



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 *Enforcement Guidance on Harassment in the Workplace*
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 everyone in this country. With more than 3 million members, activists, and supporters, the ACLU is a nationwide organization that fights tirelessly in all 50 states, Puerto Rico, and Washington, D.C. for the principle that every individual’s rights must be protected equally under the law, regardless of race, religion, gender, sexual orientation, gender identity or expression, disability, national origin, or record of arrest or conviction.

The ACLU is unique in being committed to advancing the rights of people traditionally marginalized – including people of color, women, LGBTQ people, people with disabilities, Indigenous people, immigrants, and people impacted by the criminal justice system – while being equally committed to vigorously defending First Amendment rights. We believe that, when carefully crafted, non-discrimination and anti-harassment policies can protect workers from abuse while also preserving core free speech rights. We also recognize that conduct or expression that might not be actionable outside of the workplace may constitute harassment in the workplace.

Beginning with efforts to counter the vehement anti-union crusades of the 1920s, the ACLU has long championed the rights of workers, including the right to be free from harassment that demeans individuals simply because of who they are. We have litigated some of the nation’s most

¹ U.S. Equal Emp. Opportunity Comm’n, *Proposed Enforcement Guidance on Harassment in the Workplace* (Oct. 2, 2023), <https://www.regulations.gov/document/EEOC-2016-0009-0001>.



significant cases establishing the contours of on-the-job rights, from *Frontiero v. Richardson*,² the first Supreme Court decision to apply heightened scrutiny to constitutional claims alleging sex-based distinctions, to *Bostock v. Clayton County*,³ the landmark ruling confirming that discrimination on the basis of sexual orientation or gender identity is discrimination “because of . . . sex” under Title VII. Most recently, the ACLU Women’s Rights Project partnered with Fight for \$15 to challenge systemic sexual harassment in McDonald’s restaurants nationwide, bringing dozens of EEOC charges,⁴ as well as a class action against a Michigan franchise⁵ that ultimately settled for \$1.5 million, benefiting nearly 100 women.⁶

The EEOC’s Proposed Guidance has been issued at a critical moment, legally and culturally. Given that the EEOC has not issued any comprehensive guidance about unlawful harassment since 1999, the Guidance will supplant a number of outdated publications and provide up-to-date information to employers, workers, and the courts. Indeed, in the past quarter century, our understanding of harassment’s perniciousness, and of the myriad ways in which it infects the U.S. workplace, has expanded exponentially. Among the most notable developments have been the EEOC’s publication of its landmark *Report of the Select Task Force on the Study of Harassment in the Workplace*, the #MeToo explosion that ignited an unprecedented national conversation about harassment’s causes and effects, the reckoning with our nation’s violent racist history propelled by the Black Lives Matter movement, and the Supreme Court’s decision in *Bostock*. Also vastly changed is the structure of the U.S. workplace itself, which today is typified by fissures – in the location of work, and in the relationships among those directing and performing work – that diminish workers’ access to justice.

The EEOC’s early recognition of hostile work environment harassment⁷ was integral to the U.S. Supreme Court’s eventual acknowledgment in *Meritor Savings Bank, FSB v. Vinson*⁸ that harassment can be discriminatory even when 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.

² 411 U.S. 677 (1973).

³ 140 S. Ct. 1731 (2020).

⁴ See, e.g., Bryce Covert, “McDonald’s Has a Real Sexual Harassment Problem,” *The Nation* (Aug. 10/17, 2020), available at <https://www.thenation.com/article/society/mcdonalds-sexual-harassment-feature/>; Melena Ryzik, “In a Test of Their Power, #MeToo’s Legal Forces Take on McDonald’s,” *The New York Times* (May 21, 2019), available at <https://www.nytimes.com/2019/05/21/business/mcdonalds-female-employees-sexual-harassment.html>.

⁵ See, e.g., David Yaffe-Bellamy, “McDonald’s Lawsuit Targets ‘Pervasive’ Culture of Sexual Harassment,” *The New York Times* (Nov. 12, 2019), available at <https://www.nytimes.com/2019/11/12/business/mcdonalds-harassment-lawsuit.html>.

⁶ ACLU Press Release, “Former McDonald’s Workers Win \$1.5 Million in Class-Action Sexual Harassment Lawsuit,” (Apr. 4, 2022), available at <https://www.aclu.org/press-releases/former-mcdonalds-workers-win-15-million-class-action-sexual-harassment-lawsuit>.

⁷ *Guidelines on Discrimination Because of Sex*, 29 C.F.R. § 1604.11(a) (Nov. 10, 1980).

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



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.

The Proposed Guidance accurately reflects the widely variegated types of harassment that workers experience. While harassment that communicates unvarnished group-based bias undeniably still runs rampant, harassment based on stereotypes, as well as traits and characteristics linked to race, national origin, and religion – such as cultural dress, names, and manner of speaking – is equally prevalent. In particular, the ACLU supports the Guidance’s foregrounding of intentional misgendering a trans employee as a form of unlawful harassment, and its express recognition that harassment that conveys sex-based hostility is no less abusive than harassment that is explicitly sexual in nature.

The ACLU believes that two aspects of the Proposed Guidance’s discussion of “covered bases” should be supplemented, and additional clarifying language and illustrative examples included to fully convey the range of harassment to which workers are subjected.

A. The EEOC should supplement its discussions of harassment based on pregnancy, childbirth, and related medical conditions, and retaliatory harassment.

Pregnancy-based harassment. 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,⁹ the Final Guidance should provide more examples of this form of sex harassment. In particular, in light of the new Pregnant Workers Fairness Act,¹⁰ 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, 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 become pregnant 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

⁹ Proposed Guidance at 9-10.

¹⁰ 42 U.S.C. § 2000gg *et seq.*



family.¹¹ 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, as do cisgender men who obtain treatment seen as “emasculating” or otherwise insufficiently masculine, such as a vasectomy.

Retaliatory harassment. We appreciate that the Proposed Guidance addresses harassment as a form of retaliation.¹² Retaliation is the most commonly-filed charge with the EEOC, comprising 51.6 percent of all discrimination charges filed with the agency in 2022.¹³ In cases where a complainant reports both discriminatory harassment and related retaliatory harassment, it is common for the retaliation allegations to be substantiated even where the underlying discrimination allegations are not.¹⁴ We believe the Proposed Guidance would benefit from greater clarity as to the legal standard appropriately applied to such cases. Specifically, while a standalone harassment claim will be assessed according to the liability standards described in Sections III and IV of the Proposed Guidance, a retaliatory harassment claim will be assessed pursuant to the less stringent standard articulated in *Burlington Northern & Santa Fe Railway Co. v. White*,¹⁵ which outlaws employer action that “might well deter a reasonable employee from complaining about discrimination.”¹⁶

The Proposed Guidance currently alludes to the relevant differences between these standards, but forgoes a full explanation of them, instead directing readers to the EEOC’s 2016 Enforcement Guidance on Retaliation and Related Issues for additional information.¹⁷ We urge the Commission to incorporate its guidance of retaliatory harassment within the text of 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.”

B. The Proposed Guidance would benefit from more examples illustrating the full range of workplace abuse.

The text of the Proposed Guidance describes a wide range of “covered bases” of harassment, but should amplify its discussion with illustrative examples. In particular, the ACLU recommends inclusion of the following examples:

¹¹ See, e.g., *Turic v. Holland Hospitality*, 85 F.3d 1211, 1214 (6th Cir. 1996) (affirming judgment for hotel employee fired after her contemplation of obtaining abortion “precipitated a controversy among the other employees”).

¹² Proposed Guidance at 19 & n.59.

¹³ U.S. Equal Emp. Opportunity Comm’n, *Charge Statistics FY 1997 Through FY 2022*, <https://www.eeoc.gov/data/charge-statistics-charges-filed-eeoc-fy-1997-through-fy-2022> (last visited Oct. 25, 2023).

¹⁴ U.S. Equal Emp. Opportunity Comm’n, “Retaliation – Making It Personal,” https://www.eeoc.gov/retaliation-making-it-personal#_3 (last visited Oct. 25, 2023).

¹⁵ 548 U.S. 53 (2006).

¹⁶ *Id.* at 69.

¹⁷ Proposed Guidance at 19.

- ***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 person¹⁸; 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 implemented, or are actively working to implement, policies that undermine existing legal protections for LGBTQ people. Employers would benefit from 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.

¹⁸ Footnote 11 of the Proposed Guidance includes a number of cases presenting such fact patterns. Proposed Guidance at 6.

¹⁹ For instance, one study found that Black women’s hair was 2.5 times more likely to be perceived as unprofessional, and that one-fifth of respondents between age 25 and 34 had been sent home from work because of their hair. The Joy Collective & Dove, *The CROWN Research Study* (2019), available at https://static1.squarespace.com/static/5edc69fd622c36173f56651f/t/5edeaa2fe5ddef345e087361/1591650865168/Dove_research_brochure2020_FINAL3.pdf.

²⁰ See *Equal Emp. Opportunity Comm’n v. Catastrophe Management Solutions*, 837 F.3d 1156, 1159 (11th Cir. 2016) (Black woman denied job for wearing hair in locs, which hiring manager opined “tend to get messy”).

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 Alarming, 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 *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989), and *Bostock*, 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.

²² 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* (June 2016), at 7, available at https://www.eeoc.gov/sites/default/files/migrated_files/eeoc/task_force/harassment/report.pdf ("Task Force Report").

²³ Sara Luterman, "Nearly Half of Women with Disabilities Report Experiencing Sexual Harassment or Assault at Work, Poll Finds," *19th News* (Sept. 20, 2023), available at <https://19thnews.org/2023/09/poll-disability-sexual-violence-workplace/>.

²⁴ Task Force Report, at 13 & n.49.

dynamics of intersectional harassment. These could include examples of harassment involving racialized sexual references or slurs based on stereotypes about both race and gender, or sexual harassment of a woman with a disability.

- **Teenaged workers.** The EEOC has long been a leader in addressing harassment of teenagers, among the most vulnerable people in our workforce. As evidenced by its Youth@Work website and countless lawsuits, the agency understands that young people, most of whom are new to the workplace, are distinctly vulnerable to harassment, both because they are uninformed about their right to be free from such abuse and because they are intimidated by the prospect of coming forward to object to such conduct. We urge the inclusion of a specific discussion of teenaged workers in the Final Guidance; an illustrious example – for instance, with respect to what will be considered appropriate preventive and remedial efforts in the context of a workforce comprised of high numbers of teens²⁵ – would also be an important addition.
- **Survivors of gender-based violence.** Given that the EEOC’s Strategic Enforcement Plan for FY2024-28 expanded the list of vulnerable workers and persons from underserved communities to include survivors of gender-based violence (GBV), we urge that the Final Guidance both clarify that unlawful harassment includes sex-based assumptions about victims of domestic violence, dating violence, sexual assault, and stalking, and also include illustrious examples of such harassment. We note that harassment against survivors of GBV may also violate the ADA.²⁶

II. THE PROPOSED GUIDANCE SHOULD STATE THAT HARASSMENT BASED ON STEREOTYPES IS A VARIANT OF, NOT DISTINCT FROM, “FACIALLY DISCRIMINATORY CONDUCT,” AND SHOULD CLARIFY THE STANDARD FOR PROVING CAUSATION IN CASES OF SEX-BASED HARASSMENT.

The ACLU applauds the EEOC’s recognition of the myriad ways that a worker may show that alleged harassment occurred “because of” that person’s protected characteristic. It is important that the Guidance recognizes that context is a critical part of any harassment analysis, and that even conduct that is neutral on its face – such as exclusion from office gatherings – can be harassing when considered in relation to a larger pattern of abuse.

²⁵ See, e.g., *Equal Emp. Opportunity Comm’n v. V&J Foods*, 507 F.3d 575, 578-79 (7th Cir. 2007) (Posner, J.) (fast food restaurant’s anti-harassment policy, written in legalese unlikely to be understood by teenaged workers, insufficient to support summary judgment where teenager failed to complain about supervisor’s harassment). As *V&J* noted, the same logic applies to workforces known to be made up primarily of workers who are not native English speakers, *id.* at 578; the Final Guidance should amplify this point, as well.

²⁶ U.S. Equal Emp. Opportunity Comm’n, *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* (Oct. 12, 2012), available at <https://www.eeoc.gov/laws/guidance/questions-and-answers-application-title-vii-and-ada-applicants-or-employees-who>.



The ACLU especially appreciates the EEOC’s specific acknowledgment of the pernicious harms worked by harassment based on stereotypes; such assumptions about how people with particular protected characteristics should look, speak, and behave are foundational drivers of bias on the job.²⁷ Because harassment based on stereotypes explicitly invokes the target’s identity – or more accurately, the perceived traits associated with that identity – the ACLU urges the EEOC to clarify that such conduct is a variant of “facially discriminatory conduct.” As the agency recognizes, facial conduct “explicitly insults or threatens an individual based on a protected characteristic.”²⁸ Discussion of stereotype-based harassment as a standalone category of conduct creates the appearance of a weaker “causal” link between the harassment and the target’s protected characteristic. This perception may lead to employers and courts dismissing such harassment as discriminatory unless the harasser uses “magic words” expressly stating that the protected characteristic motivates the abuse.

Additionally, the ACLU urges the EEOC to modify its explanation of the causation showing in cases of sex-based abuse. The Proposed Guidance cites the three indicia of causation articulated by the U.S. Supreme Court in *Oncale v. Sundowner Offshore Servs., Inc.* – explicit or implicit sexual advances, general hostility toward members of the complainant’s sex, and comparative evidence regarding the harasser’s treatment of the complainant versus others from different groups.²⁹ While we appreciate the agency’s stating that this is not an exhaustive list – and noting that stereotyping and hostility that is directed toward just one individual, rather than a group, also may show causation – we believe that the Final Guidance should be more explicit. For instance, it would be helpful to note that, in the context of same-sex harassment cases, some courts have erroneously limited proof of causation to the three categories singled out in *Oncale*,³⁰ instead of examining the “critical issue” identified by the Court: whether the complainant was subjected to “more disadvantageous terms and conditions of employment” because of their sex.³¹ Another valuable addition to this section of the Final Guidance would be an express acknowledgment that sex-based harassment may be shown where people of a particular gender are routinely sexualized – as opposed to propositioned for sex –

²⁷ The ACLU acknowledges the EEOC’s including an example documenting the harassment of a man who does not conform to masculine stereotypes in terms of appearance and behavior. We also appreciate inclusion of sex-role stereotyping in the list of unlawful conduct. We suggest, however, that an example of such stereotyping be included, *e.g.*, harassment of a man with caregiving obligations; failure to conform to traditional notions of masculinity with respect to parenting not only is exceptionally common, *see, e.g.*, Scott Coltrane *et al.*, *Fathers and the Flexibility Stigma*, 69 *Journal of Social Issues*, 280-302 (2013), but also, by dissuading men from assuming equal parenting roles, perpetuates the workplace inequities experienced by mothers.

²⁸ Proposed Guidance at 21.

²⁹ *Id.* at 27 & n.88, citing *Oncale*, 523 U.S. 75, 80-81 (1998).

³⁰ *See, e.g.*, *Roberts v. Glenn Indus. Grp., Inc.*, 998 F.3d 111, 119 (4th Cir. 2021) (“The district court erred in its interpretation of *Oncale*. Nothing in *Oncale* indicates the Supreme Court intended the three examples it cited to be the only ways to prove that same-sex sexual harassment is sex-based discrimination.”); *id.* at 1120 n.4 (collecting cases from other circuits). *See also E.E.O.C. v. Boh Bros. Constr. Co.*, 731 F.3d 444, 455–56 (5th Cir. 2013) (en banc) (“[E]very circuit to squarely consider the issue has held that the *Oncale* categories are illustrative, not exhaustive, in nature”).

³¹ *Oncale*, 523 U.S. at 80.

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 notes, the historic distinction between “quid pro quo” and “hostile environment” harassment is no longer the lone framework; rather, the inquiry now centers on the identity of the harasser, the nature of the change in the complainant’s “terms, conditions, or privileges” of employment, and the quality of the employer’s preventive and remedial measures.³³

The ACLU believes, however, that the Guidance would be improved by the inclusion of additional detail regarding the dividing line between lawful and unlawful conduct, particularly with respect to hostile environment claims.

A. The Final Guidance should clarify the definition of “explicit change” to the terms, conditions, or privileges of employment, and make clear that an express statement of intent is not required.

The Proposed Guidance distinguishes supervisor harassment that results in an “explicit change to the terms or conditions of employment” – which can trigger automatic employer liability – from harassment, either by a supervisor or a co-worker or both, that changes those terms or conditions through a hostile environment, which triggers different liability inquiries.³⁴ As to the former category, we encourage the EEOC to clarify what constitutes an “explicit change.” The Proposed Guidance mentions “firing an employee because she rejected sexual advances” and “refusing to allow a woman to use earned vacation time because she did not submit to sexual advances,” but otherwise does not define “explicit change” in this section.³⁵ In a footnote, the Proposed Guidance describes such a change as a “tangible employment action,” and then refers the

³² See, e.g., *Gallagher v. C.H. Robinson Inc.*, 567 F.3d 263, 271, 272 (6th Cir. 2009) (reversing district court’s conclusion that “indiscriminate” harassment occurring in “open forum” of office was insufficiently sex-based, finding it “focused too narrowly on the motivation for the harassers’ offensive conduct rather than on the effects of the conduct on the victim-recipient”). The ACLU is cognizant of the tension between this principle and the importance of preserving workers’ ability to express themselves freely, including on matters of public concern. It is for this reason that we urge a clear and robust articulation of the objective component of the hostile environment inquiry, particularly where it occurs outside of work and on social media, as discussed further *infra*.

³³ Proposed Guidance at 28-29 (internal citations omitted).

³⁴ *Id.*

³⁵ *Id.*

reader to another footnote, in another section of the Guidance.³⁶ That section – Section IV.A.2 – concerns the indicia of a “supervisor” whose “tangible” actions will impute liability to the employer unless it makes out the *Faragher-Ellerth* affirmative defense, and defines a “tangible employment action” as a “‘significant change in employment status’ that requires an ‘official act’ of the employer.”³⁷ The Proposed Guidance states that examples of such actions “include hiring and firing, failure to promote demotion, reassignment with significantly different responsibilities, a compensation decision, and a decision causing a significant change in benefits.”³⁸

The totality of these conflicting language choices in the Proposed Guidance – *i.e.*, “explicit” versus “tangible” – as well as the circuitous route by which the reader learns what “explicit” apparently means³⁹ – is likely to sow confusion and potentially limit workers’ ability to challenge supervisory misconduct.

Accordingly, the ACLU urges the EEOC to make clear, in distinguishing supervisory harassment that may trigger automatic liability from harassment that creates a hostile environment, that an “explicit change to the terms, conditions, or privileges of employment” means a “significant change in employment status.” The ACLU further recommends that the EEOC list the kinds of changes that will meet this definition, either duplicating or specifically referencing the list provided in Section IV.B.2. Moreover, given the Proposed Guidance’s recognition that “a decision may constitute a tangible employment action even though it does not have immediate direct economic consequence,” the list of actions that impose a “significant change in employment status” should be expanded to include negative performance evaluations; interference with the employee’s workstation or equipment; schedule changes that offer inferior opportunities for advancement or interfere with the workers’ responsibilities or opportunities outside the workplace (*e.g.*, caregiving, school, other employment), and job transfers that significantly increase commuting time or expense.

Finally, to the extent that “explicit change” could be read as requiring that the supervisor “explicitly” state that the change is being made because of the complainant’s rejection of sexual advances, the Final Guidance should make clear that such an express statement is not required. Rather, we urge the EEOC to state that causation may be proved according to the same standards detailed in Section II.B.⁴⁰

³⁶ *Id.* at 29 n.98.

³⁷ *Id.* at 58 & n.206, quoting *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742, 761-62 (1998).

³⁸ Proposed Guidance at 58-59 (internal citation omitted).

³⁹ We note that “tangible” is the term repeatedly used throughout Section IV in discussing liability standards, whereas “explicit” is used in that section just once.

⁴⁰ Indeed, 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).

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 *Meritor*, 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 *Meritor*, 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 *Meritor* 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 *Harris v. Forklift Systems, Inc.*,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

⁴¹ Proposed Guidance at 33-55.

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

⁴³ 510 U.S. 17 (1993).

⁴⁴ *Id.* at 22-23.

⁴⁵ *Id.* at 23 (“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.”) (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 *Meritor*’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 hostile environment harassment in Section III.A., whether conduct “alters” employment conditions to the point of creating an “abusive working environment” is to be assessed subjectively and objectively,⁴⁸ pursuant to the Supreme Court’s decision in *Harris*.⁴⁹ Section III.A.’s introductory remarks further describe *Harris*’s directive that the objective prong of this inquiry depends on the “totality of the circumstances.”⁵⁰ Yet when the Guidance turns, in Section III.C.4., to its full discussion of “objective” hostility, it never mentions the “totality of the circumstances” test.⁵¹ That silence leaves the reader to wonder at what stage of the analysis the “totality of the circumstances” test should be applied, and how that test relates to the other factors identified in Section III.C. as being relevant to the “objective” inquiry.

Accordingly, we urge the Final Guidance to integrate *Harris*’s “totality of the circumstances” standard into Section III.C.4. Moreover, given the countless incorrect applications of the *Meritor*’s “severe or pervasive” language noted above, we further recommend that the Final Guidance make

⁴⁶ See, e.g., *Lopez v. Whirlpool Corp.*, 989 F.3d 656, 663 (8th Cir. 2021) (finding 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) (concluding that 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); *Weiss v. Coca-Cola Bottling Co. of Chicago*, 990 F.2d 333 (7th Cir. 1993) (affirming summary judgment for employer where supervisor tried to kiss plaintiff on three occasions, asked her out repeatedly, placed “I love you” signs in work area, called her a “dumb blond,” asked about her personal life and told her she was beautiful, and touched her suggestively). See also Sandra F. Sperino & Suja A. Thomas, “Boss Grab Your Breasts? That’s Not (Legally) Harassment,” *The New York Times*, (Nov. 29, 2017), <https://www.nytimes.com/2017/11/29/opinion/harassment-employees-laws-.html>.

⁴⁷ See, e.g., *Shaver v. Independent Stave 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).

⁴⁸ Proposed Guidance at 30.

⁴⁹ *Id.* at 29-30 & n.103, quoting *Harris*, 510 U.S. at 21-22.

⁵⁰ Proposed Guidance at 30 & n.109, citing *Harris*, 510 U.S. at 22-23.

⁵¹ Proposed Guidance at 39-47. This section of the Proposed Guidance says that “[t]he impact of conduct must be evaluated in the context of ‘surrounding circumstances, expectations, and relationships,’” but that language is drawn from *Oncale*, not *Harris*. Proposed Guidance at 42 & n.158, quoting *Oncale*, 523 U.S. at 81-82.

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 *prior* 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.

With respect to the other factors identified as relevant to “objective hostility,” the ACLU applauds the Proposed Guidance’s directive that the inquiry’s touchstone is what “a reasonable person in the plaintiff’s position would find hostile.”⁵² We also support the Guidance’s making explicit that there is no “crude environment” exception to the anti-discrimination laws; far too many workers, especially women seeking to integrate historically male, hyper-masculinized workplaces, have been denied relief because courts have assumed that such environments were so inherently, irredeemably hostile as to be beyond the reach of the law. We further appreciate the agency directing that “[i]n some circumstances, evidence of unwelcomeness also may be relevant to the showing of objective hostility.”⁵³

We urge the EEOC to make its discussion of the “objective” analysis even more robust by expressly noting that many types of power imbalances can exist in a particular workplace, and are relevant to the “totality of the circumstances” analysis. The Task Force Report provides a helpful blueprint for compiling such a list: homogeneous workforces, where a worker who is in the minority, or does not conform to certain workplace norms, could be especially isolated; environments where management is mostly U.S.-born and where the “rank and file” are mostly immigrants; workplaces with large numbers of teenagers; environments dominated by a “high value” employee; service environments where “the customer is always right,” alcohol consumption during work hours is the norm, and workers are expected to promote their own sexuality; and decentralized and isolated workplaces, where people may labor far away from personnel who can assist them – literally or figuratively.⁵⁴

⁵² Proposed Guidance at 42, citing *Oncale*, 523 U.S. at 81.

⁵³ 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 subjectively “unwelcome.” Proposed Guidance at 39.

⁵⁴ Task Force Report, at 25-30. Additionally, to the list of four factors identified in *Harris* as comprising the “totality of the circumstances,” 510 U.S. at 23, ACLU suggests that the Final Guidance specifically itemize the following factors, some of which the Guidance already alludes to: (i) the frequency of the conduct; (ii) the duration of the conduct; (iii) the location where the conduct occurred; (iv) whether the conduct is threatening, regardless of whether it is physically threatening; (v) the number of individuals engaged in the conduct; (vi) the nature of the conduct; (vii) 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.

As to the specific issue of “threatening” conduct, the ACLU applauds the EEOC’s providing specific examples of threats that are objectively harassing – *e.g.*, threats by a supervisor to deprive an employee of a job benefit unless they submit to sexual advances, harassment that occurs in a secluded location, and threats of deportation. We suggest that the Final Guidance also include circumstances where the harasser repeatedly appears unannounced at the complainant’s home or repeatedly telephones, texts, or messages them outside of work, and where a harasser threatens to reveal personal or private information. As to this last example, given the agency’s recognition of unlawful harassment based on reproductive

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 Final Guidance make clear that, like other off-site conduct that is not directed at a particular worker – e.g., a group outing to a bar where a co-worker is overheard making racist or homophobic statements – such activity usually, without more, will not have a sufficient nexus to the workplace to support a hostile environment claim. It may, however, provide additional evidence that on-site conduct is “because of” a protected characteristic, or may contribute to a hostile environment when aggregated with other on-site conduct, particularly if the plaintiff is required to work with, or in proximity to, the person responsible for the hostile off-site conduct.⁵⁷ The ACLU also urges that the Final Guidance note the additional protection enjoyed by public employees outside of work to express themselves, in their private capacity, about matters of public concern, unless the speech’s disruptive effect in the workplace overcomes the value of the speech.⁵⁸

decisionmaking, as well as the prevalence of “doxxing” of individuals who obtain certain kinds of care, an illustrative example of this kind of threat would be especially beneficial.

⁵⁵ Proposed Guidance at 52-54.

⁵⁶ *Id.* at 55.

⁵⁷ The Proposed Guidance appropriately notes that conduct by a supervisor outside the workplace “is more likely to contribute to a hostile work environment than similar conduct by coworkers.” Proposed Guidance, at 55.

⁵⁸ *Pickering v. Board of Ed. of Tp. High School Dist. 205*, 391 U.S. 563 (1968).

IV. THE PROPOSED GUIDANCE SHOULD INCLUDE ADDITIONAL EXAMPLES OF THE KIND OF PREVENTIVE AND REMEDIAL ACTIONS THAT WILL, AND WILL NOT, DEFEAT LIABILITY.

The Proposed Guidance defines a “supervisor” as someone “empowered by the employer to take tangible employment actions against the victim”⁵⁹ and further defines “tangible employment actions” to encompass a wide range of decisions.⁶⁰ The Guidance further properly emphasizes that an employer may not seek to artificially limit the universe of supervisors by concentrating all decisionmaking authority within a small group, while in reality “effectively delegat[ing] the authority to take tangible employment actions to the lower-level employees on whose input formal decisionmakers will be required to rely.”⁶¹ We also applaud the EEOC for recognizing that individuals with the power to recommend such tangible actions, and those who enjoy “apparent authority” to make such decisions, *i.e.*, those whom workers reasonably believe to hold such power, all are appropriately deemed “supervisors” for purposes of deciding which liability standard applies.

As to the liability standard itself, the ACLU appreciates the Proposed Guidance making clear that an employer makes out the first prong of the *Faragher-Ellerth* defense – *i.e.*, it exercised reasonable care to prevent and remedy harassment – when it takes steps to *both* prevent harassment *and* attempt to remedy known harassment. As the Task Force Report noted, the Supreme Court’s rulings in *Faragher v. City of Boca Raton*⁶² and *Burlington Indus., Inc. v. Ellerth*⁶³ effected a sea change in how employers address harassment – in many respects not for the better. While incentivizing employers to implement preventive and remedial anti-harassment regimes is, of course, positive in theory, in far too many workplaces, the practical effect has been an overly-formulaic, bare-bones approach designed chiefly to avoid liability. Indeed, that the #MeToo explosion in October 2017 occurred nearly 20 years after the *Faragher-Ellerth* defense was born spoke volumes about the rigor of employers’ anti-harassment efforts.

Nevertheless, courts have rewarded employers’ “file cabinet compliance” time and time again. Employers have been found to satisfy the *Faragher-Ellerth* defense even when they have done little more than insert a few paragraphs about harassment deep inside an employee handbook and obtained a signed acknowledgment that the handbook was received.⁶⁴ The Proposed Guidance incorporates many of the Select Task Force’s recommendations by specifically identifying the pro-

⁵⁹ Proposed Guidance at 58 & n.205, quoting *Vance v. Ball State Univ.*, 570 U.S. 421, 424 (2013).

⁶⁰ Proposed Guidance at 58-59 (internal citations omitted).

⁶¹ *Id.* at 58 n.205.

⁶² 524 U.S. 775 (1998).

⁶³ 524 U.S. 742 (1998).

⁶⁴ See, e.g., *Trahanas v. Northwestern Univ.*, 64 F.4th 842, 854 (7th Cir. 2023) (internal quotations omitted) (finding employer satisfied first prong of *Faragher-Ellerth* defense merely because it maintained an anti-harassment policy and complaint procedure); *Barrett v. Applied Radiant Energy Corp.*, 240 F.3d 262, 266 (4th Cir. 2001) (internal citation omitted) (“Distribution of an anti-harassment policy provides ‘compelling proof’ that the company exercised reasonable care in preventing and promptly correcting sexual harassment.”); *Leopold v. Baccarat, Inc.*, 239 F.3d 243, 245 (2d Cir. 2001) (“We conclude that [the defendant] had in place an anti-harassment policy and accompanying complaint procedure sufficient to satisfy the first element of [the] affirmative defense.”).

active efforts that employers must make in order to be entitled to avoid liability for supervisors' creation of a hostile work environment.⁶⁵

Similarly, the Proposed Guidance appropriately details the high bar that should apply to an employer's effort to characterize a worker's failure to lodge a formal complaint,⁶⁶ given the fear of retaliation that, research has shown, workers overwhelmingly have, as well as many workers' inclination to attempt to resolve the harassing situation themselves.⁶⁷ Courts are exceptionally unforgiving of workers' perceived delay in reporting abuse⁶⁸; the Proposed Guidance performs a significant service by reminding them, and employers, of complainants' entitlement to more leeway.

As to co-worker harassment, and the standard that should apply in assessing whether an employer unreasonably failed to prevent harassment, the ACLU similarly supports the Proposed Guidance's detailed recitation of the preventive measures that will meet this standard⁶⁹; the laxity shown to employers with respect to satisfying the first prong of the *Faragher-Ellerth* standard is mirrored in the co-worker harassment context. With respect to the notice requirement under the negligence standard – *i.e.*, the employer “knew or should have known” of the abuse – the Proposed Guidance likewise takes an admirably and appropriately broad view.⁷⁰ It is the employer that is

⁶⁵ Proposed Guidance at 65-72.

⁶⁶ *Id.* at 73-78.

⁶⁷ *See, e.g.*, Task Force Report, at 16 & n.60 (“The least common response of either men or women to harassment is to take some formal action – either to report the harassment internally or to file a formal legal complaint.”). Research also demonstrates workers' fears of facing negative repercussions for complaining are well-founded; for example, one study found that two-thirds of public employees who complained about sexual harassment experienced some form of retaliation – from their harasser, their employer, their co-workers, or all of the above. Lilia M. Cortina & Vicki J. Magley, *Raising Voice, Risking Retaliation: Events Following Interpersonal Mistreatment in the Workplace*, 8 J. Occup. Health Psych. 247 (2003); *see also Crawford v. Metro. Gov't of Nashville*, 555 U.S. 271, 274 (2009) (worker complaint of harassment, corroborated by two colleagues, resulted in employer's discharging all three employees). It is worth noting that employers' propensity for adopting a “zero tolerance policy” with respect to harassment can actually deter workers from reporting abuse; social science shows that in the vast majority of cases, people who experience harassment simply want it to stop, rather than to cause the discharge of the harasser.

⁶⁸ *See, e.g., Cooper v. CLP Corp.*, 679 F. App'x 851, 854-55 (11th Cir. 2017) (finding that plaintiff failed to take corrective measures because she reported harassment to a district manager instead of the “company representatives to whom [she] was supposed to report harassment under the policy”); *Pinkerton v. Colo. DOT*, 563 F.3d 1052, 1063 (10th Cir. 2009) (finding a two-month reporting delay sufficient to show that plaintiff unreasonably failed to take advantage of corrective measures); *Hunt v. Wal-Mart Stores, Inc.*, 931 F.3d 624, 631 (7th Cir. 2019) (finding four-month reporting delay sufficient to show that plaintiff unreasonably failed to take advantage of corrective measures, despite plaintiff's unawareness of the anonymous reporting hotline and stated fear of retaliation); *Baldwin v. Blue Cross/Blue Shield*, 480 F.3d 1287, 1307 (11th Cir. 2007) (“Plaintiff waited too long to complain. Her complaint came three months and two weeks after the first proposition incident and three months and one week after the second one.”); *Dowdy v. North Carolina*, 23 Fed. Appx. 121, 123 (4th Cir. 2001) (finding that plaintiff unreasonably failed to take corrective action despite her having reported her harassment to a supervisor outside of her chain of command).

⁶⁹ Proposed Guidance at 78-80.

⁷⁰ *Id.* at 80-85. The need for clarification of employers' obligations is significant; even post-#MeToo, courts routinely forgive failures to act upon constructive or even actual notice. *See, e.g., Wantou v. Wal-Mart Stores Tex., L.L.C.*, 23 F.4th 422, 434 (5th Cir. 2022) (granting summary judgment to employer on issue of notice despite Black pharmacist's allegations that three white co-workers “continuously” called him “chimp” and “monkey,” “constantly” mimicked and mocked his accent,” and that another co-worker called him an “African fart” and “you little African” on “multiple”

bound by the anti-discrimination laws, and the burden therefore is appropriately on employers to be vigilant to potentially unlawful conduct. A broad constructive notice standard also incentivizes employers to properly train all supervisors in their obligation to be the employer entity's eyes and ears, and to report conduct that they witness or become aware of – even if they do not directly supervise the complainant.

Finally, the ACLU supports the robust discussion of the rigor with which employers' responses to known harassment, by supervisors or by co-workers, should be assessed.⁷¹ The description of the characteristics of an effective investigation is especially necessary, not least because it instills in workers the confidence that lodging a complaint actually has a chance of resolving the harassment. Throughout the ACLU's three-year initiative of lodging administrative complaints and lawsuits against McDonald's and its franchises nationwide, we observed the low standards to which even one of the nation's largest employers adheres in conducting harassment investigations. McDonald's, like many employers, routinely delegates the task to a manager who has no training in conducting effective investigations, or even any training in harassment beyond what rank and file workers receive. More often than not, their "inquiry" consists of simply asking the complainant and accused harasser for their version of events – sometimes by convening them at a joint meeting, or at an interview held in full view of other workers – and then, when invariably confronted with a "he said, she said" stalemate, declares the investigation inconclusive. To the extent the "investigator" seeks out other workers' accounts, they typically just ask them what they observed of the complainant's interactions with the alleged harasser, rather than asking them about their own experiences with workplace conditions, including but not limited to their experiences with the accused individual; in this way, the employer virtually guarantees a lack of evidence that would break the "he said, she said" impasse, and is unlikely to glean information about other potentially harassing behavior.

Accordingly, at the end of the investigation, the worker who alleged harassment has been identified as a complainer but received no benefit to coming forward, the harasser has faced no meaningful consequences and feels emboldened to continue behaving as if nothing has happened, and other workers have witnessed both outcomes, confirming their belief that there is no point in complaining. In sum, the EEOC's articulation of what a reasonable investigation will, and will not, include – as well as the appropriateness, in some circumstances, of taking immediate steps to protect the complainant and prevent retaliation – provides a welcome incentive to employers to adopt more than a *pro forma* approach to investigations.⁷²

occasions"); *Clehm v. Bae Sys. Ordnance Sys.*, 786 F. App'x 391, 393 (4th Cir. 2019) (plaintiff failed to show employer "knew or should have known" of harassment despite harasser having sexually assaulted "at least" three other people over the course of several years); *Catslides v. City of Fort Pierce*, 724 F. App'x 749 (11th Cir. 2018) (finding defendant not liable for sexual harassment despite having received four previous reports of sexual misconduct by the same harasser).

⁷¹ Proposed Guidance at 85-96.

⁷² The Proposed Guidance appears to favor confidentiality with respect to investigations of harassment complaints. Proposed Guidance at 69, n.245 ("An employer should make clear to employees that it will protect the confidentiality of harassment allegation to the extent possible. . . . [I]nformation about the allegation of harassment should be shared only with those who need to know about it."). The ACLU understands the reason for such a recommendation, and agrees that

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 agency⁷³ – 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

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 *prohibited* 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. *Stericycle, Inc.*, 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 permissible confidentiality of workplace investigations,” Task Force Report, at 43, remains relevant. Given the potential for continuing conflict between these equally compelling interests, the ACLU urges the EEOC to engage with the NLRB to address them.

⁷³ Proposed Guidance at 59 n.213.

⁷⁴ *Id.* at 77-78 & n.273.

⁷⁵ See, e.g., Mark John, *Workers Seize Their Moment to Shift their Balance of Power*, Reuters, July 26, 2022.

⁷⁶ Monica Anderson, et al., *The State of Gig Work in 2021*, Pew Research Center (Dec. 8, 2021) (“State of Gig Work”), available at <https://www.pewresearch.org/internet/2021/12/08/the-state-of-gig-work-in-2021/>.

⁷⁷ See, e.g., National Women’s Law Center, *#JobsReport: Gains for Women Are Too Often Temporary – Literally*. (Nov. 4, 2016), available at <https://nwlc.org/jobsreport-disparities-remain-and-gains-for-women-too-often-temporary-literally/>.

⁷⁸ Maria Menendez, et al., *Is Precarious Employment More Damaging to Women’s Health Than Men’s?*, 64 Soc. Science & Med. 776-781 (Feb. 2007).

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 See, e.g., *State of Gig Work*, *supra* 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,” *The Atlantic* (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 Are the Industries with the Most Reported Sexual Harassment Claims,” *Vox.com* (Nov. 21, 2017), available at <https://www.vox.com/identities/2017/11/21/16685942/sexual-harassment-industry-service-retail> (reporting high rates of harassment reported by women in hospitality and health care industries, among others); Bernice Yeung, “Rape on the Night Shift,” *Reveal* (June 23, 2015), available at <https://revealnews.org/article/under-cover-of-darkness-female-janitors-face-rape-and-assault/> (documenting harassment faced by women in custodial field).

⁸⁰ 29 C.F.R. Part 103, 88 Fed. Reg. 73946 (2023).

⁸¹ See, e.g., *id.* at 73953-54.

⁸² See, e.g., *Johnson v. McDonald Corp.*, 542 F. Supp. 3d 888 (E.D. Mo. 2021) (denying McDonald’s motion to dismiss harassment claim by franchise worker based on joint employer theory); *accord Smith v. JEENs, Inc.*, 566 F. Supp. 3d 941 (S.D. Iowa 2021) (same). See also *A.H. by & through Hunt v. Wendy’s Co.*, No. 3:18-CV-0485, 2018 WL 4002856, at *6 (M.D. Pa. Aug. 22, 2018) (denying motion to dismiss franchise worker’s sexual harassment claim against Wendy’s corporate entity based on joint employer doctrine); *Parrott v. Marriott Int’l, Inc.*, No. 17-10359, 2017 WL 3891805, at *2, *4 (E.D. Mich. Sept. 6, 2017) (in FLSA case, franchisor control through broad contractual rights, frequent inspections, manager training at corporate headquarters, guidance about employee training, financial audits, setting workplaces standards and hiring procedures, and authority to terminate plaintiffs’ employment via terminating franchise may be sufficient to establish joint employer liability).





express incorporation of agency principles⁸³ 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,


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⁸³ 42 U.S.C. §2000e-2(a) & 2(b) (unlawful for an “employer . . . to discriminate against any individual”; “employer” is “a person engaged in an industry affecting commerce who has fifteen or more employees . . . and any agent of such a person . . .”) (emphasis added).

⁸⁴ *Ellerth*, 524 U.S. at 754, citing *Meritor*, 477 U.S. at 72. See also *Faragher*, 524 U.S. at 791 (same).

⁸⁵ See, e.g., *Miller v. D.F. Zee’s*, 31 F.Supp.2d at 808 (denying summary judgment to franchisor in Title VII sexual harassment action where “evidence create[d] a question of fact as to whether franchise employees [alleged to have created a hostile work environment] acted with at least the apparent authority of the [franchisor] defendants”); *Myers*, 679 F.Supp.2d at 613 (franchisee employee “may establish Title VII liability based on [the franchisor’s] apparent control over [the franchisee]”).

⁸⁶ *Thomas v. Freeway Foods, Inc.*, 406 F.Supp.2d 610, 618 (M.D.N.C. 2005) (in customers’ Section 1981 case, denying franchisor summary judgment based on apparent agency).

⁸⁷ *Salazar v. McDonald’s Corp.*, No. 14-cv-02096-RS, 2016 WL 4394165 (N.D. Cal. Aug. 16, 2016) (denying McDonald’s summary judgment under state wage-and-hour law on apparent agency grounds); *Ochoa v. McDonald’s Corp.*, 133 F. Supp. 3d 1228, 1239 (N.D. Cal. 2015) (same).

⁸⁸ *Butler v. McDonald’s Corp.*, 110 F.Supp.2d at 70 (denying McDonald’s summary judgment under state tort law on apparent agency theory).