 (2020), [https://nwlc.org/wp-content/uploads/2020/10/NWLC-Intake-Report\\_FINAL\\_2020-10-13.pdf](https://nwlc.org/wp-content/uploads/2020/10/NWLC-Intake-Report_FINAL_2020-10-13.pdf) (noting that 18% of people who sought help from the Time's Up Legal Defense Fund reported that they experienced discrimination or harassment "based on sex and other aspects of their identities," including race, disability, and sexual orientation or gender identity).

<sup>21</sup> See, e.g., Jamillah Bowman Williams, *Beyond Sex-Plus: Acknowledging Black Women in Employment Law and Policy*, 25 EMPLOYEE RTS. & EMP. POL'Y J. 13, 16-17 (2021) (describing cases involving intersectional harassment experienced by Black women).

<sup>22</sup> U.S. EQUAL EMP. OPPORTUNITY COMM'N, STRATEGIC ENFORCEMENT PLAN FISCAL YEARS 2024-2028 (2023), <https://www.eeoc.gov/sites/default/files/2023-09/SEP%20FY%2020242028%20FINAL%20APPROVED.pdf>.

<sup>23</sup> *Questions and Answers: The Application of Title VII and the ADA to Applicants or Employees Who Experience Domestic or Dating Violence, Sexual Assault, or Stalking*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (Oct. 12, 2012), <https://www.eeoc.gov/laws/guidance/questions-and-answers-application-title-vii-and-ada-applicants-or-employees-who>.

<sup>24</sup> See WORKPLACES RESPOND TO DOMESTIC & AND SEXUAL VIOLENCE & LEGAL MOMENTUM, STATE GUIDE ON EMPLOYMENT RIGHTS FOR SURVIVORS OF DOMESTIC VIOLENCE, SEXUAL ASSAULT, AND STALKING, (2022) (listing California, Connecticut, Delaware, Hawaii, Illinois, New Hampshire, New York, Oregon, Puerto Rico, Vermont, U.S. Virgin Islands, Washington State and Washington, DC as states that have anti-discrimination laws) <https://www.workplacesrespond.org/wp-content/uploads/2017/01/State-Employment-Guide.pdf>.

<sup>25</sup> *Questions and Answers: The Application of Title VII and the ADA to Applicants or Employees Who Experience Domestic or Dating Violence, Sexual Assault, or Stalking*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (Oct. 12, 2012), <https://www.eeoc.gov/laws/guidance/questions-and-answers-application-title-vii-and-ada-applicants-or-employees-who>.



## **E. Intragroup Harassment**

The EEOC appropriately recognizes that individuals may unlawfully harass others sharing the same protected characteristics.<sup>26</sup> We propose that the agency illustrate this common occurrence with some examples, beyond Example 9, which concerns same-sex harassment. For instance, the section on color-based harassment would benefit from an example reflecting a lighter-skinned Black worker's harassment of a darker-skinned Black person;<sup>27</sup> the sex-based harassment section could use an example of a woman without children harassing a woman who is a mother with child care obligations; and the national origin harassment section could provide an example of an employee of Dominican descent harassing a Mexican American co-worker, to name just a few potential scenarios. Employers often are dismissive of harassment occurring in such contexts; if the EEOC emphasizes that such conduct is no less abusive because it is perpetrated by a person who has the same protected characteristic, it would be invaluable in debunking such preconceptions.

### **III. The EEOC Should Provide Further Clarity on the Following Areas.**

#### **A. Harassment That Results in an Explicit Change to the Terms, Conditions, or Privileges of Employment**

The Proposed Guidance distinguishes harassment that results in an “explicit change to the terms or conditions of employment” from harassment that does not result in an “explicit change” but changes the terms or conditions of employment by creating a hostile work environment.<sup>28</sup> We encourage the EEOC to further clarify what constitutes an “explicit change to the terms or conditions of employment” in the Final Guidance. Specifically, the discussion in Section III.A of the Proposed Guidance regarding harassment that results in an “explicit change” to the terms or conditions of employment could be read to suggest that in order to establish a cognizable claim, an employee must show that the employer *expressly* stated that the submission to or refusal of sexual advances was the basis for the change to the terms and condition of employment, or must otherwise prove a subjective intent to harass.<sup>29</sup> This would be a misrepresentation of the law.<sup>30</sup> The Final Guidance should make clear that such an express statement is not required to establish a claim that harassment resulted in an explicit change to the terms or conditions of employment. For example, if a supervisor fired an employee the day after she refused his sexual advances because of

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<sup>26</sup> Proposed Guidance at 17 & n.51.

<sup>27</sup> Footnote 11 of the Proposed Guidance contains citations to numerous such cases from which to draw illustrative fact patterns.

<sup>28</sup> Proposed Guidance at 28.

<sup>29</sup> Proposed Guidance at 28-29 (providing an example in which an employer makes an explicit threat to deny a job benefit if an employee rejects his sexual advances, and then denies the job benefit).

<sup>30</sup> Federal courts have found that plaintiffs established cognizable claims of harassment where they rejected sexual advances and subsequently experienced a change to the terms or conditions of employment, even in the absence of an express statement that the rejection was the basis for the change. *See, e.g., Molnar v. Booth*, 229 F.3d 593 (7th Cir. 2000) (concluding that harassment of an art teacher led to a tangible change to the terms and conditions of her employment when a school principal took back supplies he had given her and gave her a negative evaluation after she rejected his advances); *Hulsey v. Pride Restaurants LLC*, 367 F.3d 1238 (11th Cir. 2004) (stating that plaintiff's allegations, if true, would be sufficient to establish harassment resulting in a tangible employment action, where plaintiff was terminated immediately after rejecting a supervisor's sexual advances).

her refusal, even if not expressly stated, then this would represent an “explicit change to the terms or conditions of employment.”

## B. Standard for Showing a Hostile Work Environment

We applaud the EEOC’s appropriately broad reading of the factors that will contribute to creation of an unlawful hostile work environment. The EEOC’s early recognition of hostile work environment harassment<sup>31</sup> was integral to the U.S. Supreme Court’s eventual acknowledgment in *Meritor Savings Bank, FSB v. Vinson*<sup>32</sup> that harassment is discriminatory even where it does not cause economic harm. With this new guidance, the agency has the opportunity to again influence courts’ — and thus employers’ and workers’ — understanding of unlawful harassment.

Unfortunately, in the years since *Meritor* — as well as the next hostile environment case to be considered by the Court, *Harris v. Forklift Systems, Inc.*<sup>33</sup> — the federal courts have interpreted the requirement that the challenged harassment be “sufficiently severe or pervasive to ‘alter the conditions of [the victim’s] employment and create an abusive working environment,’” in inconsistent, erroneous, and sometimes downright head-scratching ways.<sup>34</sup> Some courts have also imposed an exceptionally high bar for meeting the “severe or pervasive” threshold, resulting in a wide range of egregious conduct being found merely “offensive,” “unprofessional,” or “inappropriate.”<sup>35</sup> Such findings are particularly likely when the

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<sup>31</sup> *Guidelines on Discrimination Because of Sex*, 29 C.F.R. § 1604.11(a) (Nov. 10, 1980).

<sup>32</sup> 477 U.S. 57, 65-67 (1986) (discussing the *Guidelines* and unanimous federal courts’ adoption of the hostile environment doctrine).

<sup>33</sup> 510 U.S. 17 (1993).

<sup>34</sup> See generally Sandra F. Sperino & Suja A. Thomas, *Boss Grab Your Breasts? That’s Not (Legally) Harassment*, N.Y. TIMES (Nov. 29, 2017), <https://www.nytimes.com/2017/11/29/opinion/harassment-employees-laws-.html>. Among the most egregious of these is the requirement that harassment be “severe and pervasive” in order to be found unlawful, either because the court explicitly misstates the standard or because it imposes a requirement that the conduct be serious and frequent or widespread among several harassers. See, e.g., *Nathan v. Great Lakes Water Auth.*, 992 F.3d 557, 568 (6th Cir. 2021) (six instances of harassment over roughly 15 months insufficient to survive summary judgment); *Stewart v. Miss. Transp. Comm’n*, 586 F.3d 321, 330-31 (5th Cir. 2009) (supervisor’s six incidents of telling subordinate he loved her over the course of a month meant that the plaintiff “was allegedly subject to one subjectively offensive utterance by [her supervisor] every few days”), citing *Shepherd v. Comptroller of Public Accounts of State of Texas*, 168 F.3d 871, 874 (5th Cir. 1999) (sexual teasing and touching over two-year period not sufficiently “severe”).

<sup>35</sup> See, e.g., *Lopez v. Whirlpool Corp.*, 989 F.3d 656, 663 (8th Cir. 2021) (conduct not severe or pervasive where harasser touched the plaintiff “almost every time he saw her” over several months, including “touch[ing] her back, invad[ing] her personal space, and [blowing] on her finger while calling her ‘baby’”); *Stewart v. Miss. Transp. Comm’n*, 586 F.3d 321, 330-31 (5th Cir. 2009) (supervisor’s repeatedly telling plaintiff that he “loved” her did not constitute harassment “because [his statements] were not severe, physically threatening or humiliating; at most they were unwanted and offensive.”); *Mitchell v. Pope*, 189 F. Appx. 911, 913-14, n.3 (11th Cir. 2006) (granting summary judgment to employer where plaintiff alleged superior officer harassed her, including trying to kiss her and calling her a “frigid bitch” when she refused, showed up at her home unannounced several times, told her “you can just walk into the room and I’d get an erection,” forced her to share a hotel room at a conference, and chased her around the office); *LeGrand v. Area Res. for Cmty. & Human Servs.*, 394 F.3d 1098, 1100, 1102-03 (8th Cir. 2005) (finding conduct was not severe or pervasive where priest asked employee to watch pornographic movies with him, asked him to “jerk off with [him],” kissed him, grabbed his buttocks, and reached for his genitals).



harassment consists of “verbal conduct only.”<sup>36</sup> These errors occur in all types of harassment cases, not just those involving sex-based harassment.<sup>37</sup>

While the Proposed Guidance in some respects implicitly rejects these developments — particularly in its discussion of the proof required to show that a given environment is “objectively” hostile<sup>38</sup> — we urge the EEOC to explicitly address the widespread flawed readings of when harassment is sufficiently “severe or pervasive” to constitute a hostile work environment. We further urge the agency to include examples specifically demonstrating “severity”; the Proposed Guidance currently includes none. Finally, with respect to its remarks introducing the concept of a hostile work environment, we urge that the EEOC expand the list of factors constituting the “totality of the circumstances” inquiry. Currently, the Proposed Guidance chiefly relies on the four factors listed in *Harris*<sup>39</sup>; three of these, however, would place the conduct at the outer limits — i.e., whether the conduct is “physically threatening or humiliating,” whether it “interfered with the complainant’s work performance,” and “the degree to which it caused the complainant psychological harm,” which are factors that the Proposed Guidance elsewhere states are *not* preconditions for a liability finding. This 30-year-old standard, without more, is an unnecessarily cramped recitation of what kinds of “circumstances” have been recognized to “alter the conditions of employment and create an abusive working environment.” We suggest that the Final Guidance expressly state additional relevant factors approved by the courts and by the EEOC itself, including but not limited to (i) the frequency of the conduct; (ii) the duration of the conduct; (iii) the location where the conduct occurred; (iv) the number of individuals engaged in the conduct; (v) the nature of the conduct; (vi) any power differential between the alleged harasser and the person allegedly harassed; (viii) any use of epithets, slurs, or other conduct that is humiliating or degrading; and (ix) whether the conduct reflects stereotypes about individuals in the protected class involved.

### C. Retaliatory Harassment

We appreciate that the Proposed Guidance addresses harassment as a form of retaliation and encourage the EEOC to clearly state the standard for unlawful retaliatory harassment in the Final Guidance. Retaliation is the most commonly filed charge with the EEOC, comprising 51.6 percent of all

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<sup>36</sup> *Paskert v. Kemna-Asa Auto Plaza, Inc.*, 950 F.3d 535, 538-39 (8th Cir. 2020) (“[P]laintiff only alleges one instance of unwelcome physical contact, one or two statements where [supervisor] stated he could ‘have [plaintiff],’ and several statements about how he never should have hired a female and wanted to make [plaintiff] cry. All of this behavior is inappropriate and should never be tolerated in the workplace, but it is not [severe or pervasive].”); *Black v. Zaring Homes, Inc.*, 104 F.3d 822, 826-27 (6th Cir. 1997), citing with approval *Baskerville v. Culligan Int’l Co.*, 50 F.3d 428 (7th Cir. 1995). See also *Mitchell*, 189 F. Appx. at 913 (“most [of the instances alleged by plaintiff] involved ‘offensive utterances’”; “[o]nly three times did [the supervisor] touch her or attempt to touch her”).

<sup>37</sup> See, e.g., *Shaver v. Independent Slave Co.*, 350 F.3d 716 (8th Cir. 2003); (disability); *Woodland v. Joseph T. Ryerson & Son, Inc.*, 302 F.3d 839 (8th Cir. 2002) (race); *Crawford v. Medina General Hospital*, 96 F.3d 830 (6th Cir. 1996) (age).

<sup>38</sup> We also applaud the EEOC’s recognition that where a plaintiff satisfies the “subjective” prong of the hostility inquiry, they need not *also* prove that the conduct was “unwelcome.” Proposed Guidance at 39.

<sup>39</sup> “Some such circumstances include the frequency and severity of the conduct; the degree to which the conduct was physically threatening or humiliating; the degree to which the conduct interfered with an employee’s work performance; and the degree to which it caused the complainant psychological harm.” Proposed Guidance, at 30, citing *Harris*, 510 U.S. at 23.



discrimination charges filed with the agency in 2022.<sup>40</sup> In cases where a complainant reports both discrimination based on a protected class and related retaliation, it is common for the retaliation allegations to be substantiated when allegations of the original discriminatory conduct are not.<sup>41</sup> This includes matters in which a complainant files charges of both retaliatory harassment and other form(s) of discriminatory harassment.<sup>42</sup> The prevalence and relative success of retaliation charges make it a particularly important issue area to provide clear guidance around, including in the harassment context.

The Proposed Guidance notes that retaliation claims — including those involving alleged retaliatory harassment — are enforced under a different legal standard than claims involving harassment based on a protected class.<sup>43</sup> Since the threshold for establishing retaliatory harassment is less stringent than for discriminatory hostile work environment, the Final Guidance should take advantage of the opportunity to provide greater clarity on the issue by including an explanation of the relevant differences between these standards in the text, instead of directing readers to the EEOC’s 2016 Enforcement Guidance on Retaliation and Related Issues for additional information.<sup>44</sup> We urge the commission to incorporate its guidance of retaliatory harassment within the Final Guidance and explicitly explain that, “If [] conduct would be sufficiently material to deter protected activity in the given context, even if it were insufficiently severe or pervasive to create a hostile work environment, there would be actionable retaliation.”<sup>45</sup>

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We applaud the EEOC for issuing this comprehensive Proposed Guidance. Thank you for the opportunity to submit comments on the Proposed Guidance and for taking the time to consider our views and the impact the guidance will have on the civil and human rights of the communities our coalition represents. Please do not hesitate to reach out to Peggy Ramin, policy counsel for health and anti-poverty, at [ramin@civilrights.org](mailto:ramin@civilrights.org) with any questions.

Sincerely,  
The Leadership Conference on Civil and Human Rights

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<sup>40</sup> *Charge Statistics FY 1997 Through FY 2022*, U.S. EQUAL EMP. OPPORTUNITY COMM’N, <https://www.eeoc.gov/data/charge-statistics-charges-filed-eeoc-fy-1997-through-fy-2022> (last visited Oct. 25, 2023).

<sup>41</sup> Romella Janene El Kharzazi, Mxolisi Siwatu, and Dexter R. Brooks, *Retaliation- Making It Personal*, U.S. EQUAL EMP. OPPORTUNITY COMM’N, [https://www.eeoc.gov/retaliation-making-it-personal#\\_3](https://www.eeoc.gov/retaliation-making-it-personal#_3) (last visited Oct. 25, 2023).

<sup>42</sup> Examples of employees being harassed in retaliation for filing a claim of discrimination, including harassment based on a protected class, are numerous and the interplay between the forms of harassment can have a compounding effect. *See, e.g.*, Nicole Buonocore Porter, *Ending Harassment by Starting with Retaliation*, 71 STAN. L. REV. ONLINE (2018) <https://www.stanfordlawreview.org/online/ending-harassment-by-starting-with-retaliation/>; Blair Druham Bullock, *Uncovering Harassment Retaliation*, 72 ALA. L. REV. 671, 677 (2021) (“[H]arassment retaliation is a unique and prevalent problem. Harassment charges are more than 90% more likely to include a retaliation charge than any other type of charge [filed with the EEOC].”).

<sup>43</sup> Proposed Guidance at 19.

<sup>44</sup> U.S. Equal Emp. Opportunity Comm’n, *Enforcement Guidance on Retaliation and Related Issues* (2016), <https://www.eeoc.gov/laws/guidance/enforcement-guidance-retaliation-and-related-issues>.

<sup>45</sup> U.S. Equal Emp. Opportunity Comm’n, *Enforcement Guidance on Retaliation and Related Issues* § II.B.3(2016), <https://www.eeoc.gov/laws/guidance/enforcement-guidance-retaliation-and-related-issues>.