November 1, 2023

Raymond Windmiller
Executive Officer
Executive Secretariat
U.S. Equal Employment Opportunity Commission
131 M Street NE
Washington, DC 20507

Submitted electronically

Re: Proposed
RIN 3046-ZA02

Dear Mr. Windmiller,

The American Civil Liberties Union ("ACLU") submits these comments on the Proposed Guidance issued by the U.S. Equal Employment Opportunity Commission ("EEOC") with the title "Enforcement Guidance on Harassment in the Workplace" (the "Proposed Guidance" or "Guidance").[1]

For more than 100 years, the ACLU has been our nation's guardian of liberty, working in courts, legislatures, and communities to defend and preserve the individual rights and liberties that the Constitution and laws of the United States guarantee to every

significant cases establishing the contours of on-the-job rights, from

The Proposed Guidance admirably reflects the breadth of the doctrinal developments over the past 25 years, both with respect to the substantive anti-harassment protections and applicable liability standards. We submit these comments chiefly to identify areas where we believe the Guidance would benefit from clarification or amplification, including through the addition of examples that demonstrate the full range of harassment occurring in various sectors and settings.

I. THE PROPOSED GUIDANCE'S DEFINITION OF THE "COVERED BASES" OF HARASSMENT IS APPROPRIATELY BROAD, BUT THE GUIDANCE SHOULD SUPPLEMENT ITS EXPLANATIONS OF PREGNANCY-BASED AND RETALIATORY HARASSMENT, AND PROVIDE MORE ILLUSTRATIVE EXAMPLES TO CAPTURE THE FULL RANGE OF WORKPLACE ABUSE.

- ***Intra-group harassment.*** The EEOC appropriately recognizes that individuals sometimes unlawfully harass others who share the protected characteristic that is the basis for the harassment. Employers often are dismissive of harassment occurring in such contexts; the EEOC's emphasizing that such conduct is no less abusive because it is perpetrated by a person who has the same protected characteristic would be invaluable in debunking such preconceptions. 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[18]; the sex-based harassment section could use an example of a woman without children harassing a woman who is a mother with childcare 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.

- ***Hair-based harassment.*** The EEOC mentions that racialized harassment may take the form of harassment based on "grooming practices (e.g., harassment based on hair textures and hairstyles commonly associated with specific racial groups)." The ACLU appreciates this recognition; Black workers, particularly Black women, face extreme scrutiny of their hair, with severe adverse consequences.[19] To amplify this distinct but prevalent form of abuse, the Final Guidance should include an illustrative example – for instance, of a Black woman with locs being harassed for having "messy" hair.[20] We also urge the EEOC to replace "grooming practices" with "appearance standards"; "grooming" suggests a lesser standard of cleanliness that reinforces, rather than undermines, the very stereotype targeted by the Guidance.

- ***LGBTQ harassment.*** The ACLU applauds the EEOC for including an example illustrating that intentionally and repeatedly referring to someone in a manner inconsistent with the employee's gender identity constitutes harassment. We urge the inclusion of additional examples of harassment based on sexual orientation and gender identity in the Final Guidance. Many LGBTQ employees live and work in states, counties, and towns that have

More detailed examples and explanations of harassment based on gender identity would answer employers' questions as they adopt these employment policies.[21]

- ***Harassment of people with disabilities***. It is well-documented that people with disabilities experience high rates of harassment. As the EEOC's Task Force Report recounted, 19 percent of harassment charges filed in FY15 by employees of private, state, and local employers alleged disability harassment – a greater percentage than those alleging age, national origin, or religion harassment – and 34 percent of the harassment charges filed that year by federal government workers alleged disability-based abuse, second only to race-based harassment.[22] Alarmingly, people with disabilities, regardless of gender, report much higher rates of sexual harassment than people without disabilities; indeed, nearly half of all working women with a disability report experiencing sexual harassment or assault at work, as compared with 32 percent of women without a disability.[23] While the ACLU appreciates the inclusion of an example of harassment of an individual experiencing PTSD and an individual with a mobility disability, it urges more examples that will raise awareness of the full range of abuse faced by workers with disabilities. These could include examples of harassment based on an employee's reasonable accommodation requests, harassment based on stereotypes about people with particularly stigmatized disabilities, or harassment against employees who have disabilities that wax and wane (such as chronic illness, long-COVID, and certain psychiatric disabilities).

- ***Intersectional harassment.*** We appreciate the Proposed Guidance's recognition that harassment may be based on one's intersectional identity, such as one's identity as a Muslim woman or a Black woman. As the report of the Co-Chairs of the EEOC's Select Task Force on the Study of Harassment in the Workplace noted, research confirms the "intersectional nature of harassing behavior" and indicates that "targets of harassment often experience mistreatment in multiple forms, such as because of one's race and gender, or ethnicity and religion."[24] Recognizing that harassment is often intersectional – and that 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

[21] The EEOC also should 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. Intersex people face distinct forms of prejudice and harassment that should be directly addressed by this Guidance. Under the plain language of , 490 U.S. 228 (1989), and Title VII's prohibition against sex discrimination applies to intersex discrimination. Indeed, courts have recognized that similar anti-discrimination laws prohibit intersex discrimination. Moreover, the EEOC should clarify the application of the Genetic Information Nondiscrimination Act (GINA) to intersex discrimination.

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given that that is among the most common forms of harassment, and among the most likely to be dismissed as insufficiently linked to the individual complainant.[32]

III. THE PROPOSED GUIDANCE SHOULD CLARIFY THE SUBSTANTIVE CRITERIA FOR SHOWING THAT HARASSMENT RESULTS IN DISCRIMINATION WITH RESPECT TO A TERM, CONDITION, OR PRIVILEGE OF EMPLOYMENT.

The Proposed Guidance does an invaluable service by articulating and synthesizing the Supreme Court rulings concerning the substance of harassment claims and the modes by which an employer will be held liable for such conduct. As the Guidance notmodech an

B. The Final Guidance should clarify the standards for proving a hostile work environment, particularly with respect to the "severe or pervasive" inquiry, the criteria for assessing the "objective" hostility of an environment, and conduct occurring outside the workplace.

The Proposed Guidance is admirably thorough in describing the circumstances that may support a hostile environment finding.[41] It would be enhanced, however, by clarifying the interplay among the relevant standards, particularly those governing the "severe or pervasive" and "objective" hostility inquiries, as well as amplifying the circumstances in which conduct occurring on social media will and will not give rise to liability.

The Final Guidance should repudiate court decisions that misapply Meritor's "severe or pervasive" language. As the Proposed Guidance explains, the central question in a hostile environment case, as established by the Supreme Court in , is whether the conduct is "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment."[42] Yet as the EEOC is no doubt aware, in the years since , courts overwhelmingly have focused exclusively on whether the challenged conduct was "severe or pervasive," and further, have imposed their own (unduly narrow) definitions of what conduct meets that test. Such decisions ignore that itself contains the definition of what constitutes "severe or pervasive" conduct, namely, conduct that "alters the conditions of . . . employment and creates an abusive working environment." They also ignore the Supreme Court's directive, in ,[43] that whether an environment is unlawfully "abusive" is to be assessed according to the "totality of the circumstances"[44] – of which severity and pervasiveness are just two factors.[45]

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[41] Proposed Guidance at 33-55.

[42] Proposed Guidance at 29 & n.102, quoting , 477 U.S. 57, 67 (1986) (internal citation omitted).

[43] 510 U.S. 17 (1993).

[44] . at 22-23.

[45] at 23 ("Some such circumstances include the ; 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.") (Emphasis added.)

The improper application of the "severe or pervasive" language has resulted in exceptionally egregious abuse routinely being deemed boorish, unprofessional, inappropriate – but not unlawful.[46] These errors occur in all types of harassment cases, not just those involving sex-based harassment.[47]

Accordingly, the Final Guidance should explicitly repudiate courts' incomplete and incorrect applications of 's "severe or pervasive" language.

The Final Guidance should clarify that the "objective" hostility of an environment depends on the "totality of the circumstances," and should clarify the full list of "circumstances" to be considered. As the Proposed Guidance correctly notes when introducing the concept of hostil intr

clear that these two components are just part of the "totality" inquiry. Relatedly, we suggest that Section III be re-ordered so that the concept of an "objectively hostile environment" is discussed to the concepts of "severity" and "pervasiveness" – currently Sections III.B.1. and III.B.2., respectively, in the Proposed Guidance – and thereby further emphasize that those factors comprise only part of the "objectively hostile" assessment.

On this note, we observe that the "severity" section of the Proposed Guidance does not include any illustrative examples. Given the literally countless examples of severe harassment available from the caselaw, as well as the rampant misreadings by courts of what conduct actually qualifies as "severe," the Final Guidance should include not just more examples, but several more.

The EEOC strikes the right balance with respect to conduct occurring outside of work, but should clarify when social media activity is and is not actionable. The Proposed Guidance appropriately recognizes that the physical confines of the workplace no longer limit the spaces in which work occurs.[55] Whether at off-site trainings, company-sponsored social events, or over an employer's electronic platforms, workers interact with one another in a wide range of settings. The EEOC correctly treats harassing conduct occurring in those spaces on the same footing as conduct occurring in the physical workplace.

Similarly, the Proposed Guidance does a tremendous service by addressing the transformative effects of the Internet with respect to the U.S. workplace, including workers' near-universal utilization of one or more forms of social media in their personal lives. The ACLU appreciates the Proposed Guidance's Example 25, in which a Black employee's co-workers posted both her name and her image, using racist imagery. Such specific targeting unquestionably has discriminatory effects in the workplace, regardless of where the conduct occurs. We also agree that "non-consensual distribution of real or computer-generated intimate images using social media can contribute to a hostile work environment, if it impacts the workplace."[56]

In order to provide maximum guidance to courts, employers, and workers alike, we urge the EEOC to also address social media activity that does not target a specific individual. The ACLU proposes that the Fon of rc yn of rvy
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V. THE PROPOSED GUIDANCE SHOULD INCLUDE A MORE ROBUST DISCUSSION OF THE DISTINCT CONSIDERATIONS APPLICABLE TO TODAY'S FISSURED WORKPLACE.

The ACLU applauds the EEOC's specific mention of the doctrine of apparent agency[73] – in the context of identifying which liability standard may apply to an alleged harasser's conduct – as well as its brief discussion of the joint employer doctrine in the context of a temporary agency's liability for harassment by a client-employer.[74] With respect to both doctrines, we urge the EEOC to go further, and to provide greater guidance to courts regarding the factual scenarios that will support holding entities responsible for harassment experienced by people whose labor they control, despite disclaiming those individuals' employee status.

Today, many people work in heavily fissured industries, where companies outsource traditional "in-house" services through subcontracting, licensing, and franchising arrangements.[75] Similarly, approximately 9 percent of the U.S. workforce is a current or recent "gig" worker.[76] Such precarity has a gender component; for instance, low-wage jobs that are disproportionately held by women, particularly Black and brown women – such as housekeeping, laundry, food service, and care work – are among those most likely to be outsourced. Women also disproportionately are represented among the ranks of temporary workers in the business and professional service sectors.[77] Indeed, one study found that 31 percent of the female workforce, as compared to 22.8 percent of the male workforce, worked in some form of a non-standard work arrangement, defined as "regular part-time, temporary help agency, on-call/day laborer, self-employed, independent contractor, and contract company."[78]

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confidentiality in many cases may be necessary, both to overcome workers' fears of coming forward and to encourage supportive witnesses to divulge what they know. We note that the Task Force Report acknowledged, however, that such confidentiality rules potentially run afoul of workers' right under the National Labor Relations Act (NLRA) to engage in "concerted, collective activity," and that National Labor Relations Board (NLRB) policy at the time in fact such rules. Task Force Report, at 42. Although the NLRB rescinded that policy in 2017, it recently overruled that decision, adopting a new standard that disfavors employer-imposed confidentiality in workplace investigations. , 372 NLRB No. 113 (Aug. 2, 2023). Accordingly, the Task Force Report's recommendation that "EEOC and the [NLRB] should confer, consult, and attempt to jointly clarify and harmonize the interplay of the [NLRA] and federal EEO statutes with regard to the pera0sf wshe p4.2 ()4.2 (e)4.2 bE92.dg 43 ƀDC 0 gt (w)5.1 6[e6.9 (,)2n1 a097d6.9 (,)2n1 a097d

Despite rampant harassment in these industries,[79] workers struggle to enforce their rights against the companies that have the most control over their working conditions. The joint employer and apparent agency doctrines allow workers to hold accountable those entities that are truly calling the shots.

The joint employer doctrine has been interpreted unduly narrowly by the courts in the context of the nation's anti-discrimination laws, but not universally so. Moreover, we note that the NLRB recently issued its final rule under which joint employer status depends on the authority to control any of seven essential terms and conditions of employment – including decisions regarding hiring, firing, pay, and work hours – regardless of whether such control actually is exercised, and regardless of whether such control is direct or indirect.[80] Notably, the rule drew upon court decisions outside of the NLRA context, including Title VII jurisprudence.[81] The ACLU urges the EEOC to follow the NLRB's lead, and to issue revised guidelines for application of the joint employer doctrine; regardless of whether it does so, however, there remain a wide range of cases where the economic realities between the parties plainly establish an employer-employee relationship.[82] The Final Guidance should include more details of such cases, as well as illustrative examples.

The apparent agency doctrine also holds untapped potential; where an entity intentionally fosters in its workers the reasonable belief that it is their employer, it should not, and cannot, evade liability for abuse experienced by those workers simply by claiming "not it." As the Supreme Court made plain in its rulings regarding employer liability for harassment under Title VII, the statute's

[79] , , , n.76 (37 percent of gig workers surveyed reported that they had felt unsafe on at least one occasion, and 20 percent had experienced unwanted sexual advances); Ariel Ramchandani, "There's a Sexual-Harassment Epidemic on America's Farms," (Jan. 29, 2018), available at https://www.theatlantic.com/business/archive/2018/01/agriculture-sexual-harassment/550109/ (profiling abuses experienced by immigrant women farmworkers); Emily Stewart, "These [illegible]

express incorporation of agency principles[83] evinced Congress's intent to "direct[ ] federal courts to interpret Title VII based on agency principles."[84] Accordingly, courts have approved apparent agency as a theory for holding franchisors liable for sexual harassment under Title VII,[85] as well as for racial harassment under Section 1981,[86] violations of state wage and hour statutes,[87] and state tort law violations.[88] The EEOC should provide greater detail about this doctrine, and how it may be utilized to redress harassment of workers who have been induced to reasonably believe they are employed by a given entity, but to whom that entity seeks to deny the protections of the anti-discrimination laws.

VI. CONCLUSION

The ACLU applauds the EEOC's synthesis of the many legal developments and cultural changes over the past 25 years. Its rigorous, thoughtful approach will provide much-needed guidance to courts and employers, and will ensure the dignity and safety of millions of workers.

Sincerely,

Louise Melling
Deputy Legal Director

Julie Sweet
Director, Policy and Government Affairs
Liberty Division
National Political Advocacy Department

Ria Tabacco Mar
Director
Women's Rights Project

Gillian Thomas
Senior Staff Attorney
Women's Rights Project

Vania Leveille
Senior Legislative Counsel
National Political Advocacy Department

83