U.S. Chamber of Commerce

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November 8, 2023

The Honorable Charlotte A. Burrows, Chair
The Honorable Jocelyn Samuels, Vice Chair
The Honorable Kalpana Kotagal, Commissioner
The Honorable Keith Sonderling, Commissioner
The Honorable Andrea Lucas, Commissioner

U.S. Equal Employment Opportunity Commission
131 M Street, NE
Washington, DC 20507

Re: Notice of Availability and Request for Comment, Equal Employment Opportunity Commission; Proposed Enforcement Guidance on Harassment in the Workplace (88 Fed. Reg. 67,750, October 2, 2023)

Submitted via regulations.gov, and electronic communication

Dear Chair Burrows and Commissioners of the EEOC:

The U.S. Chamber of Commerce ("Chamber") presents these comments and questions regarding the Equal Employment Opportunity Commission's ("EEOC's" or "Commission's") proposed Enforcement Guidance on Harassment in the Workplace ("Enforcement Guidance").

The Chamber is a long-standing supporter of reasonable steps designed to achieve the goal of equal employment opportunity for all – including employment practices and policies that ensure all employees work in a respectful work environment free from unlawful harassment.

Introduction

The Chamber supports the work of businesses across the country that incorporate respectful workplace policies and related practices into work environment and culture. Specifically, the Chamber supports businesses who, among other practices: (1) maintain a clear, easy to understand, written harassment policy that unequivocally states that harassment based on a legally protected characteristic is prohibited; (2) take immediate and appropriate corrective action if the business

determines that harassment has occurred; and (3) guarantee non-retaliation against any employee who raises harassment concerns in good faith.[1]

The Chamber notes that the EEOC is the principal Federal agency responsible for equal employment opportunity policy and enforcement.[2] The EEOC's voice, beginning with Title VII and expanding to other federal equal employment opportunity laws, is authoritative and must not be compromised or relegated secondary to other federal rights or agencies.

The Chamber supports the work of the EEOC contained in the sub-regulatory Enforcement Guidance to the extent that it provides numerous, modern, real-workplace examples and suggestions for employers regarding workplace situations they may encounter, along with an accurate application of legal principles as guidance as to ways to address specific fact situations that may arise in their workplaces to ensure workplaces are free from unlawful harassment. In this regard, the Enforcement Guidance complements prior Commission resources[3] to further the goal of informing businesses regarding suggested practices to support their efforts to create and maintain civil workplace cultures that do not tolerate employee harassment based upon an employee's protected status. Providing these suggestions regarding specific attributes of successful business practices is instructive for all employers in crafting and maintaining policies and practices to support harassment-free workplaces, based on their unique business and workplace circumstances.[4]

Similarly, while not all abusive or uncivil conduct or language, by itself, creates the basis for a hostile work environment claim under Title VII or other equal employment opportunity laws enforced by the Commission, the Enforcement Guidance provides some clarity to employers, that, consistent with legal precedent cited, "in limited circumstances, a single incident of harassment can result in a hostile work environment" for an employee. The Enforcement Guidance continues, emphasizing: "using epithets based on protected characteristics is a serious form of workplace harassment."[5]

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[1] The Chamber notes that these and other employer practices supporting Title VII's legal requirements that employers maintain respectful workplaces free from illegal harassment have specifically been identified as "Promising Practices" by the EEOC. *See* Chai R. Feldblum & Victoria A. Lipnic, EEOC, *Select Task Force on the Study of Harassment in the Workplace, Report of the Co-Chairs Chai R. Feldblum & Victoria A. Lipnic* (2016) ("EEOC Select Taskforce Report") https://www.eeoc.gov/sites/default/files/migrated_files/eeoc/task_force/harassment/report.pdf.

[2] *See* Reorganization Plan 1, 1978, 5 U.S.C. – Appendix, Reorganization Plan No. 1 of 1978, 42 U.S.C. § 2000E-14.

[3] Id.

[4] We note that the EEOC has made it clear that these valuable steps are suggestions and are not meant to be an exhaustive or mandatory check list of necessary actions by which an employer's compliance with Title VII would be judged.

[5] Enforcement Guidance at p. 32.

However, the Enforcement Guidance is noticeably lacking in a key area of concern – the intersection of employee rights under Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e ("Title VII"), and other equal employment opportunity laws, to work in a work environment free from unlawful harassment, including objectively abusive employee conduct based on an employee's protected class (along with an employer's right to maintain discipline for violation of workplace non-harassment policies), and Section 7 of the National Labor Relations Act, 29 U.S.C. § 157 ("Section 7") which ensures that employees also retain the right of self-organization.

The resulting uncertainty and concern stem primarily from the National Labor Relation Board's ("NLRB's") 2023 decisions in *Stericycle,* 372 NLRB No. 113 (2023) and *Lion Elastomers LLC II,* 372 NLRB No. 83 (2023). While the draft Enforcement Guidance correctly describes that protected class based epithets can serve as the basis for a harassment claim, and should not be tolerated by an employer, the Enforcement Guidance provides no guidance to employers or employees as to how an employer can remedy such conduct with respect to an employee who is viewed by the NLRB as committing the actionable harassment in the context of the exercise of their Section 7 rights. In this area – addressing objectively abusive employee conduct, including the utterances of protected-class epithets – the Chamber urges the Commission to provide clarity to employers and employees, as detailed below.

The Chamber urges the EEOC to perform what is one of its critical roles – guidance to employers and employees regarding compliance with federal equal employment opportunity laws, including Title VII. The EEOC's authority and voice should not be compromised or subjugated to the NLRB. Employers should not be left with uncertainty as to their obligations under the equal employment opportunity laws the EEOC enforces, including, importantly prohibitions against unlawful harassment. Yet, employers may fail to take prompt, appropriate remedial action against perpetrators of unlawful harassment of co-workers whose unlawful harassment touches on or is in the context of disputes about overtime, scheduling, pay, hours worked, a labor dispute, or other terms or conditions of employment, for fear that doing so runs afoul of the NLRB's decisions in *Lion Elastomers* and *Stericycle*, as noted above, and especially now, in light of the NLRB's recent decision in *Cemex Construction Materials Pacific, LLC* 372 NLRB No. 130 (2023).

In *Cemex*, the NLRB threatens employers with the imposition of not just the posting of a notice, but a so-called *Cemex* bargaining order without a secret ballot election, if the employer is determined to have violated Section 7 rights of employees. The impact of *Cemex* combined with *Lion Elastomers* and *Stericycle* means that if the NLRB determines that an employer's prohibitions against unlawful harassment in a non-harassment policy or an employer's remedial action of an employee who engages in unlawful harassment that the NLRB later determines is protected under Section 7, the employer may be subject to a *Cemex* bargaining order. These real, significant

risks and consequences of the NLRB's recent decisions should be of concern to the EEOC, as it is to employers. In light of the above, employers will face a Hobson's choice: should they permit workplace harassment that would otherwise be banned, or should they protect employees and maintain a harassment free workplace and accept the likelihood that the NLRB will impose a union favorable *Cemex* bargaining order?

EEOC guidance to employers on the central issues of what conduct violates federal equal employment opportunity laws (including appropriate policy language) and whether the EEOC directs employers to remedy unlawful harassment by co-workers, even if the NLRB might view the unlawful harassment as protected by Section 7 of the NLRA, is critical. Without such guidance, employers do not have guidance as to their own policies, trainings and remedial practices. And, the end result, it is feared, is that federal non harassment protections of employees are subjugated to other unrelated federal protections under the NLRA.

Impact of 2023 NLRB Decisions on Employer's Non-Harassment Policies and Practices

On August 2, 2023, the Board issued a decision that undermines union and non-union employers' ability to enforce longstanding facially neutral rules that do not expressly restrict employee rights under the NLRA, but that expressly and unequivocally promote a respectful, harassment-free work environment based on an employees' protected statuses under federal law. In *Stericycle*, the Board held that work rules are presumptively unlawful if an employee "could" (rather than "would") interpret them to restrict Section 7 rights.[6] The Board has already applied *Stericycle* to strike down handbook language that stated: "Partners are expected to communicate with other partners and customers in a professional and respectful manner at all times. The use of vulgar or profane language is not acceptable."[7] Yet, the EEOC's Enforcement Guidance does not address how an employer's respectful workplace policies can be reconciled with *Stericycle* and its progeny.

This is made even more complicated for employees and employers in light of the May 1, 2023 Board decision in *Lion Elastomers LLC II,* wherein the Board endorsed three different standards for determining whether an employer's response to "abusive conduct" by an employee in the course of the employee's exercise of Section 7 rights is lawful (and thus cannot be the subject of discipline or other remedial action). In doing so, the NLRB reversed its holding in *General Motors, LLC*, 369 NLRB No. 127 (2020) in which the NLRB held that whether employer discipline of an employee engaging in abusive activities toward a co-worker or manager, on the picket line or in the workplace, or over social media, should all be governed by one inquiry – whether

[6] Stericycle at 2.
[7] Starbucks Corporation and Workers United, NLRB Administrative Law Judges Decision (Aug. 10, 2023), https://appsnlrb.gov/link/document.aspx/O9O31d4583bOd84e .

the employee engaged in Section 7 activity, whether the employer knew of the activity, and whether there is a casual relationship between the discipline and the Section 7 activity.[8]

As a result of the reversal of *General Motors,* employers are now left wondering how to maintain workplaces free of profanity as well as abusive and/or harassing language on the basis of an employee's protected status, if the language has any tie to Section 7 activity. These recent decisions by the NLRB intrude into the EEOC's primacy in the policy area of defining improper harassing actions or statements, and an employer's appropriate actions to remedy violations of Title VII and other equal employment opportunity laws. The Enforcement Guidance should provide answers to these key questions. The current draft does not address these topics in any way.

The Chamber urges the EEOC to provide employers with that specific guidance with respect to compliance with Title VII in its promulgated non harassment policies and remedial actions following determinations of violations of those policies, in light of the restrictions imposed on employer policies and remedial actions that prohibit and remedy harassment as defined by the NLRB in *Stericycle* and *Lion Elastomers.*[9] What is desperately needed now is EEOC guidance in these two critical areas wherein employers have already developed promising practices to rid the workplace of harassing conduct that violates Title VII – how do employers meet their obligations under Title VII, in light of the impact of the Board's recent decisions? Specifically, the Chamber sets forth below a bulleted list of questions regarding employer policies and remedial practices for guidance by the EEOC in its final Enforcement Guidance on Harassment in the Workplace. The Chamber urges the EEOC to provide this clarity in the Enforcement Guidance, after conferring and consulting, with the NLRB, as appropriate, for the benefit of employees and employers.[10]

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[8] *See General Motors,* at p. 1 and ftnt 4 applying the *Wright Line* standard (251 NLRB 1083 (1980), *enfd.* 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982).

[9] The Chamber expressly notes that it disagrees with the NLRB's current approach to the construction of workplace rules' impact on an employee's Section 7 rights, including specifically its failure to give deference to lawful and neutral respectful workplace policies that ban derogatory and offensive conduct based on an employee's protected status under federal EEO laws. Similarly the Chamber disagrees with the Board's reversal of the 2020 decision in *General Motors* in lieu of the standards resurrected by this Board in *Stericycle* that elevate Section 7 rights over the rights of all employees to be free from a work environment devoid of illegal harassment under federal law based on a protected category.

[10] In 2016, EEOC's Select Taskforce Report recognized the need for the EEOC and NLRB to confer and consult to jointly clarify and harmonize the interplay of the NLRA and the federal EEO statutes. *See* Select Taskforce Report, Part 3, Section "Reporting Systems for Harassment; Investigation; and Corrective Action."

Guidance Requested Regarding Employer Non-Harassment Policies and Practices

In compliance with Title VII and other equal employment opportunity laws that regulate employee conduct in the workplace, the EEOC encourages employers to develop and implement non-harassment policies that are clear and easily understood by all employees.[11] As a result, employers have implemented, applied, and trained employees on the contents of a simple, clear direction that it is inappropriate in the workplace to engage in conduct and comments directed at other employees that include a variety of offensive acts and conduct based on a protected characteristic, including: physical or sexual assaults or threats; offensive jokes, slurs, epithets, or name calling; intimidation, bullying, ridicule, or mockery; insults or put-downs; ostracism; the display of offensive objects or pictures; and interference with work performance. *See* Proposed Harassment Guidance at page 32.

Just months earlier, the current Board, in this summer's decisions in *Stericycle* and *Lion Elastomers* directed employers that their workplace policies will be found to violate an employee's Section 7 rights if an employee could reasonably read it to inhibit their communications regarding wages, hours, and working conditions. In *Lion Elastomers* no one standard or clear universal test applies to judge the protection Section 7 affords an employee's use of profane, bullying, vulgar, or obscene language directed towards another employee's protected status – it all depends on several different factors. Under Section 7, unlike Title VII, co-workers (who are the subject of the abusive conduct) and employers (who are asked to remedy it to enforce reasonable workplace non-harassment rules), are left to judge the words and conduct as follows:

(1) an employee's abusive conduct based on a supervisor's or manager's protected status is considered protected based on a review of the following totality of the circumstances test factors: (i) the place of the conduct; (ii) the subject matter of the discussion; (iii) the nature of the employee outburst; and (iv) whether the outburst was, in any way, provoked by an employer's unfair labor practice;[12]

(2) an employee's abusive conduct in conversations in the workplace and over social media posts is governed by a different totality of the circumstances

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[11] *See Promising Practices for Preventing Harassment, Section B. Comprehensive and Effective Harassment Policy (2017)* https://www.eeoc.gov/laws/guidance/promising-practices-preventing-harassment#.

[12] *Lion Elastomers* at p. 1, and ftnt 3, citing *Atlantic Steel*, 245 NLRB 814 (1979), and reversing *General Motors,* 369 NLRB No. 127 (2020).

test, without enumerated factors, instead considering at the time of the conduct, what factors might be relevant;[13] and

(3) an employee's abusive conduct, including racially and sexually offensive language toward another employee based on the employee's protected status, which occurs while the employee is on a picket line, is protected and cannot be disciplined where the conduct does not involve an overt or implied threat or where there is no reasonable likelihood of an imminent physical confrontation.[14]

As a result, the Chamber requests that the EEOC provide guidance on the following:

- Does an employer's policy that bans the use of racially derogatory language, including the N-word, run afoul of Section 7? The same question is directed to the Commission with respect to sex based derogatory language (including the use of profane language related to someone's sex) as well as other vulgar, hostile, derogatory language based on other protected statuses under federal law? If yes, should the employer's policy be revised to notify employees that in certain settings it is not a violation of its policy for an employee to use racially derogatory language directed at another employee, and that the employee's use of the language will be evaluated as to its appropriateness in the workplace under a non-exhaustive list of factors?
    - For example, if the racially-derogatory language is a part of conversations in the workplace or over social media, should the employer's policy be revised to notify all employees that the evaluation of the appropriateness of the conduct will be made depending on a factual analysis of unnamed factors (and likewise note that if directed toward a manager or supervisor, four specific factors will be considered)?
    - If yes, should the employer's policy also be revised to state that if the employee directs the racially derogatory language toward an employee who crosses a picket line, that it is protected, unless the racial epithets are accompanied by an imminent threat of violence or physical confrontation?

[13] *Lion Elastomers* at p. 1, and ftnt 5, citing *Desert Springs Hospital Medical Center*, 363 NLRB No. 185 (2016), and reversing *General Motors,* 369 NLRB No. 127.
[14] *Lion Elastomers* at p. 1, and ftnt 8, citing *Clear Pine Mouldings, Inc.* 268 NLRB 1044 (1984), enfd. Mem. 765 F.2d 148 (9th Cir. 1985), and reversing *General Motors,* 369 NLRB No. 127.

- If yes, how should the employer's policy be revised? Is a general savings clause – "The Company's policy will be construed in compliance with all applicable laws, include an employee's Section 7 rights."—sufficient to ensure the policy's compliance with Section 7? Or must the policy be detailed to explain the different ways in which employee speech can be viewed by a reasonable employee as severely and pervasively interfering with their rights under Title VII to be free from racial discrimination, but another employee is free to engage in this conduct under Section 7?

- Should non-harassment policies now be revised to state that employees will not be automatically subject to corrective remedial action for violations of the policy, but that instead, it will depend on a number of factors?

- Employers have historically included language in policies and trainings that state explicitly that an employee's intent to harass or discriminate based on an employee's protected status is irrelevant as to whether the conduct is violative of an employer's policies against harassment (and the law). For example, an employee's sexually suggestive jokes, nicknames, and other comments are not judged by the intent of the person uttering those comments to another employee. In other contexts, the EEOC has previously stated that "there is no leeway granted employees who make racist or sexist comments because they may have heated feelings about workplace matters."[15] Yet, under *Lion Elastomers*, intent of the speaker is one of a number of factors that is expressly noted as relevant in determining whether the statements are protected (including whether the statements are motivated by unrelated conduct by other employees or managers related to terms or conditions of employees that the employee who is subjected to the comments played no part). What impact should intent of the speaker play in an employer's assessment of whether a comment violates Title VII?

- How can an employer stop profane and harassing conduct based on a protected status directed towards an employee that has a severe and/or

[15] *See Brief of the EEOC as Amicus Curiae,* General Motors, LLC, 369 NLRB No. 127 (2020) (available at https://www.eeoc.gov/sites/default/files/2020-05/general_motors.html . Further, the EEOC stated there that: "At least under Title VII and the statutes the EEOC enforces, *Oncale's* requirement of 'appropriate sensitivity to social context" does not require employers to tolerate sexist and racist language, even if the language is used during contentious discussions about promotions, salary, transfers, and other working conditions, and even if the employer provokes the employee by confronting him about his work performance."

pervasive effect on their work environment, as it has an obligation under Title VII to do so, if the NLRB prohibits the employer from taking remedial action against employees who engage in such conduct in certain circumstances based on a totality of the circumstances in which the conduct occurs. For example, if every workday a female African American employee is called sexist, racist names when they cross a picket line to work, what action should an employer take (if the name calling is not accompanied by an implied or explicit threat of violence toward the employee)?

- For the benefit of employees and employers, the Chamber urges the EEOC to provide employers guidance as to how harassing conduct that violates Title VII can be remedied by employers, including, specifically with respect to the following real-life examples of conduct from caselaw that current NLRB Member Kaplan illustrated in his dissent in *Lion Elastomers*:

    - In *Airo Die Casting, Inc.,* 347 NLRB 810, 812 (2006) the NLRB found the following conduct of a striker protected under Section 7 – the employee shouted "fuck you [n-word]" to a black security guard while gesturing with both middle fingers. If this activity is protected speech, in what remedial action can the employer engage to remedy the conduct for the benefit of other current employees? Or, do the employer and other employees have to tolerate this conduct on a daily basis?

    - In *Nickell Moulding*, 317 NLRB 826, 828-829 (1995), *enfd. denied sub nom NMC Finishing v. NLRB*, 101 F.3d 528 (8th Cir. 1996), the NLRB found the following conduct of a striker protected under Section 7 – a striker carried a sign targeted at one non striking employee that read: "Who is Rhonda F [with an X through the F] Sucking Today?" Similarly, if this activity is protected speech, in what remedial action can the employer engage to remedy the conduct for the benefit of other current employees? Or, do the employer and other employees have to tolerate this conduct on a daily basis?

- Does the EEOC continue to counsel employers to take corrective action as soon as they have notice of harassing conduct – even if the harassing conduct has not yet risen to the level of a hostile work environment, if the harassing conduct arises in the content of workplace disputes over terms and conditions of employment such as the assignment of overtime or scheduling of workdays? If not, does the EEOC continue to believe

that such "gateway conduct" can lead to illegal sexual harassment as it has previously counseled? How does the Company address such conduct and not run afoul of its legal obligations under Title VII and Section 7? Employers need to know how to take reasonable corrective action in response to a known instance of harassment, as required by Title VII, even if the harassment occurs within the context of an employee's discussions regarding wages, hours or other working conditions.[16]

Conclusion

The Chamber urges the EEOC to consider the above real workplace issues presented by the recent decisions of the NLRB and their impact on both an employer's respectful workplace policy and obligations under Title VII and other workplace equal employment opportunity laws. The Chamber urges the EEOC to resolve this conflict. Left unaddressed by the EEOC, employers and employees alike are now faced with uncertainty and potential legal liability as their ability to create and maintain safe, respectful work environments for the benefit of all employees. This is especially likely to occur without this critical guidance from the EEOC. Without it, the Enforcement Guidance has a gaping hole through which harassing objectively abusive employee conduct, including the utterance of protected class epithets, will seep into the workplace -- without recourse by co-workers and employers.

The EEOC not only has the responsibility to clarify that employers have the ability to prohibit and remedy improper harassing statements and comments directed at employees, but it has the authority to set out appropriate policy in this critical area. The EEOC must not yield control over Title VII workplace harassment issues to the NLRB or any other agency.

[16] *See* Enforcement Guidance at p. 78 ("an employer is liable for a hostile work environment created by non-supervisory employees or by non-employees if it was negligent because: it unreasonably failed to prevent the harassment; OR it failed to take reasonable corrective action in response to harassment about which it knew or should have known). How does an employer meet its obligations under Title VII if the imposition of remedial action is imposed on what is determined to be "protected activity" under Section 7 under *Lion Elastomers*?

Thank you for your consideration of the Chamber's comments and questions. Please do not hesitate to contact us if the Chamber can be of further assistance as the Commission considers these important matters.

Sincerely,

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