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United States Senate

COMMITTEE ON HEALTH, EDUCATION,
LABOR, AND PENSIONS

WASHINGTON, DC 20510-6300

WARREN GUNNELS, MAJORITY STAFF DIRECTOR
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December 5, 2023

VIA ELECTRONIC TRANSMISSION

The Honorable Charlotte A. Burrows
Chair
U.S. Equal Employment Opportunity Commission
131 M Street, NE
Washington, D.C. 20507

Dear Chair Burrows:

On September 29, the U.S. Equal Employment Opportunity Commission (EEOC or Commission) released its Proposed Enforcement Guidance on Harassment in the Workplace (Proposed Guidance), which purports to “reflect notable changes in law, including the Supreme Court’s decision in *Bostock v. Clayton County*, the #MeToo movement, and [other] emerging issues.”¹

Through this Proposed Guidance, the EEOC claims that employees may bring a viable claim for workplace harassment when they experience intentional and repeated “misgendering” or the denial of the use of a sex-segregated facility that comports with the employee’s claimed gender identity.² This Proposed Guidance, which seeks to expand the category of conduct forbidden under the law without any underlying statutory changes or other legal justification, relies on overstatements and exaggerations of legal precedent and ignores the adverse decision the EEOC received in *Texas v. EEOC* in 2022. Accordingly, I urge you to revise the Proposed Guidance to reflect existing law under Title VII and *Bostock*.

As you recall, you issued “Technical Assistance” on these issues in 2021, claiming that the law requires dress-code, bathroom, and pronoun accommodations, and that the *Bostock* decision called for employers to provide all those accommodations.³ After you released that “Technical

¹ U.S. Equal Employment Opportunity Commission, *EEOC Proposes Updated Workplace Harassment Guidance to Protect Workers* (Sept. 29, 2023), <https://www.eeoc.gov/newsroom/eeoc-proposes-updated-workplace-harassment-guidance-protect-workers>.

² U.S. Equal Employment Opportunity Commission, *PROPOSED Enforcement Guidance on Harassment in the Workplace* (Sept. 29, 2023), <https://www.eeoc.gov/proposed-enforcement-guidance-harassment-workplace>.

³ U.S. Equal Employment Opportunity Commission, *Protections Against Employment Discrimination Based on Sexual Orientation or Gender Identity*, <https://www.eeoc.gov/laws/guidance/protections-against-employment-discrimination-based-sexual-orientation-or-gender> (June 15, 2021).

Assistance,” one federal district court in the Northern District of Texas overturned it, concluding that it not only misstated the law, but also violated Title VII of the Civil Rights Act of 1964 (Title VII), the Administrative Procedures Act, and the EEOC’s own internal rules by “issuing substantive, legislative rules through improper procedures.”⁴

In what appears to be an attempt to remedy those procedural defects, the EEOC has now released Proposed Guidance with the same substantive directives regarding the need to accommodate an individual’s pronoun of choice and desire to use a sex-segregated space that does not comport with their biological sex.⁵ In reality, however, this Proposed Guidance is promulgated in spite of the very rebuke the Commission previously received in *Texas v. EEOC*, where the court made clear that the law under *Bostock* and Title VII is that an individual is protected from discrimination based on the status of their sexual orientation and/or gender identity, and not based on conduct emanating from that status.⁶

In support of its position that allegations of “misgendering” and the denial of an individual’s use of the sex-specific bathroom of their choice can form the basis of a workplace harassment claim, the EEOC relies on caselaw that does not directly support its broad proposition. For example, in claiming that repeated “misgendering” can justify legal action on its own, the EEOC relies on *Doe v. Triangle Doughnuts, LLC*,⁷ in which the plaintiff’s coworkers asked questions about the plaintiff’s sexual orientation, transgender status, genitalia, and dedication to identifying as transgender in the long term.⁸ There, the plaintiff’s supervisor also transferred the plaintiff to a different job—moving the plaintiff away from a client-facing position—and held the plaintiff to a higher dress code standard, all in addition to “misgendering” the plaintiff.⁹ The EEOC also cites to *Holub v. Saber Healthcare Grp.*,¹⁰ a case in which the plaintiff experienced a variety of harassing actions including unwanted touching, systematic negative comments from the manager, and “several instances” of coworkers referring to the male employee who identified as a female with male pronouns.¹¹

These cases do not support the EEOC’s position that allegations of “misgendering” can form the foundation of a workplace harassment claim. In fact, the EEOC admits as much by stating that it is “not aware of any cases in which a court has held that evidence of misgendering is irrelevant to a hostile work environment claim.”¹²

⁴ *Texas v. EEOC*, 633 F. Supp. 3d 824, 840 (N.D. Tex. 2022).

⁵ U.S. Equal Employment Opportunity Commission, *PROPOSED Enforcement Guidance on Harassment in the Workplace* (Sept. 29, 2023), <https://www.eeoc.gov/proposed-enforcement-guidance-harassment-workplace>.

⁶ *Texas*, 633 F. Supp. 3d at 830 (confirming that *Bostock* only addressed discrimination based on an individual’s status and not the individual’s conduct).

⁷ *Doe v. Triangle Doughnuts, LLC*, 472 F. Supp. 3d 115 (E.D. Pa. 2020). The EEOC similarly relies on this case in support of its claim about denying individuals the use of sex-specific facilities that aligns with their gender of choice.

⁸ *Id.* at 122.

⁹ *Id.*

¹⁰ *Holub v. Saber Healthcare Grp.*, No. 1:16-CV-02130, 2018 U.S. Dist. LEXIS 35458 (N.D. Ohio Mar. 2, 2018).

¹¹ *Id.* at *

¹² U.S. Equal Employment Opportunity Commission, *PROPOSED Enforcement Guidance on Harassment in the Workplace*, at n.33 (Sept. 29, 2023), <https://www.eeoc.gov/proposed-enforcement-guidance-harassment-workplace>.

The Proposed Guidance cites similarly flimsy support for its claim that an employer may be at risk of a workplace harassment lawsuit if they deny an employee access to a bathroom or other sex-segregated facility “consistent with the individual’s gender identity.”¹³ There, the EEOC again cites to *Doe v. Triangle Doughnuts, LLC* before relying entirely on Title IX caselaw to justify its claim.¹⁴ If the Commission’s legal justification for making fundamental expansions to federal workplace harassment law is this thin, it must rethink whether such expansions are permissible under the law.

Finally, as I brought to your attention following the EEOC’s Notice of Proposed Rulemaking regarding the Pregnant Workers Fairness Act, I remain concerned about the lack of consideration of the effects of this and other EEOC actions on religious employers.¹⁵ I believe it necessary that the EEOC consider and adequately express how its implementation of rules and guidance will protect core religious and employer rights to avoid unnecessary and fruitless litigation. This Proposed Guidance gives no such instruction.

In light of the Commission’s past history on this matter, I request that you answer the following questions, on a question-by-question basis, by December 19, 2023:

1. In what ways, if any, did the Commission draft the substance of the Proposed Guidance with regard to misgendering and denial of sex-segregated facilities in light of the decision in *Texas v. EEOC*?
 - a. If the Commission did not make any substantive changes between its 2021 Technical Assistance and the Proposed Guidance, provide a brief narrative as to why the Commission did not deem it necessary to make any such changes.
2. The Proposed Guidance makes clear that it lacks the force and effect of law. Explain why the Commission chose to issue this broad expansion of workplace harassment law through guidance that lacks the force and effect of law as opposed to formal, binding rulemaking.
3. What processes and procedures does the Commission have in place to ensure religious employers are not subjected to meritless and unnecessary litigation as a result of this guidance?
 - a. Does the Commission have plans to make explicit carveouts for religious employers in the final version of this guidance?

¹³ U.S. Equal Employment Opportunity Commission, *Protections Against Employment Discrimination Based on Sexual Orientation or Gender Identity*, <https://www.eeoc.gov/laws/guidance/protections-against-employment-discrimination-based-sexual-orientation-or-gender> (June 15, 2021).

¹⁴ *Id.* (citing *Triangle Doughnuts*, 472 F. Supp. 3d at 135). The EEOC otherwise cites only to cases arising under Title IX and public sector EEOC cases.

¹⁵ Letter from Sen. Bill Cassidy, Ranking Member of Senate Committee on Health, Education, Labor, & Pensions, to Hon. Charlotte Burrows, Chair, EEOC, at 3-4 (Sept. 29, 2023).

I appreciate your prompt attention to this important matter.

Sincerely,

Bill Cassidy, M.D.

Bill Cassidy, M.D.

Ranking Member

Senate Committee on Health,

Education, Labor, and Pensions