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March 21, 2017

Ms. Bernadette B. Wilson
Acting Executive Officer
Executive Secretariat
U.S. Equal Employment Opportunity Commission
131 M. Street, N.E.
Washington, DC 20507

Re: Proposed Enforcement Guidance on Unlawful Harassment

Dear Ms. Wilson:

On behalf of the U.S. Chamber of Commerce (Chamber), the world's largest business federation representing the interests of more than three million businesses and organizations of every size, sector and region, we are pleased to submit these brief comments in response to the Equal Employment Opportunity Commission's (EEOC's or Commission's) Proposed Enforcement Guidance on Unlawful Harassment Discrimination (Enforcement Guidance or Guidance).

The Chamber is a long-standing supporter of reasonable and necessary steps designed to achieve the goal of equal employment opportunity for all -- including practices to protect against unlawful harassment in employment.

As a result, the Chamber supports the EEOC's work and recent publication entitled *Select Task Force on the Study of Harassment in the Workplace, Report of Co-Chairs Chai R. Feldblum & Victoria A. Lipnic* (2016). The Chamber supports the work of businesses across the country that incorporate respect for every employee into their leadership, policies, training, work environment, values and culture. The Chamber similarly supports businesses who insist upon workplaces that, among other things: (1) are free of harassment based on any protected statuses; (2) provide employees with avenues to raise issues of non-compliance; and (3) guarantee non-retaliation against any employee who raises harassment concerns in good faith.

The Chamber also generally supports the purpose of the Enforcement Guidance, Section VI, Promising Practices, in that it provides employers with instructive and flexible checklists and best practices to consider in connection with their efforts to ensure that their workplaces are free from unlawful harassment.[1] The Chamber is supportive of the Guidance's identification of leadership and accountability, comprehensive and effective harassment policies, effective and accessible unlawful harassment complaint systems, as well as non-harassment training to further the goal of a harassment-free workplace. Providing these suggestions regarding specific attributes of successful practices observed at employers' businesses is instructive for all employers as it is the individual employers themselves who determine how best to provide harassment-free workplaces, taking into consideration their individual and unique circumstances. 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 of the Civil Rights Act of 1964, 42 U.S.C. § 2000e (Title VII), would be judged.

It should be noted that, while the Chamber believes that harassment of individuals on the basis of the protected characteristics under law is a wholly impermissible and abhorrent practice, it is concerned that the EEOC may be using its function of issuing sub-regulatory guidance, which should state the law in a manner understandable to the stakeholders, as a means of restating and expanding the law beyond which statute and decided case law permits. Congress was clear when it denied the EEOC authority to issue regulations under Title VII – and only recently permitted regulations to be issued under the Americans With Disabilities Act, 42 U.S.C. § 12101 (ADA) – that it expected the EEOC to confine itself to charge processing and case prosecution and that it cannot engage in wholesale regulatory interpretation to restate the law. We urge the EEOC maintain credibility with the courts and its stakeholders by issuing guidance tethered to settled law so as not to undermine its effectiveness.

To that end, set forth below are several suggestions to ensure that the final Enforcement Guidance is consistent with federal law and acceptable to stakeholders as guidance in application of the current legal standards applicable to unlawful harassment in the workplace. We urge the EEOC to consider these suggestions so

[1] The Chamber notes that one of the Promising Practices' recommendations is for employers to ensure confidentiality to the extent possible during harassment investigations and to conduct "workplace civility training." *See* page. 75. While the Chamber agrees with these suggestions, it notes that recent decisions by the National Labor Relations Board (Board) run contrary to these recommendations, leaving employers who incorporate the Guidance's recommendations at risk that the Board may find their practices violate the National Labor Relations Act (NLRA) as currently construed by the Board . *See , e.g., Banner Estrella Med. Ctr.*, 362 NLRB No. 137 and *Karl Knauz Motors, Inc.*, 358 NLRB No. 164 (2012). While the Board must protect employees' Section 7 rights under the NLRA, it should do so in a way that preserves employers' abilities to ensure harassment-free workplaces.

that the valuable analysis and recommendations contained in the Guidance are not overwhelmed by the following three or four critical issues of legal interpretation.

I. Purpose of Guidance

The Enforcement Guidance is an EEOC sub-regulatory guidance document that "express[es] official agency policy and … explain[s] how the laws and regulations apply to specific workplace situations."[2]

The EEOC introduces the Enforcement Guidance by describing its contents as an explanation of "the legal standards for unlawful harassment and employer liability. … a single analysis for harassment that applies the same legal principles under all equal employment opportunity statutes enforced by the Commission."[3] It "replaces, updates, and consolidates" four EEOC guidance documents on harassment in the workplace issued between 1990 to 1999. The Commission describes its contents as expressing the uniform interpretations of laws regarding many harassment issues, and the Commission's considered positions where the interpretations of the law differ across jurisdictions.[4]

For the Guidance to be accepted and embraced by stakeholders it must accurately and credibly reflect the current state of the law. In this way, making corrections in the Guidance can help ensure that a final document will not follow in the unfortunate footsteps of various other EEOC enforcement guidance documents and policy statements and instead serve as a solid basis upon which employers can rely to ensure that they understand the law and the best practices to protect against any unlawful harassment occurring in their workplaces.[5]

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[2] See https://wwww1.eeoc.gov//laws/guidance/index.cfm?renderforprint=1

[3] Enforcement Guidance at p. 4.

[4] *See id.*

[5] For example, in *Young v. United Parcel Service, Inc.*, the U.S. Supreme Court declined to rely on the EEOC's reasoning in its Pregnancy Discrimination Act Guidance, "not because of any agency lack of 'experience' or 'informed judgment.' Rather, the difficulties are those of timing, 'consistency,' and 'thoroughness' of 'consideration.' " 135 S. Ct. 1338, 1352 (2015). Additionally, in the Chamber's 2014 report entitled, *A Review of EEOC Enforcement and Litigation Strategy during the Obama Administration -- A Misuse of Authority*, the Chamber cited numerous examples of federal courts declining to defer to the EEOC's guidance documents. *See*, *e.g.*, *Vance v. Ball State Univ.*, 133 S. Ct. 2434 (Jun. 24, 2013) (rejecting EEOC's *Enforcement Guidance on Vicarious Employer Liability* as "a proposed standard of remarkable ambiguity"); *Univ. of Texas Southwestern Med. Ctr. v. Nassar*, 133 S. Ct. 2517 (Jun. 24, 2013) (declining to defer to the EEOC's *Enforcement Guidance on Recent Developments in Disparate Treatment Theory* as it 'fail[ed] to address the specific provisions of this statutory scheme, coupled with the generic nature of its discussion of the causation standards for status-based discrimination and retaliation claims, calling the manual's conclusion into serious question").

II. Covered Bases -- Prohibitions Against Race and National Origin Harassment In Title VII Don't Include Harassment Based on An Employee's Preferences Unrelated to Their Own Racial or Ethnic Identity

The Guidance's description of covered bases is not consistent with the law. This is a significant misstep, as the question of whether the conduct at issue is based on the complainant's legally protected status is a prerequisite to establishing that the conduct violated federal EEO law. The Chamber requests that the Guidance's position with respect to "covered bases" be revised to delete any reference to a complainant having a covered basis for a claim of harassment as a result of a protected category-related trait that the complainant exhibits that is unrelated to the complainant's own status.

The Guidance correctly states that race-based harassment includes harassment based on a complainant's race (including, for example, harassment because the complainant is African-American or Asian-American or because the African-American complainant displays race-linked traits). However, the Guidance incorrectly states that race-based harassment includes harassment based on race-linked traits, such as facial features or hair, that are not associated with the complainant's race, but with another race.[6] Under the Guidance, a Caucasian employee who is teased for a race-based characteristic such as a temporary hairstyle that incorporates braids or cornrows, or who sports a dark tan after a vacation is a complainant who temporarily is covered by Title VII's prohibition against harassment on the basis of race (African-American or Hispanic), even though the complainant is neither African-American or Hispanic. This is not an accurate reflection of the law.

The Commission's expanded definition of a protected immutable characteristic to encompass instances in which an individual may show an affinity toward a protected classification without the individual actually possessing that characteristic distorts the protections of the statutes entrusted to the Commission for enforcement. Title VII's unambiguous language protects an applicant and employee from discrimination with respect to his or her compensation, terms, conditions, or privileges of employment, because of **such** individual's race, color, religion, sex or national origin[7] (emph. added). Moreover, in the seminal decision of *McDonnell Douglas v Green*, 411 U.S. 792, 802 (1973*),* the Supreme Court held that Title VII required that a plaintiff alleging prohibited discrimination must establish membership in a protected classification.

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[6] *See* Guidance at p. 5-6

[7] 42 U.S.C. § 2000e-2(a)(1) (2006).

In support of its contrary position, the Guidance cites one inapposite case at footnote 5, *Ellis v. Houston*, 742 F.3d 307, 314, 320-321 (8th Cir. 2014). In *Ellis*, plaintiffs were found to have suffered a broad pattern of harassment, that included offensive comments about African-American hair and hairstyles, but the plaintiffs' race was African-American! The Guidance cites no case where a plaintiff was found by a court to state a cause of action for harassment based on a protected category-related trait that is temporary and voluntarily engaged in unrelated to the plaintiff's race or national origin (*compare Saliceti-Valdespino v. Wyndham Vacation Ownership*, 2013 WL 5947140 (D. P.R. Nov. 6, 2013) (court rejects plaintiff's claims based on allegations of harassment towards women and Blacks, two protected categories of which plaintiff was not a member). As a result, the only case the Guidance cites does not support the Guidance's legal position.

Similarly, the Guidance correctly states that national origin harassment includes harassment based on a complainant's (or his or her ancestor's) place of origin (including, for example, harassment because a complainant of Mexican ancestry displays national origin-linked traits). However, it incorrectly states that national origin-based harassment includes harassment based on national origin-linked traits, such as diet or attire of a person who is not of the national origin of those traits. Numerous district courts have rejected Title VII claims based on allegations of a plaintiff's perceived national origin, where the plaintiff is not actually a member of the perceived group. *Burrage v. FedEx Freight, Inc.*, No. 4:10CV2755, 2012 WL 1068794 (N.D. Ohio Mar. 29, 2012) (rejecting an African American's claims for harassment based on race or color where the harasser's commentary clearly suggested the misconception that plaintiff was Mexican, and finding that plaintiff was not a member of a protected class for those claims); *Lopez-Galvan v. Mens Wearhouse, Inc.*, No. 3:06cv537, 2008 U.S. Dist. LEXIS 53456 (W.D.N.C. July 10, 2008) (rejecting plaintiff's race based claims because he was perceived to be Black but was in fact Latino.) The Guidance cites no case that supports its position that a plaintiff with a race or national origin-based trait that is unrelated to his or her race or national origin states a cause of action for harassment based on the plaintiff's race or national origin-linked trait.

Title VII does not prohibit harassment against an individual based on their choice of cuisine (for example, Chinese, Sushi, German, Italian, Mexican) or clothes style (for example, Ukrainian peasant blouses, handcrafted beaded Native American jewelry, gold embroidered silk Chinese jackets, or Mexican straw sombreros) unrelated to their own protected status. If a Caucasian employee likes Chinese food, a colleague's comments, even if viewed as insensitive, is not harassment covered by Title VII. Put another way, Title VII does not prohibit harassment or discrimination based on a person's affinity for certain cultural aspects which are closely associated with a particular protected class.

Again, the cases cited in footnote 7 simply do not support the Guidance's position that national origin-based harassment includes harassment based on national origin-linked traits, if the complainant is not of the national origin associated with those traits. The distinguishing feature of these cited cases is that all plaintiffs were of the national origin of the cuisine, clothes, or other characteristic that they were being mocked about. As a result, the cases do not stand for the proposition presented in the Guidance -- that harassment on the basis of a race or national origin-linked trait that is voluntarily and/or temporarily associated with a person creates a cause of action for race or national origin harassment under Title VII. Thus, the Guidance should be amended to make it clear that individuals cannot bring national origin-based harassment claims under Title VII based on national origin-linked traits when they are not of that national origin.

III. Covered Bases -- The Guidance's Citations Regarding Title VII's Prohibitions Against Harassment Based on One's Gender Identity Should be More Inclusive

The Guidance unequivocally states:

Gender Identity: Sex-based harassment includes harassment based on gender identity. This includes harassment based on an individual's transgender status or the individual's intent to transition. It also includes using a name or pronoun inconsistent with the individual's gender identity in a persistent or offensive manner. (footnote omitted).

In support of its position, the Guidance cites only one case, *Jameson v. U.S. Postal Serv.*, EEOC Appeal No. 0120130992 (May 21, 2013) (*see* page 8, ftnt. 16). The case was not issued by a court, but rather the EEOC, the author of the Guidance. The Chamber recommends that, for a full discussion of this important issue, the Guidance include court decisions in the private sector that support or are contrary to the Guidance's position.

For example, the Guidance does not recognize other cases holding that Title VII does *not* include harassment or discrimination based on an individual's transgender status. *See*, for example, *Etsitty v. Utah Transit Auth.*, 502 F.3d 1215, 1222 (10th Cir. 2007) (there is nothing in the record to support the conclusion that the plain meaning of "sex" encompasses anything more than male and female. … Rather, like all other employees, such protection extends to transsexual employees only if they are discriminated against because they are male or because they are female;"); *Eure v. Sage Corp.*, 61 F.Supp.3d 651 (W.D. Tex. 2014) (rejecting plaintiff's arguments that evidence of discrimination on the basis of gender dysphoria (transgender identity) was unlawful discrimination under Title VII "because of sex"). Yet, where contrary decisions exist with respect to the legal question of whether Title VII includes

harassment based on one's sexual orientation, the Guidance cites case law contrary to the Guidance's expressed position as to federal law's obligations on employers (*compare* Guidance page 8, ftnt. 16 with ftnt. 17).

In sum, for completeness, the Guidance should be revised to include a full review of the applicable court decisions.

IV. Establishing Causation -- The Guidance Misrepresents Title VII's and the ADEA's Causation Requirements as "at least in part"

The Guidance broadly states that EEO statutes do not prohibit harassment unless it is based, *at least in part*, on a protected characteristic. Guidance, p. 11. This test is not accurate under either Title VII or the Age Discrimination in Employment Act (ADEA). Under the ADEA, harassment is actionable if it would not have occurred *but for* the person's age. Under Title VII, harassment is actionable if *a motivating factor* of the harassment is the person's protected status. As such, the Guidance should be revised.

Congress specifically addressed the treatment of causation in the 1991 amendments to Title VII. In Section 107 of that Act, Congress added a new section addressing the standards to be followed in determining causation. 42 U.S.C. § 2000e-2(m) provides:

"Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex or national origin was ***a motivating factor*** *for any employment practice, even though other factors also motivated the practice."*

This amendment served to clarify some confusion resulting from the *Hopkins v Price Waterhouse* decision, 490 U.S. 228 (1989). It made clear that a challenged practice had to amount to at least a motivating factor for the challenged employment decision or practice to be attacked, *see Desert Palace, Inc. v Costa,* 539 U.S. 90 (2003). A motivating factor is by now a well-established standard in employment discrimination law.

The Guidance's "at least in part" formulation finds absolutely no basis in statute or decisional law and places a new standard, certainly less stringent than the "a motivating factor" standard, into the lexicon of employment discrimination law without any basis or explanation. Certainly, Guidance which purports to describe the current status of the law is not the proper vehicle to introduce new standards, particularly in such an important area as harassment law.

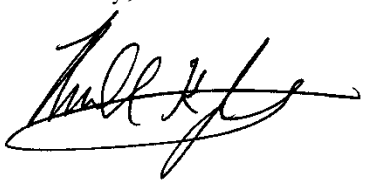
The Supreme Court also addressed the question as to what was the appropriate standard of causation to be applied under the ADEA. In *Gross v. FBL Financial Services, Inc.*, the Court observed that the standards of proof in ADEA cases were statutorily different than in Title VII cases and perhaps most importantly, the Congress did not apply its new causation definition established by 2000e-2(m) to the ADEA. Thus, it is clear beyond any doubt that the ADEA requires a plaintiff to show that age was the but for factor in determining whether the ADEA was violated, either directly or in the form of harassment based upon age. As such, it would be inappropriate to apply the "at least in part" standard to harassment cases falling under the ADEA. Here again, the EEOC greatly oversteps its charge to fairly interpret the laws entrusted to it. The differing standard for harassment on the basis of one's age under the ADEA is not recognized by the Guidance. As a result, the Guidance should be revised.

Conclusion

The Chamber continues to be supportive of reasonable policies to combat workplace harassment. We believe that the suggested changes set forth in these comments can help EEOC to arrive at a final Guidance that describes accurately an employer's legal obligations under applicable law.

Thank you for your consideration of these comments. Please do not hesitate to contact us if we may be of further assistance as you consider these important matters.

Sincerely,



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