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Religious Harassment

THE EFFECT OF EEOC PROPOSED GUIDELINES ON HARASSMENT BASED ON RACE, COLOR, RELIGION, GENDER, NATIONAL ORIGIN, AGE, OR DISABILITY ON EMPLOYERS' LIABILITY AND RELIGIOUS EXPRESSION IN THE WORKPLACE

TESTIMONY BEFORE SENATE JUDICIARY COMMITTEE

SUBCOMMITTEE ON COURTS AND ADMINISTRATIVE PRACTICE

HOWELL HEFLIN, CHAIRMAN

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SUMMARY AND OUTLINE OF TESTIMONY

The following testimony analyzes the EEOC Proposed Guidelines from the perspective of an employer's potential liability and the effect on the employer's and employees' freedoms of religious expression and speech. The analysis includes a background discussion of current religious harassment law, the Proposed Guidelines' radical extension of and deviation from current law with specific comparison to existing regulations and case law, the effect on the employer and employees of the expanded potential liability which results, and the unconstitutional infringements on speech and religious expression. The specific sections are as follows:

1. THE GUIDELINES BROADEN THE DEFINITION OF RELIGIOUS HARASSMENT AND EXTEND POTENTIAL LIABILITY BEYOND THE CURRENT LEGAL STANDARDS.

A. Existing Law Adequately Protects Employees from Religious Harassment.
B. The Guidelines Substantially Broaden the Employer's Liability for Harassment and Deviate from Established Precedent.
C. Compliance with the Guidelines Requires an Employer to Maintain a “Religionfree” Workplace.

II. THE GUIDELINES, AS APPLIED TO RELIGIOUS HARASSMENT, VIOLATE THE FIRST AMENDMENT.

A. Free Expression of Religion.
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III. POLICY CONCERNS.

A. The Guidelines Undermine Employers' Rights.
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THE EFFECT OF EEOC PROPOSED GUIDELINES ON HARASSMENT ON EMPLOYERS' LIABILITY AND RELIGIOUS EXPRESSION IN THE WORKPLACE

Testimony by Dudley C. Rochelle

This testimony is given in response to a request by the Senate Judiciary Committee, Subcommittee on Courts and Administrative Practice, to provide the legal perspective of a labor and employment specialist who represents employers. The writer has practiced labor

and employment law for eighteen years, having graduated from Yale Law School in 1975, served as a trial attorney for the United States Department of Labor, Office of the Regional Solicitor, and represented management in private practice since 1982. 1 appreciate the opportunity to provide the Subcommittee with the perspective of an attorney who attempts to educate and assist employer clients in complying with, and preventing potential liability under, the various federal and state labor and employment statutes, including Title VII.

CONCLUSION

It is my opinion that the Proposed Guidelines on Harassment Based on Race, Color, Religion, Gender, National Origin, Age, or Disability, proposed by the EEOC on October 1, 1993 ("Guidelines" or "Proposed Guidelines") [58 FR 51266], if promulgated in their present form, will significantly increase potential liability under Title VII of the Civil Rights Act of 1964 [42 U.S.C.A. Secs. 2000e, et seq.] ("Title VII") for employers. In practical terms, the only sure course for an employer seeking to avoid liability for religious harassment would be to prohibit any discussion or expression of religion in the workplace, i.e. to institute a "religion free workplace". Although employers are constrained from prohibiting all religious expression of employees by Title VII's prohibition against religious discrimination, the potential threat for claims of harassment as defined by these Guidelines is far greater than the threat of claims from religious employees. Further, the personal expression of religious beliefs and practices by the employer and all management employees is directly and severely curtailed by these Guidelines; non-management employees are likely to have their rights curtailed by employer policies constraining or prohibiting religious expression in the workplace as a result of these Guidelines. The overall effect -of these Guidelines would be to infringe on the rights to freedom of speech and free exercise of religion guaranteed by the First Amendment to the Constitution of the United States. The Guidelines also ignore the recent enactment of the Religious Freedom Restoration Act, which applies a strict scrutiny test to any law that substantially burdens religious practice.

DISCUSSION

1. THE GUIDELINES BROADEN THE DEFINITION OF RELIGIOUS HARASSMENT AND EXTEND POTENTIAL LIABILITY BEYOND THE CURRENT LEGAL STANDARDS.

A. Existing Law Adequately Protects Employees from Religious Harassment.

The only religious harassment court decision cited by the EEOC illustrates that courts do enforce Title VII against employers for

religious harassment. Weiss v. United States,, 595 F. Supp. 1050 [36-FEF Cases 1] (E.D. ' Va. 1984) presents a classic case of harassment, in which a Jewish employee endured his supervisor's blatant and continuing pattern of verbal abuse, offensive religious slurs, demeaning criticism of Weiss's performance before co-workers, hostile treatment, poor appraisals, and groundless accusations. The court held the employer liable for the supervisor's harassment. A number of cases have enforced Title VII's prohibition against religious discrimination in cases where harassment based on the employee's religion took place, and have also recognized harassment under tort theories. See, e.g., Lambert v. Condor Mfg., 56 FEP Cases (BNA) 532 (E.D. Mich. 1991) (male employee had religious objections to nude photos in work area); Obradovich v. Federal Reserve Bank, 569 F. Supp. 785, 34 FEP Cases (BNA) 1803 (S.C.N.Y. 1983) (Jewish employee subjected to ethnic and religious slurs, assigned menial and demeaning tasks not required of other employees); Compston v. Borden, Inc., 424 F. Supp. 157 (S.D. Ohio 1976) (Pattern of verbal abuse calculated to demean employee before co-workers, based on religion and national ancestry); Smallzman v. Sea Breeze, 60 FEP Cases (BNA) 1031 (D.Md. 1993) (Jewish employee who endured anti-Semitic harassment stated a claim for intentional infliction of emotional distress).

Courts have held that mandatory (or apparently mandatory) attendance at company meetings with devotional elements creates a hostile environment sufficient to justify a constructive discharge complaint. See, e.g., E.E.O.C. v. Townley Engineering & Mfg. Co., 859 F.2d 610, 613-615 (9th Cir. 1988); Young v. Southwestern S&L Assoc., 509 F.2d 140, 143-144 (5th Cir. 1975). In Townley, the employer required that employees attend weekly devotional services; when an employee asked to be excused, he was told he must attend but did not have to participate. The Court upheld his constructive discharge claim. 859 F.2d at 612-615. In Southwestern S&L, an atheist teller ceased attending required staff meetings because a prayer was included; when she objected, her supervisor said the meeting was mandatory, and she quit. The Court upheld her claim for constructive discharge, relying on E.E.O.C. Decision No. 721 1 14, 1972 WL 4024 (1972) (employee believed that job security threatened if she did not attend meetings); and E.E.O.C. Decision No. 72-528, 1971 WL 3910 (1971) (employer policy which urges employees to attend meetings regardless of religious belief is on its face discriminatory). Both the EEOC and the courts have found discrimination even when the employer does not affirmatively mandate religious activity. Townley, 859 F.2d at 614, n.5.; Blalock v. Metals Trades, Inc., 39 FEP 140 (6th Cir. 1985). See also E.E.O.C. Decision No. 72-1114, 1972 WL 4024 (1972); E.E.O.C. Decision No. 72-528, 1971 WL 3910 (1971).

Although there are also cases where the claim of religious harassment is not sustained by the court, these cases do not suggest an unwillingness to enforce the prohibition of religious harassment.

See, e.g., Taylor v. National Group, 52 FEP Cases (BNA) 832 (N.D. Ohio 1989) (Christian employee alleged sexual and religious harassment, court found insufficient facts for religious harassment claim); Slamon v. Westinghouse Electric Corp., 386 F. Supp. 174 (E.D. Pa. 1974) (Supervisor denied making abusive statement, and testimony of other employees corroborates supervisor rather than employee); Reichman v. Bureau of Affirmative Action, 536 F. Supp 1149, 30 FEP Cases (BNA) 1644 (M.D. Pa. 1982) (Comments by management to Jewish employee about Arab-Israeli conflict were based on political opinion, not religion); Vaughn v. Ag Processing, 57 FEP Cases (BNA) 1227 (Iowa i990) (Roman Catholic employee was verbally abused by his supervisor; company took immediate action; court found that the company acted reasonably, and the employee was unreasonable in refusing to return to work after walking off the job).

The above cases illustrate that the prohibition of religious discrimination is well recognized and enforced by the courts, according to the principles of hostile environment analysis developed in the area of racial and national origin harassment and applied to sexual harassment. See Meritor Savings Bank v. Vinson, 477 U.S. 57, 65-66, 106 S.Ct. 2399, 2405 [40 FEP Cases (BNA) 1822] (1986), for a discussion of the development of this body of law.

Courts have generally adopted the EEOC's definition of “religious practices” in enforcing Title VII:

[T]he Commission will define religious practices to include moral or ethical beliefs as to what is right and wrong which are sincerely held with the strength of traditional religious views... The fact that no religious group espouses such beliefs or the fact that the religious group to which the individual professes to belong may not accept such belief will not determine whether the belief is a religious belief of the employee or prospective employee.

EEOC Religious Discrimination Guidelines, 29 CFR 1605.

An individual does not have to belong to any established religious group as long as his individual belief is held with the strength of traditional religious conviction [see, e.g., EEOC Decision No. 71-799 (1979), EEOC Decision No. 76-104]. An individual's belief which is incomprehensible or incorrect to others is nevertheless protected. See, e.g., EEOC Decision No. 71-2620 (1971); EEOC Decision No. 72-1301 (1971) (Employee's views protected though novel, arguably offensive, or in questionable taste). An employee need not establish that he is a member of a particular sect or group in order to espouse religious beliefs. See, e.g., EEOC Decision No. 76-104, 12 FEP Cas. (BNA) 1359. It is clear that avowed atheists, or employees who simply do not share the employer's beliefs, are protected from discrimination. See, e.g., Young v. Southwestern Savings and Loan

Assn, 509 F.2d 140, 10 FEP Cas. (BNA) 522 (5th Cir. 1975); Shapolia v. Los Alamos National Lab., 56 FEP Cas. (BNA) 1617, 1618 (D.N.M. 1991).

The EEOC definition of religion is so broad that an employer could easily commit discrimination without realizing it, since in most cases there is no way of knowing the religion of an employee unless the employee makes it known. For that reason, the traditional test for a prima facie case of religious discrimination has included the element that the employee must have complained or made known his objections.

To establish a prima facie case of religious discrimination, an employee must prove that (1) he has a bona fide belief that compliance with an employment requirement is contrary to his religious faith; (2) he has informed his employer about the conflict; and (3) he was discharged because of his refusal to comply with the employment requirement. See, e.g., Johnson v. Angelica Uniform Group, Inc., 762 F.2d 671, 673 (8th Cir. 1985); Toledo v. Nobel-Sysco, Inc., 892 F.2d 1481, 1486 (10th Cir. 1989), cert. denied, 495 U.S. 948, 110 S.Ct. 2208 (1990); Turpen v. Missouri-Kansas-Texas R.R., 736 F.2d 1022, 1026 (5th Cir. 1984). Once the employee establishes a prima facie ("on its face") case, the employer must prove that it could not have reasonably accommodated the employee's religious beliefs without creating an undue hardship to the business. 42 U.S.C. 20OOe(j).

In the harassment context, where there may be no explicit employment requirement to which the employee makes known his objection, the courts have defined the test in similar terms as sexual harassment cases, that is, that the conduct must be known to be "unwelcome" to the employee. The elements of a "hostile environment" religious harassment case are as follows: (1) the plaintiff belongs to a protected class; (2) the plaintiff was subject to unwelcome religious harassment; (3) the harassment was based upon religion; (4) the harassment affected a term, condition or privilege of employment; and (5) the employer knew or should have known of the harassment and failed to take prompt remedial action. Vaughn v. Ag Processing, 57 FEP Cases (BNA) 1227 (Iowa 1990).

Where a supervisor with actual authority over the employee as the employer's agent commits harassment and causes adverse action against an employee, the employer will be liable regardless of the employer's knowledge or remedial action. See, e.g., EEOC Decision No. 72114 (1972). However, employers are not automatically liable for harassment by supervisors. Meritor Savings Bank, 106 S.Ct. at 2408. For automatic or "strict liability" to result, the harassment by the supervisor must result in a tangible job detriment (such as discharge, demotion, loss of promotional opportunity). See Id. at 2410 (Concurring Opinion) and cases cited therein.

As this review makes clear, Title VII and the currently applicable regulations have been interpreted by the courts to provide adequate protection of employees from religious discrimination, including harassment.

B. The Guidelines Substantially Broaden the Employer's Liability for Harassment and Deviate from Established Precedent.

The Supplementary Information published with the Guidelines infers that the Guidelines merely state the existing law of harassment. In response to concerns about religious harassment, the EEOC has issued a letter which states that the Guidelines "do not set forth new law" but merely consolidate and clarify existing law on harassment in the workplace". In fact, the Guidelines substantially broaden the existing concept of harassment and the potential liability of the employer.

This broader view is easily illustrated by a comparison of the Proposed Guidelines to the existing guidelines on sexual harassment, EEOC Guidelines on Discrimination Because of Sex, 29 C.F.R. Sec. 1604.11 (1992) ("Sex Guidelines").

The Proposed Guidelines broaden the definition of harassment:

Harassment is verbal or physical conduct that denigrates or shows hostility or aversion toward an individual because of his/her . . . religion. . . or that of his/her relatives, friends. or associates, and that:

(i) Has the purpose of effect of creating an intimidating, hostile, or offensive working environment;

(ii) Has the purpose of effect of unreasonably interfering with an individual's work performance; or

(iii) Otherwise adversely affects an individual's employment opportunities.

Proposed Guidelines, Sec. 1609(b)(1) (Emphasis added to highlight portions not found in Sex Guidelines).

The Guidelines eliminate the requirement set forth in established precedent that the employee must object to the employer or make known that the conduct is unwelcome. Therefore, the employer may be completely ignorant of the employee's religious beliefs, which may be atheism, or agnosticism according to the EEOC definition. The employer is almost certainly ignorant of the beliefs of the employee's "relatives, friends, or associates." Yet, the employer must not engage in any conduct which could have the effect of being offensive to them.

This is an impossible burden for an employer to meet.

The "adversely affects" clause is vague and not defined in any case law on harassment. If an employer takes adverse action against an employee because of his/her religion, that is simply religious discrimination, and evidence of slurs, jokes, or other conduct which may constitute harassment is admissible as evidence that the action was based on religion. That case would be determined by the well-developed legal standards for discrimination cases. Harassment cases have always required a showing of either a hostile environment (category i), or interference with the individual's work performance (category ii). Legal standards of proof have been developed for both these recognized types of harassment. To place "adverse action" discrimination (category iii) under the definition of harassment has the effect of analyzing all religious discrimination cases as harassment, which is inappropriate and, under these guidelines, troublesome. If "adversely affects" means something besides adverse action, it adds a new category to harassment which is vague, undefined, and unlimited.

The Guidelines include a comprehensive definition of harassing conduct which is not found in the sexual harassment guidelines, and a standard for determining whether conduct is sufficient to constitute actionable harassment which is unprecedented in current law.

Harassing conduct includes, but is not limited to, the following:

(i) Epithets, slurs, negative stereotyping, or threatening, intimidating or hostile acts that relate to . . . religion . . . and

(ii) Written or graphic material that denigrates or shows hostility or aversion toward an individual or group because of . . . religion . . . and that is placed on walls, bulletin boards, or elsewhere on the employer's premises, or circulated in the workplace.

Proposed Guidelines, Sec. 1609.1(b)(2).

The Supreme Court has recently reiterated that all conduct must be considered in context, and that a "a mere offensive utterance" does not necessarily establish harassment." Harris v. Forklift Systems, Inc., _ U.S. _, 114 S.Ct. 367, 371 (1993). The Proposed Guidelines include the standard provision (also included in the sexual harassment guidelines) that the determination whether the alleged conduct constitutes harassment will include the totality of the circumstances [Sec. 1609. l(e)]. Notwithstanding that provision, the Guidelines' description of harassing conduct does not make any reference to the fact that one instance of such conduct does not necessarily establish harassment, though the [sexual policy guidelines, cite] do. The Guidelines cite only two cases to illustrate, one involving infrequent

comments and one involving one egregious incident, thereby emphasizing that isolated instances may establish harassment. Sec. 1609.l(c) and n. 4.

Perhaps the most significant departure from current law is the description of the standard for determining whether harassing conduct creates a hostile or abusive work environment:

The standard for determining whether verbal or physical conduct relating to . . . religion is sufficiently severe or pervasive to create a hostile or abusive work environment is whether a reasonable person in the same or similar circumstances would find the conduct intimidating, hostile or abusive. The "reasonable person" standard includes consideration of the perspective of persons of the alleged victim's . . . religion. It is not necessary to make an additional showing of psychological harm.

Guidelines, Sec. 1609.1(c) (Emphasis added).

Presumably, the Guidelines would extend this definition of "reasonable person" to include a person of the religion of the victim's "relatives, friends, or associates" in those cases where liability is founded on conduct showing aversion towards their religion, as permitted under Sec. 1609(a).

This reasonable person standard, as applied to religion, is not found in current law. In sexual harassment cases, courts have differed on whether to apply a "reasonable person" or a "reasonable woman" (that is, from the perspective of the alleged victim's sex) standard, and the Supreme Court has not resolved this issue. There is a great deal of controversy about whether the objective "reasonable person" test can be narrowed to encompass only persons from the victim's group (i.e., reasonable woman). Still, at least the employer is able to determine which sex he is dealing with; in religious harassment cases, he may not know the victim's perspective or the perspective of persons of the victim's religion.
Indeed, neither the EEOC nor the courts have applied a "reasonable person" test of any kind in religious cases. The victim of religious discrimination is viewed alone, and his views need not be shared by any organized religion, cult, or group to be protected, nor must they appear in doctrinal statements of faith. See, e.g., EEOC Decision No. 76-104, 12 FEP Cases (BNA) 1359 (1976) (Employee with sincere belief against Sunday work entitled to accommodation though not a member of any Sabbatarian group); EEOC Decision No. 91-1 (1991) (Christian employees had claim despite employer's claim that he was also a Christian); EEOC Decision No. 71-1114 (1972) (Employee "subjectively felt intimidated", no further inquiry into beliefs; this case was relied on in Guidelines, Sec. 1609. l(d) at n. 5); Young v. Southwestern S&L Assoc., 509 F.2d 140 (5th Cir. 1975) (atheist

employee). Again, the Guidelines have departed from established precedent.

Finally, the Guidelines go far beyond current law in establishing strict liability of the employer [1] for employees' behavior towards other employees:

[1] Strict liability means that the Court imposes liability regardless of whether the employer knew of the harassment and failed to take action.

An employer is liable for its conduct and that of its agents and supervisory employees with respect to workplace harassment on the basis of . . . religion .:

(1) Where the employer knew or should have known of the conduct and failed to take immediate and appropriate corrective action; or

(2) Regardless of whether the employer knew or should have known of the conduct, where the harassing supervisory employee is acting in an "agency capacity. " To determine whether the harassing individual is acting in an "agency capacity," the circumstances of the particular employment relationship and the job functions performed by the harassing individual shall be examined. "Apparent authority" to act on the employer's behalf shall be established where the employer fails to institute an explicit policy against harassment that is clearly and regularly communicated to employees, or fails to establish a reasonably accessible procedure by which victims of harassment can make their complaints known to appropriate officials who are in a position to act on complaints.

Guidelines, Sec. 1609.2(a)(2) (Emphasis added).

Contrast this to the law of sexual harassment as it has developed. The Sex Guidelines include a statement that an employer is responsible for the acts of its agents regardless of whether the specific acts were authorized of forbidden and regardless of whether the employer knew or should have known of their occurrence [Sec. 1604.11(c)]. However, the courts have not completely adopted the EEOC's definition of liability based on agency and has limited strict liability to quid pro quo cases.

To establish quid pro quo sexual harassment, the claimant must prove that submission to unwelcome sexual advances is made either explicitly or implicitly a term or condition of employment, and that submission to or rejection of such harassment is used as the basis for employment decisions affecting him/her. See, e.g., Sex Guidelines, Sec. 1604.11(a)(2). To establish liability by the employer for quid pro quo harassment by a supervisor, the supervisor's actual authority

over the claimant establishes him/her as the employer's agent; if the supervisor exercises his/her authority to affect the claimant's terms or conditions of employment based on the claimant's response to sexual demands, then the courts will impute the supervisor's actions to the employer regardless of the employer knew of the harasser's actions or not. Even so, a tangible job detriment must result from the claimant's response to unwelcome advances in order for the courts to impose strict liability on the employer.

If there is no tangible job detriment, or the supervisor lacks actual authority over the employee, the claimant may still be able to prove a hostile environment case. In a hostile environment case, there are two additional elements which must be proven: that the company knew or should have known of the harassment and that the company failed to take prompt and remedial action in response to the harassment. See, e.g., Meritor Savings Bank v. Vinson, 477 U.S. 57, 106 S. Ct. 2399 (1986); Kaufman v. Allied Signal, 59 FEP Cases (BNA) 606, 612 (6th Cir. 1992); Babcock v. Frank, 59 FEP Cases (BNA) 410 (S.D. N.Y. 1992); Gomez v. Metro Dade County, 59 FEP Cases (BNA) 1191 (S.D. Fla. 1992). In short, the courts have been careful to limit the application of strict liability only to cases of actual agency in which the agent (supervisor) exercised his authority through harassment.

In the religious area, the only situation analogous to quid pro quo would be where a supervisor tells an employee that he/she must convert or participate in religious activity in order to get along or get ahead, and a tangible job detriment results. In the rare cases involving this situation, the employer has been held to a standard of strict liability. See, e.g., Young v. Southwestern Savings and Loan Assn, 509 F.2d 140; EEOC Decision No. 91-1.

In the Guidelines, the EEOC eliminates the requirement of proving a tangible job detriment, and extends strict liability in all situations where a supervisory employee is an agent. It further extends strict liability to all situations in which a company has not instituted a program of harassment prevention and a complaint procedure. In effect, the EEOC is attempting to extend strict liability to any situation in which a supervisor or person identified with management has some degree of participation in conduct which may constitute harassment. This is inconsistent with innumerable court cases in sexual and other types of harassment cases. Indeed, it directly contradicts the Supreme Court's holding in Meritor Savings Bank:

Congress' decision to define “employer' to include any “agent” of an employer, 42 U.S.C. 2000e(b), surely evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible. For this reason, we hold that the

Court of Appeals erred in concluding that employers are always automatically liable for sexual harassment by their supervisors. As to employer liability, we conclude that the Court of Appeals was wrong to entirely disregard agency principles and impose absolute liability on employers for the acts of their supervisors, regardless of the circumstances of a particular case.

24 S. Ct. at 2408

C. Compliance with the Guidelines Requires an Employer to Maintain a "Religion free" Workplace.

The Guidelines state than an employer "has an affirmative duty to maintain a working environment free of harassment on any of these bases [including religion]." Sec. 1609.1(d). This statement -reflects the Supreme Court's statement in Meritor that "Title VII affords employees the right to work in an environment free from discriminatory intimidation, ridicule, and insult" [106 S.Ct. at 2406], but goes beyond to impose an affirmative duty to maintain environment free from harassment as defined by the Guidelines. Applying the Guidelines in the religious context, this really requires an environment free from religion, period. There is no way an employer can maintain such an environment, and avoid liability, unless the employer simply prohibits the discussion, dissemination, or expression of any religious belief or practice. The employer does not know the religious beliefs of employees, much less the beliefs of their relatives, friends, and associates. At the same time, the employer does not know the beliefs of supervisors but is held strictly liable for any expression of them to an employee who may be offended, according to the standards of the employee's unknown religion.

The employer seeking to avoid liability has no choice but to insist upon a "religion-free workplace" and prohibit any expression of religion by employees. If the employer has religious beliefs that he/she seeks to live out in the business as in all aspects of life, but he/she may express those beliefs only at tremendous risk of liability and potential loss of the business. This is a completely unacceptable level of regulation of business and constitutes infringement of constitutional rights of employers and employees.

II. THE GUIDELINES, AS APPLIED TO RELIGIOUS HARASSMENT VIOLATE THE FIRST AMENDMENT.

The Commission fails to distinguish between religious expression, slurs, and derogatory comments, and hostile work environment. The Commission uses the same legal framework to analyze the statement, "I believe all blacks are inferior to whites," a slur aimed at a particular group, as it uses to analyze the statement, "I believe salvation can only be obtained by accepting Jesus," or "The Jews are

God's chosen people", statements which are expressions of religious belief which may be offensive to those who disagree, but are not aimed at them with derogatory intent. This critical failure makes the new policy unconstitutional, violative of recent congressional statutes, and unsound as a matter of policy. See David L. Gregory, The Role of Religion in the Secular Workplace, 750 Notre Dame J. Ethics & Public Policy 749 (1990) (arguing that religious and sexual conduct in the workplace should be analyzed differently).

As stated earlier, an employer can safely avoid liability under the Proposed Guidelines only by mandating,a workplace completely free of religious expression. This violates the First Amendment's prohibition against laws abridging freedom of speech and the exercise of religion.

A. Free Expression of Religion.

The Guidelines substantially burden religious practice, but are not narrowly drawn nor justified by a compelling governmental interest. Therefore, they violate the First Amendment and the Religious Freedom Restoration Acto of 1993.

An express purpose of the proposed Guidelines is to regulate religious behavior. For example, the Guidelines specifically hold employers liable for their employees' religious conduct. Sec. 1609.2 (a) and (b). Laws that intend to regulate religious conduct must undergo 'the most rigorous of scrutiny." Church of the Lukumi Babalu Aye v. City of Hialeah, 113 S.Ct. 2213, 2233 (1993). To survive this level of scrutiny, the law must advance "'interests of the highest order' and must be narrowly tailored in pursuit of those interests. " Id. (citations omitted). Even if the law is of general applicability, it still must pass this rigorous test under the recently enacted Religious Freedom Restoration Act of 1993 ("RFRA"). 103 P.L. 141, 1993 H. R. 1308.

As stated earlier, the Proposed Guidelines mandate strict liability for any religious activity in the workplace carried out by an employer or any agent of the employer, and broadens the employers' liability for the conduct of rank and file employees to the extent that the only safe way to avoid liability is to prohibit any religious conduct in the workplace. This complete prohibition would substantially burden the exercise of religion. Employees and employers alike would have to forego seemingly harmless acts or devotion during working hours. This is especially problematic since employees spend more time at work than ever. See Amanda Bennett, The Outlook.- In Factories, a New Day Dawns - a Longer One, Wall Street J. January 17, 1994 (average workweek the highest since 1945).

The government's substantial and important interest in

eliminating discrimination from the workplace is beyond cavil. See EEOC v. Pacific Press Pub. Assn, 676 F.2d 1272, 1280 (9th Cir. 1982) (noting government's compelling interest in eliminating discrimination). However, it is clear from the statute itself that Congress did not establish a government interest in restricting religious expression or involving religious organizations. See 42 U.S.C. Secs 20OOeo) and 20OOe-l(a). The burden is on the EEOC to demonstrate that the government's interest extends so far as to restrict the religious expression of employers. Furthermore, the Commission need not effectively ban all religious conduct at work to meet the goal of nondiscrimination.

2 A coalition of conservative and liberal lawmakers passed RFRA to ensure that government regulations would not substantially burden religious expression. 103 P.L. 141(a)(3). In doing so, these lawmakers rejected the more lenient test the Supreme Court announced in Employment Division v. Smith, 494 U.S. 872 (1990).

As the above cited cases show, the law as it exists provides significant protection for employees, without necessitating a total ban. Therefore, the Proposed Guidelines hardly represent the “least restrictive means” of promoting equality. See Townley, 859 F.2d at 615 (Recognizing the employer's right to free expression, the court narrowed the lower court's injunction).

The situation here differs in kind from previous cases where employers tried to avoid federal labor laws by relying on the Free Exercise Clause.[3] In each of the cited cases, employers sought an exemption from important provisions of federal labor law because compliance would violate their free exercise of religion. For example, in one case the employer paid a head of household benefit to men only. Dole v. Shenandoah Baptist Church, 899 F.2d 1389, 1392 (4th Cir. 1990). This patently violated the FLSA's equal pay requirement. However, the employer argued that the pay policy was based on religious belief, viewing the husband as the head of the family. Id.

[3] See e.g., Tony & Susan Alamo Foundation v. Secretary of Labor, 471 U.S. 290, 105 S.Ct. 1953 (1985) (government could force religious employer to pay FLSA's minimum wages without violating clause); EEOC v. Pacific Press Pub. Ass'n, 676 F-2d 1272 (4th Cir. 1982) (requiring religious publishing company to pay same benefits to women did not violate the clause); EEOC v. Southwestern Baptist Theological Seminary, 651 F.2d 277 (5th Cir. 1981) (applying Title VII's reporting requirements to seminary's support staff did not violate clause).

The Court found that the employer had a sincere religious belief. Yet, it ultimately held that the government's interest in providing equal pay overcame the burden on the employer's freedom of religion.

Id. at 1397-99. The Court reasoned, in part, that there was no way to exempt the employer "without exempting all other sectarian schools and thereby the thousands of Jay teachers . . . on their payrolls. " Id. at 1398.

These attempts to obtain an exemption from federal labor policy are inapposite to the situation presented here. No one has suggested an exemption from Title VII's prohibition of workplace harassment, or any deviation from current law as interpreted by the courts. However, employers and their employees should be able to express religious beliefs, in a non-threatening and non-coercive manner, without fear of reprisal. Surely, something less than a total ban on religious activity can accomplish the goal of eliminating harassment.

B. Freedom of Speech.

1. The Guidelines are Not Necessary or Narrowly Drawn.

The employer's First Amendment right to communicate his or her views at work are firmly established and cannot be infringed upon" by law. N.L.R.B. v. Gissel Packing Co., 395 U.S. 575, 617 (1969) (limiting the N.L.R.B.'s ability to prohibit the employer's anti-union speech to employer threats or captive audience speeches). Yet, the Proposed Guidelines would severely restrict employers, supervisors, and any agents of the employer from discussing and expressing their religious beliefs at work. For example, Orthodox Jewish employers would have to refrain from talking about traditional Judaic principles at work if it offended a "reasonable Muslim" or a "reasonable New Age practitioner." Therefore, the Guidelines, on their face, restrict employers' First Amendment right to express their opinions at work. Id.

To enforce this content-based exclusion on speech, the Commission would have to show that its Guidelines are necessary to serve a compelling state interest and that they are narrowly drawn to achieve that end. Cannon v. Denver, 998 F.2d 867, 871-72 (10th Cir. 1993). While achieving equality in the workplace is a compelling interest, Pacific Press, 676 F.2d at 1280, the proposed Guidelines are neither necessary to serve that interest or narrowly drawn.

The Guidelines are not necessary because current law, which is more narrowly drawn, sufficiently protects employees from religious discrimination and harassment. The Guidelines place extra burdens on free speech by increasing the scope of the employer's vicarious liability. They also place extra burdens by, for the first time, applying the "reasonable person of a particular religion" standard. However, as the above cited cases show, existing law protects employees without the Commission's new burdens on speech. Therefore, the additional burdens cannot be necessary in the Commission's quest

to promote equality in the workplace.

The Guidelines are not narrowly because they broadly prohibit any type of religious speech that a reasonable person of certain faiths would find intimidating. This goes beyond the narrow prohibition of speech that constitutes a threat, as allowed by the Supreme Court's decision in Gissel Packing, 395 U.S. at 617.

2. Traditional Exceptions to the First Amendment Do Not Cover the Speech Prohibited by the Guidelines.

The speech prohibited by these Guidelines also does not fall into other exemptions to first Amendment protection. See Kingsley R. Browne, Title VII as Censorship: Hostile-Environment Harassment and the First Amendment (hereinafter "Title VII as Censorship"), 52 Ohio St. L.J. 481, 520-31 (1991) (arguing that existing sexual harassment laws violate First Amendment).

The Guidelines do not impose a neutral time, place and manner restriction. The government may place reasonable restrictions on the time, place, and manner of speech if the restrictions are "content-neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communications. " United States v. Grace, 461 U.S. 171, 177 (1983). However, the Guidelines only restrict speech of a certain content, that is, religion. Because the Guidelines are not "content neutral," the "time, place, and manner" exception does not apply.

The speech prohibited by the Guidelines goes beyond defamation, which the government may regulate. Speech that intentionally states a falsehood about a person constitutes defamation.

For example, calling a chaste woman a "whore" would constitute defamation. See Restatement (Second) of Torts Sec. 547 & comment C. Further, derogatory and untrue statements about a class of citizens may be deemed "group libel." Beauharnais v. Illinois, 343 U.S. 250 (1952). Arguably, the First Amendment does not protect either type of speech. Id. at 258; but see New York Times Co. V. Sullivan, 376 U.S. 254 (1964) (constitution places some limit on -government's ability to punish individual defamation); American Booksellers Assn v. Hudnut, 771 F.2d 323, 331 n.3 (7th Cir. 1985), affd, 475 U.S. 1001 (1986) (questioning the continued validity of the Court's group defamation analysis in Beauharnais v. Illinois).

However, the speech prohibited by the Guidelines goes beyond either individual or group defamation. Under the Guidelines, an employer's expression of his or her own faith could offend the reasonable person of another faith and violate the proposed rules. Yet, expressions of one's own faith do not make untrue statements

about another. Even statements of one's own faith that are incidentally derogatory toward another's religion do not constitute defamations. For example, stating that one can achieve salvation only by accepting Jesus Christ, or that Jews are God's chosen people, does not constitute an intentional falsehood on the part of the believer. Indeed, one can argue that a religious believer's statement of belief could never be intentionally false. Therefore, these expressions of faith are not defamation and cannot be regulated by the government.

Nor do the Guidelines impinge only upon constitutionally unprotected fighting words or obscenity. Fighting words, by their very utterance, "inflict injury or tend to incite an immediate breach of the peace." Chaplinsky v. New Hampshire, 315 U.S. 568 (1942). However, fighting words do not include those which are "harshly insulting." Gooding v. Wilson, 405 U.S. 518, 525 (1972).[4] Obscenity must (1) appeal to a "prurient interest" in sex; (2) depict or describe, in a patently offensive way, sexual conduct specifically defined by the applicable state law; and (3) "lack serious literary, artistic, political, or scientific value." Miller v. California, 413 U.S. 15, 24-25 (1973). Speech expressing one's own religious faith is hardly speech which could "incite an immediate breach of the peace" or a description of sexual conduct.

[4] See also United States v. Sturgill, 563 F.2d 307, 310 (6th Cir. 1977) (holding unconstitutional a Kentucky statute providing that "[al person is guilty of harassment when with intent to harass, annoy or alarm another person he... in a public place, makes an offensively coarse utterance, gesture or display, or addresses abusive language.....

The situation discussed herein differs from sexual or racial harassment. In Robinson v. Jacksonville Shipyards, Inc, the court in discussing sexual harassment held that the "regulation of discriminatory speech in the workplace constitutes nothing more than a time, place, and manner regulation of speech." 760 F.Supp. 1486, 1535 (M.D. Fla. 1991). However, the court noted that the Guidelines did "not seem entirely content neutral." Id. The court justified its decision on the fact that sexually explicit speech was afforded less constitutional protection. It also reasoned that sexually harassing speech was "indistinguishable from the speech that constitutes crimes." Id.

Admittedly, the courts have not fully explored the implications of freedom of speech on anti-discrimination law. However, courts have inherently recognized that some situations may constitute an impermissible interference with protected rights. See Hishon v. King & Spalding, 467 U.S. 69, 80 n. 4 (1984) (Powell, J., concurring) (noting that the balance between equal protection law and constitutional protection must be determined on a case by case basis);

Rabidue v. Osceola Refining Co., Inc., 584, F.Supp. 419, 431 (E.D. Mich. 1984) (noting that workplace harassment law implicates the First Amendment, but declining to rule on that issue). The Supreme Court's decisions on workplace harassment have been silent on First Amendment issues.

No case has held that speech of a religious nature, which differs from racial or sexual slurs and in no way resembles speech "that constitutes crimes," is afforded less protection by the Constitution than other speech. In fact, as a form of religious exercise it has additional protection. Because the religious speech implicated by the Guidelines does not fit within the traditional doctrines which allow courts to limit speech, the courts should hold that the Guidelines violate the First Amendment.

C. Constitutional Vagueness.

Even if the Proposed Guidelines did not require employers to enforce a totally "religion free workplace," the Guidelines would still violate the Constitution under the vagueness doctrine.

When a law fails to give reasonable notice about what actions it prohibits, the law violates substantive due process and if void for vagueness. Courts strictly apply this doctrine when the law regulates activities protected by the First Amendment. See NAACP v. Button, 371 U.S. 415, 433 (1963). Unclear laws regulating expression create a substantial risk of deterring constitutionally protected speech. Id. Moreover, vague laws allow judges and juries to impose liability based on their own personal views. Smith v. Goguen, 415 U.S. 566, 575 (1974).

The Proposed Guidelines give employers no notice about what type of speech and religious practices they must forbid in the workplace in order to avoid liability. The Guidelines' prohibit discrimination that a "reasonable person" of a certain religious belief finds offensive. Sec. 1609. l(c).

Assuming that an employer may be able to determine what sexual speech and conduct a "reasonable woman" would find offensive, or what type of racial remarks a "reasonable African-American" might find offensive, how can an employer make any type of assessment about religion? Most employers and supervisors will not know their employees' religious beliefs. Indeed, these Guidelines actually encourage inquiry into an employee's beliefs by imposing this standard, which is impermissible under current law. Even if the employer had some idea of the employee's general belief, how may he or she decide what a reasonable person of that faith finds offensive. Is the reasonable Jew Hasidic, orthodox, conservative, reformed, or reformationist? Is the reasonable Christian Catholic, Lutheran,

Baptist, or Seventh Day Adventist? Even if the employer figured all this out, then how does he or she determine what would be offensive to the employee's "relatives, friends or associates?" Even if this were possible, then the employer must communicate is some detail the religious beliefs of the employee, relatives, friends, and associates to all supervisors or co-employees who might unwittingly offend.

There is no principled, non-intrusive way to determine what conduct will violate Title VII as interpreted by these Proposed Guidelines. The prudent employer's only choice is to prohibit all religious activity, even if some of the activity would not be unlawful. This chilling effect is exactly what the vagueness doctrine is designed to prohibit.

D. Violation of the Administrative Procedure Act.

The Proposed Guidelines' departure from existing EEOC policy without sufficient explanation violates the Administrative Procedure Act ("APA"), 5 U.S.C.A. Sec. 553. See International Ladies' Garment Workers' Union v. Donovan, 722, F. 2d 795, 814 (D. C. Cir. 1983) (agency must cogently explain why it has changed policy). As stated above, the Proposed Guidelines depart from EEOC and court precedent and make significant changes to existing policy. See discussion on pages 8-10. However, in the regulation's summary and supplementary information, the Commission does not even mention the changes or explain the. Indeed, in its letter to Congressmen, -the EEOC has stated the Guidelines simply codify existing policy and precedent. Without a cogent explanation of the actual changes and modifications to policy, the courts will have a basis to rescind these Guidelines if they are made final. Id. at 814.

III. POLICY CONCERNS.

The Commission's refusal to recognize that religious practice differs from religious and racial slurs ignores a simple fact: religion plays a distinct, important role in American jurisprudence and society at large. In 1776, the original thirteen states declared that the rights to "Life, Liberty and the pursuit of Happiness" were "self-evident" not because they derived from reason, but because they were "endowed by their Creator." Declaration of Independence, para. 2 (U.S. 1776).

Many of the Founding Fathers made strong statements upholding the right to freely practice one's religion of choice. See, e.g., statements of James Madison, author of the First Amendment, and Thomas Jefferson quoted Dayton Christian Sch. Inc., v. Ohio Civil Rights Comm'n, 766 F.2d 932, 949-50 n.30 (6th Cir. 1985). Congress and the Courts have continued to emphasize the importance of religious practice. Chief Justice Burger stated that "[t]he values enshrined in

the First Amendment plainly rank high 'in the scale of our national values."' N.L.R.B. v. Catholic Bishop of Chicago, 440 U.S. 490, 501, 99 S.Ct. 1313, 1319 (1979).

Most recently, a coalition of liberal and conservative legislators enacted RFRA with the purpose of protecting the "unalienable right" to free exercise of religion. 103 P.L. 141(a)(1). RFRA's passage broke down traditional party lines as numerous conservative and liberal legislators and lobbying groups backed the bill, which effectively overturned a Supreme Court decision authored and joined by all four Reagan appointed justices. See Employment Division v. Smith, 110 S.Ct 1595, 1597. At the Act's signing, President Clinton remarked 11[w]e all have a shared desire here to protect perhaps the most precious of all American liberties: religious freedom." Religious Freedom Restored, The Defender, January 1994, at 1.

The courts, Congress, the Founding Fathers, and President Clinton all apparently recognize what the EEOC does not: the ability to freely express one's own religion is an inseparable part of a person's individual fabric. See EEOC v. Townley, 859 F.2d at 622-25 (Noonan, J., dissenting) (recognition that many "who seek to integrate their lives and to integrate their activities" repudiate the "theological position ... that human beings should worship God on Sundays or some other chosen day and go about their business without reference to God the rest of the time").

By forging new policy which adopts the view that religion and the workplace must be divorced from one another, the Commission fails to protect the religious freedoms for employers and employees alike who seek to integrate their faith with daily life. A few examples illustrate the point.

A. The Guidelines Undermine Employers' Rights.

Many employers seek to base their business practices on religious teachings of right and wrong, ethical behavior, and a standard of personal behavior imposed by their religion. It is not uncommon to discuss these principles, derived from the Bible or other religious teachings, with management and employees in the course of business. A business owner, or a supervisor, with personal religious beliefs, may find occasion to pray for a troubled employee or give advice based on religious principles to an employee seeking counsel on a personal matter. Would a reasonable atheist, agnostic, or person of a different religion find these activities offensive? Quite possibly, to some extent.[5] Yet these actions do not denigrate or discriminate against any one. If there is no requirement that the employee make known his discomfort, but he may file a claim anytime within 180 days during which he may be disciplined or discharged for some entirely

unrelated cause, would any employer or supervisor take the risk of expressing his religious principles or demonstrating compassion?

[5] Indeed, the recent press release from the American Atheists states that “humming ... of religious songs”, wearing any religious insignia, or any expression of religion whatsoever is offensive, and that religion should be eliminated from the workplace as it is injurious to emotional and psychological health. See Press Release, American Atheists, May 2, 1994.

B. The Guidelines Undermine Employees' Rights

Employees asking the EEOC and courts for protection from religious harassment have not had to show that a reasonable person of their religion would be offended. They merely had to show that the employer's conduct offended their personal religious beliefs. See, e.g., Vaughn v. Ag. Processing, 459 N.W.2d 627; EEOC Decision No. 91-1 (1991). The Commission, in attempting to broaden coverage, has apparently added a new requirement. This is clear evidence that the EEOC never really considered the implications of the Guidelines on religious discrimination, which follows a personal standard which is different from the reasonable person standard followed in other discrimination law. This new regulation, had it been in place, might have changed the Commission's own prior decisions. See EEOC Decision No. 72-1114, in which the Commission found that the employee felt “subjectively ” threatened by the employer's religious behavior. Under the Proposed Guidelines, the employee would have also had to show that a reasonable person of the employee's faith would have felt threatened.

Of the five reasons given in the Supplementary Information section of the Guidelines for the Commissions's determination that new guidelines are needed to emphasize that harassment is egregious and prohibited by law, only two have any possible relation to religious harassment: (1) “[I]t would be useful to have consistent and consolidated guidelines that set forth the standards for determining whether conduct in the workplace constitutes illegal harassment under the various antidiscrimination statutes”; (2) To reiterate and emphasize that harassment on other bases of discrimination besides sex is unlawful. As the above discussion makes clear, the first goal has not been met, because these guidelines do not set forth the existing standards for determining what workplace conduct constitutes religious harassment. In fact, they go well beyond current law and regulations by effectively redefining religious harassment and increasing employers' liability for perceived harassment. In practice, this will have a chilling effect on religious expression in the workplace. As to the second goal, by reiterating that harassment based on one's religion, as newly defined, is unlawful, the Guidelines have the practical effect of removing employees' and employers' rights to

exercise any religious belief whatsoever. In short, the Guidelines eliminate religious harassment in the workplace only by eliminating religion altogether.

If these Guidelines go into effect, they will have a profound effect on daily life in the American workplace. They stand not for freedom of religion, but freedom from all religion. This is not the meaning of the First Amendment, nor the desire of the majority of American citizens. The attitude that religion has no place in the business or public life of individual citizens, so well elucidated in the recent book by Yale Law Professor Stephen Carter, De Culture of Disbelief, is a departure from our history and detrimental to our culture. Freedom of expression of religion is, and should remain, beyond the reach of the Federal Government, where no state action or discrimination is involved.

RECOMMENDATION

I recommend that the EEOC simply remove the category of religion from these Guidelines. If regulation of religious harassment is shown to be necessary, further study should be given to the constitutional and policy implications of applying the same standards to religion -as to other categories unprotected by the Constitution, and of the chilling effect of the extension of potential liability raised by these Guidelines. If any regulations are subsequently proposed dealing with religious harassment, they should be as narrowly drawn as possible so as not to curtail freedom of speech and religious expression.[6]

[6] The writer gratefully acknowledges the assistance of David N. Goldman, Esq., in the preparation of this testimony.

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