



1350 I STREET NW
SUITE 700
WASHINGTON, DC 20005
202-588-5180
NWLC.ORG

November 1, 2023

Charlotte A. Burrows, Chair
U.S. Equal Employment Opportunity Commission
131 M Street, NE
Washington, DC 20507

Submitted via regulations.gov

**RE: RIN 3046–ZA02, Proposed Enforcement Guidance on Harassment in the Workplace
Docket Number EEOC-2023-0005**

Dear Chair Burrows:

The National Women’s Law Center (“NWLC”) submits these comments in support of the U.S. Equal Employment Opportunity Commission’s (“EEOC”) Proposed Enforcement Guidance on Harassment in the Workplace (“Proposed Guidance”).¹ For over fifty years, NWLC has fought for gender justice—in the courts, in public policy, and in our society—working across the issues that are central to the lives of women and girls. Our work has long focused on removing barriers to equal treatment of women in the workplace and ensuring robust enforcement of our nation’s equal employment opportunity (“EEO”) laws, with a particular focus on the needs of women in low-paid jobs, women of color, and other women and gender-expansive workers who face systemic barriers to equality and economic security.

This Proposed Guidance is a long overdue tool that will help ensure the consistent and effective enforcement of the EEO laws protecting against workplace harassment, including Title VII of the Civil Rights Act of 1964 (as amended by the Pregnancy Discrimination Act), the Americans with Disabilities Act, the Age Discrimination in Employment Act, the Genetic Information Nondiscrimination Act, and the Pregnant Workers Fairness Act. The Proposed Guidance builds upon the EEOC’s original 2017 proposal,² and reflects subsequent developments in the law and in our understanding of the stubborn prevalence of, and myriad ways in which, sex-based harassment impacts our workplaces.

¹ 88 Fed. Reg. 67750 (proposed Oct. 2, 2023); U.S. EQUAL EMP. OPPORTUNITY COMM’N, PROPOSED ENFORCEMENT GUIDANCE ON HARASSMENT IN THE WORKPLACE (2023), <https://downloads.regulations.gov/EEOC-2023-0005-0001/content.pdf> [hereinafter Proposed Guidance].

² U.S. EQUAL EMP. OPPORTUNITY COMM’N, PROPOSED ENFORCEMENT GUIDANCE ON UNLAWFUL HARASSMENT (2017), <https://downloads.regulations.gov/EEOC-2016-0009-0001/content.pdf>.

We believe that the Proposed Guidance will promote strong enforcement of federal anti-discrimination laws and forward the reduction of sex-based harassment in the workplace, including sex-based harassment that is also motivated by other protected characteristics. We write to offer our suggestions for strengthening the Proposed Guidance and to encourage the EEOC to finalize the Proposed Guidance swiftly.

I. Sex-Based Workplace Harassment Remains a Pervasive Problem, Underscoring the Continued Need for Robust Enforcement of Anti-Discrimination Law.

The need for robust guidance from the EEOC on the scope of workplace anti-harassment laws—including the obligations on employers to prevent workplace harassment and take prompt corrective action to address any harassment that does occur—cannot be overstated. Sex-based workplace harassment³ is a widespread problem that remains far too common in the United States, impacting workers across industries in every demographic group,⁴ thwarting the ability of workers—and, overwhelmingly, women and LGBTQI+ workers—to enjoy equal opportunity, and undermining their economic security.⁵

In the fiscal years between 2018-2022, individuals filed over 122,000 charges alleging harassment with the EEOC.⁶ Of those, over 58,000 alleged sex-based harassment, including over 33,000 charges alleging sexual harassment.⁷ But these charge statistics do not even begin to represent the extent of sex-based harassment in the workplace. Most workers who experience harassment do not report it, and even fewer will make a formal complaint such as

³ Throughout these comments, we use the term "sex-based harassment" to refer to all harassment that relates to a person's sex, gender, gender identity, or sexual orientation. Sex-based harassment includes "sexual harassment," a term we use here to describe harassing conduct that takes the form of a sexual advance, a request for sexual favors, or any other conduct of a sexual nature, including but not limited to sexual comments or jokes, sexual gestures, distribution of sexual pictures, or sexual touching and assault. Sex-based harassment also, however, includes non-sexual conduct that is based on gender, sex, sexual orientation, or gender identity such as offensive or derogatory remarks about one's sexual orientation or involving sex-based stereotypes.

⁴ *Gender Matters*, CTR. FOR AMERICAN PROGRESS (Aug. 6, 2018), <https://www.americanprogress.org/article/gender-matters/>.

⁵ THE WHITE HOUSE, U.S. NATIONAL PLAN TO END GENDER-BASED VIOLENCE: STRATEGIES FOR ACTION 41 (2023), <https://www.whitehouse.gov/wp-content/uploads/2023/05/National-Plan-to-End-GBV.pdf> (explaining how harassment, including gender-based violence at work, impacts survivors' economic security and noting that "[w]orkers frequently leave their jobs to avoid harassment or are retaliated against if they report this conduct and trainees may drop out of training and apprenticeship programs and go into debt").

⁶ *All Charges Alleging Harassment (Charges Filed With EEOC) FY 2010 - FY 2022*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, <https://www.eeoc.gov/data/all-charges-alleging-harassment-charges-filed-eeoc-fy-2010-fy-2022>.

⁷ *Charges Alleging Sex-Based Harassment (Charges Filed with EEOC) FY 2010-FY2022*, U.S. EQUAL EMP. OPPORTUNITY COMM'N, <https://www.eeoc.gov/data/charges-alleging-sex-based-harassment-charges-filed-eeoc-fy-2010-fy-2022> (last visited Nov. 1, 2023).

an EEOC charge.⁸ Instead, many workers suffer in silence, are prevented from advancing in their careers, or are pushed out of their jobs entirely by the harassment.

Women are also disproportionately affected by workplace sexual harassment.⁹ Some studies indicate as many as 60 percent of women have experienced workplace sexual harassment;¹⁰ in some industries, the numbers are as high as 90 percent.¹¹ Sexual harassment is particularly common for women in low-paid jobs, in male-dominated fields, and in industries where workers have limited, or no, bargaining power in the workplace.¹² For example, women working in the restaurant industry, particularly women who rely on tips to supplement a sub-minimum wage, are among the lowest-paid workers¹³ and experience high rates of sexual harassment from managers, co-workers, and customers.¹⁴ Research also shows that women in industries that are predominately male often work in environments that are more hostile to women;¹⁵ for example, women truck drivers report experiencing rampant sexual violence while on the job.¹⁶ And women with the least amount of power are often at greatest risk of violence and discrimination;

⁸ CHAI R. FELDBLUM & VICTORIA A. LIPNIC, U.S. EQUAL EMP. OPPORTUNITY COMM’N, SELECT TASK FORCE ON THE STUDY OF HARASSMENT IN THE WORKPLACE, REPORT OF CO-CHAIRS CHAI R. FELDBLUM & VICTORIA A. LIPNIC 15-16 (2016), https://www.eeoc.gov/sites/default/files/migrated_files/eeoc/task_force/harassment/report.pdf.

⁹ Between 2018 and 2022, on average, 83.6% of sexual harassment charges were filed by women. *Charges Alleging Sex-Based Harassment (Charges Filed with EEOC) FY 2010-FY2022*, U.S. EQUAL EMP. OPPORTUNITY COMM’N, <https://www.eeoc.gov/data/charges-alleging-sex-based-harassment-charges-filed-eeoc-fy-2010-fy-2022> (last visited Nov. 1, 2023).

¹⁰ FELDBLUM & LIPNIC, *supra* note 8, at 9-10.

¹¹ See e.g. Maria Puente & Cara Kelley, *How Common Is Sexual Misconduct in Hollywood?*, USA TODAY (Feb. 23, 2018), <https://www.usatoday.com/story/life/people/2018/02/20/how-common-sexual-misconduct-hollywood/1083964001/>; HUMAN RIGHTS WATCH, CULTIVATING FEAR: THE VULNERABILITY OF IMMIGRANT FARMWORKERS IN THE US TO SEXUAL VIOLENCE AND SEXUAL HARASSMENT (2012), <https://www.hrw.org/report/2012/05/15/cultivating-fear/vulnerability-immigrant-farmworkers-us-sexual-violence-and#>.

(documenting pervasive sexual harassment and violence among immigrant farmworker women); Waugh, I.M., *Examining the Sexual Harassment Experiences of Mexican Immigrant Farmworking Women*, 16 VIOLENCE AGAINST WOMEN 237, 241 (Jan. 2010) (eighty percent of female farmworkers in California’s Central Valley reported experiencing some form of sexual harassment).

¹² U.S. NATIONAL PLAN TO END GENDER-BASED VIOLENCE, *supra* note 5, at 41.

¹³ JASMINE TUCKER & JULIE VOGTMAN, NAT’L WOMEN’S LAW CTR., WHEN HARD WORK IS NOT ENOUGH: WOMEN IN LOW-PAID JOBS App. I (Jul. 2023), https://nwlc.org/wp-content/uploads/2020/04/%C6%92.NWLC_Reports_HardWorkNotEnough_LowPaid_2023.pdf.

¹⁴ One national survey found that 71 percent of women working in the restaurant industry have experienced sexual harassment at least once while working in the industry. ONE FAIR WAGE & UC BERKELEY FOOD LABOR RESEARCH CENTER UNLIVABLE: INCREASED SEXUAL HARASSMENT AND WAGE THEFT CONTINUE TO DRIVE WOMEN, WOMEN OF COLOR AND SINGLE MOTHERS OUT OF THE SERVICE SECTOR 4 (2021), https://onefairwage.site/wp-content/uploads/2022/04/OFW_Unlivable.pdf.

¹⁵ Kim Parker, *Gender Discrimination More Common for Women in Mostly Male Workplaces*, PEW RESEARCH CENTER (Mar. 7, 2018), <https://www.pewresearch.org/short-reads/2018/03/07/women-in-majority-male-workplaces-report-higher-rates-of-gender-discrimination/>.

¹⁶ Alexia Fernández Campbell and Claire Molloy, *Attacked Behind the Wheel*, THE CENTER FOR PUBLIC INTEGRITY (Dec. 11, 2022), <https://publicintegrity.org/labor/female-drivers-attacked-behind-the-wheel/>.

immigrant farmworker women, for example, too often feel forced to endure conduct ranging from unwanted touching and remarks to sexual assault and rape in the fields.¹⁷

As the EEOC recognizes in the Proposed Guidance, sex-based workplace harassment often intersects with harassment based on other characteristics—something that the #MeToo movement made even more apparent—making it critical that employers and investigators take a holistic and intersectional approach to prevention and enforcement. Since 2018, the National Women’s Law Center Fund has housed the TIME’S UP Legal Defense Fund, which connects individuals facing sex-based workplace discrimination and retaliation with attorneys and funds select workplace sexual harassment cases. A recent analysis of the thousands of requests for assistance received by the Fund between 2018-2020 found that nearly 18 percent of individuals seeking assistance reported experiencing discrimination or harassment based on sex *and* other aspects of their identities; for instance, they were harassed because they were a woman with a disability, a woman of color, or a woman born outside of the United States.¹⁸ Of the same group, 11 percent said that they had experienced both sex and race discrimination at work.¹⁹ These findings comport with our earlier analysis of EEOC charges showing that women of color—and in particular Black women—are disproportionately more likely to experience sexual harassment at work and that many of these women experienced racialized sexual harassment based not only on their sex but also their race.²⁰

Since the EEOC first proposed enforcement guidance on workplace harassment in 2017, changes in the political climate have made LGBTQI+ workers, who were already at greater risk of discrimination at work, even more vulnerable to violence and harassment.²¹ As discussed in more detail below, the experiences of LGBTQI+ people in the workplace today cannot be divorced from the overall climate of hostility that members of this community face in their daily lives in the United States. A record-high number of anti-LGBTQI+ bills have been introduced in state legislatures around the country this year.²² Many of these bills target transgender people specifically. These bills attack LGBTQI+ people across many arenas, from education to public

¹⁷ HUMAN RIGHTS WATCH, CULTIVATING FEAR, *supra* note 11 (documenting pervasive sexual harassment and violence among immigrant farmworker women).

¹⁸ JASMINE TUCKER & JENNIFER MONDINO, NAT’L WOMEN’S LAW CTR. & TIME’S UP LEGAL DEFENSE FUND, COMING FORWARD: KEY TRENDS AND DATA FROM THE TIME’S UP LEGAL DEFENSE FUND 4 (2020), https://nwlc.org/wp-content/uploads/2020/10/NWLC-Intake-Report_FINAL_2020-10-13.pdf.

¹⁹ *Id.* Women of color, especially Black women, are also disproportionately likely to bring sexual harassment charges, across industries, suggesting they are also more likely to experience harassment, across industries. See AMANDA ROSSIE ET AL., NAT’L WOMEN’S LAW CTR., OUT OF THE SHADOWS: AN ANALYSIS OF SEXUAL HARASSMENT CHARGES FILED BY WORKING WOMEN 6 (2018), nwlc.org/wp-content/uploads/2018/08/SexualHarassmentReport.pdf.

²⁰ See, e.g., ROSSIE, *supra* note 19, at 6-9.

²¹ See e.g., Caroline Medina & Lindsay Mahowald, *Discrimination and Barriers to Well-Being: The State of the LGBTQI+ Community in 2022*, CTR. FOR AMERICAN PROGRESS (Jan. 12, 2023), <https://www.americanprogress.org/article/discrimination-and-barriers-to-well-being-the-state-of-the-lgbtqi-community-in-2022/> (noting that an increase in state legislation targeting LGBTQI+ rights has contributed to increased anti-LGBTQI+ rhetoric and violence).

²² Annett Choi, *Record Number of Anti-LGBTQ Bills Have Been Introduced This Year*, CNN (Apr. 6, 2023), <https://www.cnn.com/2023/04/06/politics/anti-lgbtq-plus-state-bill-rights-dg/index.html>.

accommodations to access to healthcare. In addition, according to the FBI, anti-LGBTQ hate crimes have increased dramatically in recent years.²³ Given this climate, the Proposed Guidance is a necessary and critically important tool to help protect the safety, dignity, and rights of LGBTQI+ workers.

II. The Proposed Guidance Correctly Identifies Multiple Forms of Sex-Based Harassment and Should Provide Additional Clarity and Examples.

A. Pregnancy, Childbirth, or Related Medical Conditions

The Proposed Guidance appropriately recognizes that sex-based harassment includes harassment on the basis of “pregnancy, childbirth, or related medical conditions,” including harassment based on an employee’s reproductive decisions.²⁴ Federal case law and EEOC guidance make clear that Title VII’s prohibition of discrimination on the basis of sex includes discrimination on the basis of pregnancy, childbirth, and related medical conditions, including but not limited to the use of contraceptives, infertility and/or the use of fertility treatment, abortion, and the decision not to have an abortion.²⁵

We encourage the EEOC to provide more examples of this form of sex-based harassment in the Final Guidance. This is especially important as workers across the country report being threatened or punished at work for their reproductive health care decisions.²⁶ As states have moved to ban or restrict abortion in the wake of the Supreme Court’s decision to overturn *Roe v. Wade*,²⁷ workers increasingly risk being targeted or harassed on the basis of pregnancy, pregnancy outcomes, and decisions about reproductive health care. It is therefore particularly important for the EEOC to provide examples that illustrate unlawful harassment on this basis—for example, the Final Guidance could include examples of an unmarried woman who becomes pregnant and faces harassment based on the gendered expectation that women should not have sex outside of marriage, or a worker who faces harassment based on their decision to have or not to have an abortion, or to use infertility treatment to start a family.²⁸ We also urge

²³ Brooke Migdon, *FBI Crime Statistics Show Anti-LGBTQ Hate Crimes on the Rise*, THE HILL (Oct. 16, 2023), <https://thehill.com/homenews/lgbtq/4259292-fbi-crime-statistics-show-anti-lgbtq-hate-crimes-on-the-rise/>.

²⁴ Proposed Guidance at 9-10.

²⁵ See generally U.S. Equal Emp. Opportunity Comm’n, *Enforcement Guidance on Pregnancy Discrimination and Related Issues* (2015), <https://www.eeoc.gov/laws/guidance/enforcement-guidance-pregnancy-discrimination-and-related-issues#> (discussing the EEOC’s interpretation of the coverage of the PDA and citing federal case law similarly holding that discrimination based on lactation, infertility treatment, use of contraception, and abortion or the decision not to have an abortion violate the PDA).

²⁶ See, e.g., NAT’L WOMEN’S LAW CTR., *STATES TAKE ACTION TO STOP DISCRIMINATION BASED ON REPRODUCTIVE HEALTH CARE DECISIONS* (Mar. 2022), https://nwlc.org/wp-content/uploads/2022/03/NWLC_FactSheet_State-Laws-Against-Employment-Discrimination-Based-on-Reproductive-Health-Decisions-3.25.22.pdf (describing examples in which employers fired or threatened to fire workers who used assisted reproductive technology, became pregnant outside of marriage, had an abortion, or used birth control).

²⁷ Allison McCann et. al, *Tracking Abortion Bans Across the Country*, N.Y. TIMES, <https://www.nytimes.com/interactive/2022/us/abortion-laws-roe-v-wade.html> (last visited Oct. 26, 2023).

²⁸ For more examples, see NAT’L WOMEN’S LAW CTR., *STATES TAKE ACTION TO STOP DISCRIMINATION*, *supra* note 26.

the EEOC to explicitly recognize that transgender and nonbinary individuals may experience sex-based harassment related to reproductive health decisions, and to include examples to this effect.

In addition, we note that while the Proposed Guidance correctly explains that EEO laws prohibit harassment based on someone seeking or receiving an accommodation based on religion or disability,²⁹ it does not address harassment based on an employee seeking or receiving pregnancy accommodations. We recommend that the Final Guidance reference the protections provided under the new Pregnant Workers Fairness Act³⁰ and provide an example of a worker who is harassed because of their request for, or receipt of, a reasonable accommodation related to pregnancy, childbirth, or a related medical condition.³¹

B. Sexual Orientation, Gender Identity, and Sex Characteristics

We strongly support the Proposed Guidance's express recognition that Title VII's prohibition against sex discrimination includes discrimination based on sexual orientation and gender identity,³² consistent with the U.S. Supreme Court's decision in *Bostock v. Clayton County*³³ and the decisions of lower courts before and after *Bostock*.³⁴ We urge the EEOC to include additional examples of unlawful harassment based on sexual orientation and gender identity in its Final Guidance.

Providing a thorough discussion of harassment against LGBTQI+ workers, including detailed examples, is especially important in light of reports of frequent violence and harassment against this community.³⁵ In a recent survey of LGBTQI+ workers, for example, a staggering 50

²⁹ Proposed Guidance at 8, 14.

³⁰ The Pregnant Workers Fairness Act requires employers to provide reasonable accommodations for workers who have limitations related to pregnancy, childbirth, or related medical conditions, unless the accommodation would impose an undue hardship. 42 U.S.C. § 2000gg et seq.

³¹ The Pregnant Workers Fairness Act prohibits employers from taking "adverse action in terms, conditions, or privileges of employment" against an employee who requests or receives an accommodation under the statute. 42 U.S.C. § 2000gg-1(5).

³² Proposed Guidance at 10-12.

³³ 140 S.Ct. 1731 (2020).

³⁴ See, e.g., *Roberts v. Glenn Indus. Grp., Inc.*, 998 F.3d 111, 121 (4th Cir. 2021); *Doe v. City of Det.*, 3 F.4th 294, 300 n.1 (6th Cir. 2021); *Houlb v. Saber Healthcare Grp.*, No. 1:16CV02130, 2018 WL 1151566, at *2 (N.D. Ohio Mar. 2, 2018); *Tudor v. Se. Okla. State Univ.*, 13 F.4th 1019, 1028 (W.D. Okla. 2017). Even before *Bostock*, the EEOC recognized that harassment based on sexual orientation and gender identity violates Title VII. See, e.g., U.S. EQUAL EMP. OPPORTUNITY COMM'N, FACT SHEET: NOTABLE EEOC LITIGATION REGARDING TITLE VII & DISCRIMINATION BASED ON SEXUAL ORIENTATION AND GENDER IDENTITY, <https://www.eeoc.gov/fact-sheet-notable-eeoc-litigation-regarding-title-vii-discrimination-based-sexual-orientation-and> (last visited Oct. 23, 2023).

³⁵ See *FBI Releases 2022 Hate Crime Statistics*, U.S. DEP'T OF JUSTICE (last updated Oct. 18, 2023), <https://www.justice.gov/hatecrimes/hate-crime-statistics> (the most recent hate crimes data compiled by the FBI, showing that hate crimes based on sexual orientation and gender identity increased sharply compared to the prior year with a 13.8% increase in reports based on sexual orientation and a 32.9% increase in reported hate crimes based on gender identity); Medina & Mahowald, *supra* note 21 (describing high rates of discrimination and

percent of respondents reported experiencing workplace discrimination or harassment in the past year based on their sexual orientation, gender identity, or intersex status.³⁶ The number is even higher—70 percent—for transgender workers.³⁷ Not surprisingly, LGBTQI+ workers of color and those with disabilities have an even greater likelihood of experiencing workplace harassment, including verbal, sexual, and physical harassment.³⁸ Many LGBTQI+ employees also live and work in states, counties, and towns that have or are actively working to implement policies that undermine legal protections for LGBTQI+ people.³⁹ For example, in Florida, a state law passed in 2023 prohibits transgender, nonbinary, and some intersex staff in public schools from using titles or pronouns consistent with their affirmed sex and gender identity.⁴⁰ In this current landscape, employers will benefit from clear guidance regarding conduct and practices prohibited under federal law. Moreover, the increasing number of workplaces seeking to implement transgender- and nonbinary-inclusive policies⁴¹ will benefit from more detailed examples of harassment based on gender identity, as this can help inform their own internal policies and training.

We appreciate that the Proposed Guidance provides examples of harassment on the basis of sexual orientation and gender identity. Specifically, we strongly support the inclusion of Example 4, which recognizes that intentional and repeated misgendering and use of incorrect names constitutes unlawful harassment.⁴² Misgendering, use of incorrect names, and other disaffirming practices are associated with negative mental health impacts such as anxiety, depression, and increased gender dysphoria.⁴³ Repeated instances of misgendering can render

harassment reported by LGBTQI+ adults in a 2022 survey); BRAD SEARS ET AL., WILLIAMS INST., LGBT PEOPLE'S EXPERIENCES OF WORKPLACE DISCRIMINATION AND HARASSMENT 2 (2021), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Workplace-Discrimination-Sep-2021.pdf> (discussing findings from a 2021 survey of workplace discrimination and harassment against LGBT adults).

³⁶ Medina & Mahowald, *supra* note 21.

³⁷ *Id.*

³⁸ *Id.* at Figure 11.

³⁹ See, e.g., HUMAN RIGHTS CAMPAIGN, LGBTQ+ AMERICANS UNDER ATTACK: A REPORT AND REFLECTION ON THE 2023 STATE LEGISLATIVE SESSION (2023), <https://hrc-prod-requests.s3-us-west-2.amazonaws.com/Anti-LGBTQ-Legislation-Impact-Report.pdf> (describing anti-LGBTQ+ state bills introduced in 2023).

⁴⁰ HB 1069 (Fla. 2023). The statute defines “sex” to mean “the classification of a person as either female or male based on the organization of the body of such person for a specific reproductive role, as indicated by the person's sex chromosomes, naturally occurring sex hormones, and internal and external genitalia present at birth” and prohibits public school employees and contractors from using their pronouns or titles if they do not correspond to their sex as defined by the statute. Fla. Stat. §§ 1000.21(9), 1000.071(3) (2023). See also Marlene Lenthag, *Florida District Bars Trans Teachers From Using Preferred Pronouns and Bathrooms to Comply with State Law*, NBC NEWS (Aug. 8, 2023), <https://www.nbcnews.com/news/us-news/florida-district-bars-trans-teachers-using-preferred-pronouns-bathroom-rcna98734>.

⁴¹ See, e.g., *Transforming Policies to Practice: A New Toolkit To Promote Transgender Inclusion In The Workplace*, HUMAN RIGHTS CAMPAIGN (Nov. 16, 2016), <https://www.hrc.org/news/transforming-policies-to-practice-a-new-toolkit-to-promote-transgender-incl> (noting that large companies are increasingly adopting policies and practices to promote equal treatment for transgender employees).

⁴² Proposed Guidance at 12-13.

⁴³ See E. Coleman et. al, *Standards of Care for the Health of Transgender & Gender Diverse People, Version 8*, INT'L J. OF TRANSGENDER HEALTH at S105, S107-108, S126 (2022),

a work environment so untenable and unsafe that a transgender or nonbinary employee must transfer or resign to escape the harassment.⁴⁴ In addition to Example 4, we also support the inclusion of Example 8 in the Proposed Guidance, which illustrates that derogatory comments about LGBTQI+ people subject LGBTQI+ employees to harassment even if the comments are not targeted at the employees themselves.⁴⁵

We urge the EEOC to provide additional examples of harassment based on sexual orientation and gender identity in Section II.A. and throughout the Final Guidance to reflect the wide range of experiences of LGBTQI+ workers and the many manifestations of anti-LGBTQI+ animosity in the workplace. LGBTQI+ individuals report high rates of verbal harassment (including offensive comments or jokes), sexual harassment (including unwanted sexual attention, sexual coercion, and crude behavior), and physical harassment (including threats and assault)—it is important that the Final Guidance provide examples that reflect this full range of conduct.⁴⁶ We appreciate that the Proposed Guidance provides a list of conduct that would constitute harassment on the basis of sexual orientation and gender identity,⁴⁷ and we encourage the EEOC to build on this list by providing more detailed fact patterns that illustrate these forms of harassment. These fact patterns can be drawn from cases already cited in the Proposed Guidance.⁴⁸

We also encourage the EEOC to address harassment based on sex characteristics, including intersex variations. Intersex individuals frequently experience discrimination and harassment, including in the workplace. Many intersex individuals report “that they have ‘made specific decisions about where to work’ in order to avoid discrimination,” and that employment discrimination has impacted their “financial well-being.”⁴⁹ The reasoning in cases such as *City of Los Angeles Dep't of Water & Power v. Manhart*, *Price Waterhouse v. Hopkins*, and *Bostock* makes clear that Title VII's prohibition against sex discrimination applies to intersex

<https://www.tandfonline.com/doi/pdf/10.1080/26895269.2022.2100644>. The World Professional Association of Transgender Health *Standards of Care for the Health of Transgender & Gender Diverse People (Version 8)* repeatedly recommends referring to transgender and non-binary individuals by pronouns and titles consistent with their gender identity. See *id.* at S13-14, S84, S105, S107, S126 (outlining recommendations for providers in health care and institutional settings).

⁴⁴ See, e.g., *Eller v. Prince George's Cnty. Pub. Sch.*, 580 F.Supp. 3d. 154, 161, 165 (D. Md. 2022) (describing repeated misgendering and physical assault of transgender teacher who developed post-traumatic stress disorder and was transferred to at least two different schools to escape harassment before ultimately resigning).

⁴⁵ Proposed Guidance at 22.

⁴⁶ See Medina & Mahowald, *supra* note 21 (noting that in a 2022 survey, 37% of LGBTQI+ respondents reported experiencing verbal harassment; 25% reported experiencing sexual harassment; and 15% reported experiencing physical harassment); see also SEARS, *supra* note 35 (providing examples of harassment experienced by LGBT workers).

⁴⁷ Proposed Guidance at 10-11

⁴⁸ See, e.g., *Eller*, 580 F. Supp. at 173 (finding that a reasonable jury could find that harassment was sufficiently severe or pervasive as to change the conditions of employment where a transgender teacher was subjected to derogatory epithets, repeated and intentional misgendering, crude statements, threats of physical violence, and physical assault).

⁴⁹ Caroline Medina & Lindsay Mahowald, *Key Issues Facing People With Intersex Traits*, CTR. FOR AMERICAN PROGRESS (Oct. 26, 2021), <https://www.americanprogress.org/article/key-issues-facing-people-intersex-traits/>.

discrimination. For example, the Court in *Manhart* clarified that Title VII's sex stereotyping framework rejects an employer's assumptions about any generalization about sex, whether the assumption involves a physical characteristic, behavior, or statistical findings.⁵⁰ Moreover, applying the reasoning in *Bostock*, discrimination on the basis of sex characteristics, including intersex traits, inherently requires an employer to discriminate "because of sex" and therefore violates Title VII.⁵¹ Federal courts have recognized that intersex discrimination falls within the scope of Title VII and similar anti-discrimination laws.⁵² The EEOC's Final Guidance should recognize these protections under Title VII and include a discussion of intersex people and people with sex variations in the workplace. The Final Guidance should also clarify the application of GINA to intersex discrimination.⁵³

C. Survivors of Gender-Based Violence

We urge the EEOC to explicitly address and provide examples of prohibited sex-based harassment against survivors of domestic violence, dating violence, sexual assault, and stalking in the Final Guidance. Gender-based violence (GBV) is prevalent in the United States⁵⁴—for example, in the 2016-2017 National Intimate Partner and Sexual Violence Survey, over two in five women reported being subjected to violence by an intimate partner in her lifetime,⁵⁵ one in four women reported completed or attempted rape victimization in her lifetime, and nearly

⁵⁰ 435 U.S. 702, 708 (1978) (striking pension plan where cost to women was more, even though it was based on actuarial mortality differences among the sexes, and observing, "Even a true generalization about a class is an insufficient reason to disqualify an individual to whom the generalization does not apply."); *see id.* at 709 (stressing Title VII rejects "[p]ractices that classify employees in terms of . . . sex" because they ordinarily preserve generalized and "traditional assumptions" about sex "rather than thoughtful scrutiny of individuals."); *accord Arizona Governing Comm. v. Norris*, 463 U.S. 1073, 1079-86 (1983); *id.* at 1085 n.15 (Title VII "clearly would not permit" an employer's use of sex as a proxy for an employment qualification, "regardless of whether a statistical correlation could be established.").

⁵¹ 140 S.Ct. 1731, 1741-42 (2020).

⁵² *See, e.g., A.C. v. Metro. Sch. Dist. of Martinsville*, 75 F.4th 760, (7th Cir. Aug. 1, 2023) (stating in dicta that intersex individuals are entitled to protection under Title IX); *Hughes v. Home Depot, Inc.*, 804, F.Supp.2d 223 (D.N.J. 2011); *Kastl v. Maricopa County Community College District*, No. 02-1531, 2004 WL2008954 at *2 & n. 5 (D. Ariz. June 3, 2004) (stating that Title VII's prohibition of discrimination for failure to conform to sex stereotypes applies to stereotypes about anatomical features), *summ. judg. granted on other grounds*, No. CV-02-1531-PHX-SRB (D. Ariz. Aug. 22, 2006); *see also Hecox v. Little*, 2023 U.S. App. LEXIS 21541 (9th Cir. Aug. 17, 2023) (recognizing that the concept of "biological sex" includes intersex variations); *Schroer v. Billington*, 424 F. Supp. 2d 203, 213 n.5 (D.D.C. 2006) (same).

⁵³ 42 U.S.C. § 2000ff-1(a).

⁵⁴ The U.S. National Plan to End Gender Based Violence defines gender-based violence to refer to "any harmful threat or act directed at an individual or group based on actual or perceived sex, gender, gender identity, sex characteristics, or sexual orientation. GBV encompasses, but is not limited to, physical, sexual, psychological, emotional, economic, and technological abuse or harm; threats of such acts; harassment; coercion; and arbitrary deprivation of liberty." The term includes sexual violence, intimate partner violence, stalking, and other interconnected forms of violence and coercive control. U.S. NATIONAL PLAN TO END GENDER-BASED VIOLENCE, *supra* note 5, at 13.

⁵⁵ *See* RUTH LEEMIS ET AL., THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2016/2017 REPORT ON INTIMATE PARTNER VIOLENCE 5 (2022), https://www.cdc.gov/violenceprevention/pdf/nisvs/nisvsreportonipv_2022.pdf.

one in two women reported unwanted sexual contact victimization in her lifetime.⁵⁶ While GBV affects all populations, women of color, Native women, transgender individuals, and people with disabilities are disproportionately impacted.⁵⁷ GBV can have significant effects on the workplace, and sex-based stereotypes of survivors can lead to workplace discrimination—including harassment—and retaliation.⁵⁸

The EEOC has recognized that workplace discrimination and harassment against survivors of GBV may violate EEO laws against workplace discrimination. For example, the EEOC has previously explained that discrimination and harassment against survivors of domestic and dating violence, sexual assault, and stalking can violate Title VII because such discrimination and harassment is rooted in gender stereotypes.⁵⁹ In addition, discrimination and harassment against survivors based on actual or perceived impairments resulting from GBV can violate the ADA.⁶⁰ Further, in its Strategic Enforcement Plan for FY 2024-2028, the EEOC expanded its list of vulnerable workers and persons from underserved communities to include survivors of gender-based violence.⁶¹ We urge the EEOC to include language and examples⁶² of prohibited harassment against survivors of GBV in the Final Guidance to make clear that sex-based harassment encompasses harassment based on sex-based expectations about how survivors of domestic violence, stalking, or sexual violence usually act, appear, or behave.

D. Intersectional Harassment

We appreciate the Proposed Guidance's recognition that harassment may be based on multiple protected characteristics or on the intersections of protected characteristics.⁶³ In light of a growing body of research suggesting the prevalence of intersectional harassment,⁶⁴ we urge

⁵⁶ See KATHLEEN C. BASILE, ET AL., THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2016/2017 REPORT ON SEXUAL VIOLENCE 3 (2022), <https://www.cdc.gov/violenceprevention/pdf/nisvs/nisvsreportonsexualviolence.pdf>.

⁵⁷ U.S. NATIONAL PLAN TO END GENDER-BASED VIOLENCE, *supra* note 5, at 18-19.

⁵⁸ See, e.g., *id.* at 41-42; Deborah A. Widiss, *Addressing the Workplace Effects of Intimate Partner Violence* 9, 11 (Maurer Sch. of L., Ind. Univ. Bloomington, Research Paper No. 379, 2019), <https://papers.ssrn.com/abstract=3056431>.

⁵⁹ *Questions and Answers: The Application of Title VII and the ADA to Applicants or Employees Who Experience Domestic or Dating Violence, Sexual Assault, or Stalking*, U.S. EQUAL EMP. OPPORTUNITY COMM'N (Oct. 12, 2012), <https://www.eeoc.gov/laws/guidance/questions-and-answers-application-title-vii-and-ada-applicants-or-employees-who>.

⁶⁰ *Id.*

⁶¹ U.S. EQUAL EMP. OPPORTUNITY COMM'N, STRATEGIC ENFORCEMENT PLAN FISCAL YEARS 2024-2028 (2023), <https://www.eeoc.gov/sites/default/files/2023-09/SEP%20FY%2020242028%20FINAL%20APPROVED.pdf>.

⁶² For examples, see *Questions and Answers*, *supra* note 59.

⁶³ Proposed Guidance at 17.

⁶⁴ See generally Joan C. Williams, *Double Jeopardy? An Empirical Study with Implication for the Debates over Implicit Bias and Intersectionality*, 37 HARV. J. L. & GENDER 185 (2014) (describing how experiences of gender discrimination and harassment in the workplace vary by race); ROSSIE, *supra* note 19, at 8 (analyzing sexual harassment charges filed with the EEOC between 2012 and 2016, and noting that "The sexual harassment charge data also suggests that many women experience racialized sexual harassment, or harassment based not only on their sex but also their race."); see also FELDBLUM & LIPNIC, *supra* note 8, at 13-14 (discussing research highlighting

the EEOC to provide additional examples that illustrate the dynamics of intersectional harassment. In particular, the Final Guidance could include examples of harassment involving racialized sexual references or slurs based on stereotypes about women from particular racial backgrounds.⁶⁵ It could also include examples of farmworkers who are subjected to harassment based on their identity as immigrant women or women from a particular national origin.⁶⁶

E. Associational Discrimination

We also encourage EEOC to clarify its discussion of “associational discrimination.”⁶⁷ In particular, the Proposed Guidance notes that an association “may include, but is not limited to, *close* familial relationships, such as marriage, or *close* friendship with another individual belonging to a protected group.”⁶⁸ Federal courts have held that there is no required threshold for closeness,⁶⁹ and this focus on the closeness of the relationship may therefore create confusion without further explanation. As explained in *Barrett v. Whirlpool Corp.*, the closeness of the association should be considered in determining “whether the plaintiff has established a hostile work environment, not whether he is eligible for the protections of Title VII in the first place.”⁷⁰ Thus the closeness of the association—in light of the totality of the circumstances—is relevant to whether the harassing conduct is subjectively and objectively hostile, but a “variety of types of association,” not just ones that are “significant” can form the basis of a Title VII claim.⁷¹ In the Final Guidance, we encourage the EEOC to provide a more thorough explanation of how the closeness of the relationship should be considered in assessing claims of associational harassment, including a clear statement that the association need not reach a threshold level of “closeness” in order to be cognizable under Title VII.

the “intersectional nature of harassing behavior” and indicating that “targets of harassment often experience mistreatment in multiple forms, such as because of one’s race and gender, or ethnicity and religion.”).

⁶⁵ See, e.g., Jamillah Bowman Williams, *Beyond Sex-Plus: Acknowledging Black Women in Employment Law and Policy*, 25 EMPLOYEE RTS. & EMP. POL’Y J. 13, 16-17 (2021) (describing cases involving intersectional harassment experienced by Black women).

⁶⁶ HUMAN RIGHTS WATCH, CULTIVATING FEAR, *supra* note 11, at Section III (noting that farmworkers who are recent immigrants or members of indigenous communities are particularly vulnerable to sexual harassment and may be subjected to discrimination and harassment based on stereotypes about their intersectional identities—for example, the report notes, “Many indigenous workers are from the Oaxaca region, and the discrimination against them extends to stereotypes about Oaxacan women and their sexuality.”).

⁶⁷ Proposed Guidance at 16-17.

⁶⁸ *Id.* at 17 (emphasis added).

⁶⁹ See, e.g., *Kengerski v. Harper*, 6 F.4th 531, 534-35, 539 (3d Cir. 2021) (noting that associational discrimination “is not limited to close or substantial relationships”); *Drake v. Minnesota Min. & Mfg. Co.*, 134 F.3d 878, 884 (7th Cir. 1998) (noting that “an objective ‘degree of association’” is irrelevant to whether the plaintiff stated a claim of associational discrimination); *Barrett v. Whirlpool Corp.*, 556 F.3d 502, 513 (6th Cir. 2009) (concluding in a case involving association among co-workers with whom the complainants did not have a close relationship outside of work that if other elements of the Title VII claim are made, then “the degree of association is irrelevant.”).

⁷⁰ *Barrett*, 556 F.3d at 513.

⁷¹ *Id.* at 512-13.

III. The Final Guidance Should Expand and Clarify Its Discussion of Causation.

A. Causation in Claims Involving an Explicit Change to a Term or Condition of Employment

The Proposed Guidance explains that its discussion of causation is focused specifically on hostile work environment claims, and through a footnote it refers readers to the EEOC's Enforcement Guidance on National Origin Discrimination for a discussion of how to assess harassment claims involving an explicit change to the terms or conditions of employment.⁷² The omission of any direct discussion of causation with regard to claims involving an explicit change to a term or condition of employment will create confusion about how to properly evaluate such claims, particularly when they occur outside the context of national origin discrimination. Rather than cross-referencing a separate guidance document that does not purport to discuss the range of protected characteristics relevant to workplace harassment analysis, and doing so in a footnote rather in the text, we encourage the EEOC to provide a separate discussion of causation as it relates to this category of unlawful harassment in the Final Guidance, including a clear statement that tying a change in the terms or conditions of employment to the refusal of sexual advances establishes causation.

B. Causation Issues Related to Sex-Based Harassment

The Proposed Guidance identifies three avenues for establishing causation in a sexual harassment claim: "(1) explicit or implicit proposals of sexual activity; (2) general hostility toward members of the complainant's sex; and (3) comparative evidence showing how the harasser treated persons who shared the complainant's sex compared to the harasser's treatment of those who did not."⁷³ We appreciate that the Proposed Guidance emphasizes that these three categories are merely examples and are not exclusive.⁷⁴

We recommend that the EEOC rephrase the first category above to read "implicit or explicit sexual overtures, including sexual assault," rather than "explicit or implicit proposals of sexual activity," to encompass a broader range of unlawful harassment that is based on sex. The Proposed Guidance appropriately recognizes earlier in its discussion of causation that "physical assaults that are targeted based on a protected characteristic" are facially discriminatory.⁷⁵ In addition to rephrasing the first avenue for establishing causation to clearly encompass sexual assault, we encourage the EEOC to restate this principal regarding physical assault in its discussion of causation issues related to sex-based harassment to make clear that sexual assault constitutes harassment based on sex.

⁷² Proposed Guidance at 20, n. 60.

⁷³ *Id.* at 27.

⁷⁴ *Id.* at 27 & n. 89 (citing *EEOC v. Boh Bros. Constr. Co.*, 731 F.3d 444, 455-56 (5th Cir. 2013); *Medina v. Income Support Div.*, 413 F.3d 1131, 1135 (10th Cir. 2005); *Pedroza v. Cintas Corp. No. 2*, 397 F.3d 1063, 1068 (8th Cir. 2005)).

⁷⁵ Proposed Guidance at 21.

IV. The Final Guidance Should Clarify the Discussion of Harassment Involving an Explicit Change to the Terms, Conditions, or Privileges of Employment.

The Proposed Guidance distinguishes harassment that results in an “explicit change to the terms or conditions of employment” from harassment that does not result in an “explicit change” but changes the terms or conditions of employment by creating a hostile work environment.⁷⁶ We encourage the EEOC to further clarify what constitutes an “explicit change to the terms or conditions of employment” in the Final Guidance.

In particular, the discussion in Section III.A. of the Proposed Guidance regarding harassment that results in an “explicit change” to the terms or conditions of employment could be read to suggest that in order to establish a cognizable claim, an employee must show that the employer *expressly* stated that the submission to or refusal of sexual advances was the basis for the change to the terms and condition of employment.⁷⁷ This would be a misrepresentation of the law, and the Final Guidance should make clear that such an express statement is not required to establish a claim that harassment resulted in an explicit change to the terms or conditions of employment.⁷⁸ Instead, an employee can establish harassment by showing that a change to the terms or conditions of employment was made as a result of the employee’s rejection of sexual advances. For example, if a supervisor fired an employee the day after she refused his sexual advances because of her refusal, then this would represent an “explicit change to the terms or conditions of employment,” even if the supervisor did not expressly state that the employee was fired for refusing his advances.

V. The Final Guidance Should Provide More Clarity Concerning the Standard for Showing a Hostile Work Environment.

A. Clarify How to Evaluate the “Totality of the Circumstances”

In discussing whether conduct creates a hostile work environment, the EEOC correctly notes in Section III.A. that the determination should be made based on the “totality of the circumstances, and no single factor is determinative.”⁷⁹ However, as the EEOC explains in greater detail in its discussion of severity, a single incident of harassing conduct may constitute

⁷⁶ *Id.* at 28.

⁷⁷ *Id.* at 28-29 (providing an example in which an employer makes an explicit threat to deny a job benefit if an employee rejects his sexual advances, and then denies the job benefit).

⁷⁸ Federal courts have found that plaintiffs established cognizable claims of harassment where they rejected sexual advances and subsequently experienced a change to the terms or conditions of employment, even in the absence of an express statement that the rejection was the basis for the change. *See, e.g., Molnar v. Booth*, 229 F.3d 593, 597-98, 600-601 (7th Cir. 2000) (concluding that harassment of an art teacher led to a tangible change to the terms and conditions of her employment when a school principal took back supplies he had given her and gave her a negative evaluation after she rejected his advances); *Hulsey v. Pride Restaurants LLC*, 367 F.3d 1238 (11th Cir. 2004) (stating that plaintiff’s allegations, if true, would be sufficient to establish harassment resulting in a tangible employment action, where plaintiff was terminated immediately after rejecting a supervisor’s sexual advances).

⁷⁹ Proposed Guidance at 30.

workplace harassment.⁸⁰ To avoid confusion in interpreting these two guidelines, we recommend that the EEOC explain within Section III.A. that the totality of the circumstances refers to the factual context in which the conduct occurred, but that within that context, a single incident alone may be enough to create a hostile work environment.

We also encourage the EEOC to lay out a more expansive list of circumstances that should be considered when evaluating the “totality of the circumstances” in which conduct occurred. We appreciate that the EEOC indicates that it lists only “some” circumstances to be considered, but explicitly naming only certain circumstances may mistakenly give the impression that these particular circumstances are somehow more salient to the analysis. We therefore urge the EEOC to specify that the list in Section III.A. is not exhaustive, and that the Final Guidance also include the following:

- The location where the conduct occurred;
- The nature of the conduct, including whether the conduct involved displaying or distributing pictures or photographs;
- The number of individuals engaged in the conduct; and
- The number of individuals who witnessed the conduct.

These circumstances are noted, separately, in various parts of the Proposed Guidance,⁸¹ but it would be helpful to include these in the overarching explanation of “totality.”

In addition, we encourage the EEOC to include an additional example in Section III.A. that illustrates a hostile work environment, based on the totality of the circumstances, involving an intersectional claim: a situation in which the “harassing acts are based on multiple protected characteristics, and the acts are sufficiently related to be considered part of the same hostile work environment.”⁸² Such an example will help assist stakeholders in identifying, and taking action to address, situations in which the harassing conduct is based, for example, on the fact of being an Asian-American woman versus being based solely on an employee’s identity as Asian-American or solely on the employee’s sex.

⁸⁰ *Id.* at 35-37.

⁸¹ *See., e.g., id.* at 43, n.162 (citing *Jenkins v. Univ. of Minn.*, 838 F.3d 938 (8th Cir. 2016) to illustrate that “surrounding circumstances,” which included harassment occurring in a remote location are relevant to determining whether the conduct was objectively hostile); *id.* at 36 (noting that displaying certain imagery, “such as a swastika, an image of a Klansman’s hood, or a noose” or “the use of animal imagery” can create a hostile work environment); *id.* at 45 (discussing pornographic or sexually suggestive imagery); *id.* at 55 (discussing “the non-consensual distribution of real or computer-generated intimate images”); *id.* at 26 (including in Example 11 a fact pattern where coworkers collectively made offensive comments and excluded victim from work events); *id.* at 35 (“some conduct may be more severe if it occurs in the presence of others, such as the complainant’s coequals, subordinates, or clients”).

⁸² *Id.* at 30-31.

B. Clarify the Concept of Severity

Although we support the Proposed Guidance's general discussion of severity, which reflects the importance of focusing on the totality of the circumstances,⁸³ this section of the Proposed Guidance could be strengthened to provide more clarity. In particular, we recommend that the Final Guidance discuss more explicitly how considering the "totality of the circumstances" impacts the question of whether conduct was "severe," and explain more fully that a complainant need not experience any one type of conduct, under any particular set of circumstances, for the conduct to be considered sufficiently severe to create a hostile work environment.

As discussed above, we appreciate the EEOC's clear explanation that a single incident of harassment may be severe enough to create a hostile work environment. Although the list of examples provided in the Proposed Guidance is illustrative of what courts have already found to be sufficiently severe to establish a hostile work environment based on a single incident,⁸⁴ the Final Guidance should clarify that this list is not exhaustive of circumstances in which a single incident *could* establish a hostile work environment. Whether a single incident can form the basis of a hostile work environment is dependent on the totality of the circumstances. The truncated discussion of a hostile work environment based on a single incident of harassment may give the incorrect impression that the incidents described in the bulleted list of examples are the *only* situations in which a single incident could give rise to a hostile work environment.

In addition, we appreciate the EEOC's acknowledgment more generally that "harassment by a supervisor or other individual with authority over the complainant" can have "more impact on a complainant's work environment" than harassment by someone who does not have authority over the complainant.⁸⁵ As we previously noted in our 2017 comments to an earlier draft of the Proposed Guidance, supervisors with the authority to direct daily work activities wield a significant amount of power that they can use to wreak havoc in the lives of their subordinates, particularly in low-wage jobs and hourly or shift work. In such industries, lower-level supervisors can harass or retaliate against an employee by reducing hours, denying breaks, or assigning a worker to an undesirable shift.⁸⁶ We therefore agree that this power dynamic will typically make harassing conduct sufficiently severe to create a hostile work environment.

At the same time, it is important that the Final Guidance also clearly explain that harassing conduct by a co-worker or non-employee, such as a customer or client, could also have significant impact on a complainant's work environment. In other words, the severity of the conduct is not necessarily diminished because the conduct did not originate from a supervisor or an employee with authority over the complainant. Instead, one must examine the totality of

⁸³ *Id.* at 35 (noting that "the severity of harassment depends on all of the circumstances...").

⁸⁴ *Id.* at 36-37.

⁸⁵ *Id.* at 34.

⁸⁶ NAT'L WOMEN'S LAW CTR., COMMENTS ON PROPOSED ENFORCEMENT GUIDANCE ON UNLAWFUL HARASSMENT, EEOC-2016-0009-0001 at 8-9, <https://nwlc.org/wp-content/uploads/2017/03/NWLC-Harassment-guidance-comment-final.pdf>.

the circumstances. For example, a restaurant server who is subject to inappropriate touching by a repeat customer may have experienced harassing conduct sufficient to create a hostile work environment; the fact that the customer, on whom she relies for tips, is the harasser, versus her shift manager, does not render the conduct insufficiently severe to create a hostile work environment.⁸⁷

Similarly, the Proposed Guidance appropriately notes that the “harassment is generally more probative of a hostile environment if it occurs in the complainant’s presence than if the complainant learns about it secondhand,” yet it may also be true that harassment that occurs outside the presence of the complainant could constitute a hostile work environment. For example, an employee is told that her colleagues have stopped inviting her to high-profile, lucrative client meetings after they each received emails from her supervisor containing sexually explicit images of her. This conduct could still be severe enough to constitute a hostile work environment even though the employee learned of the harassing conduct secondhand.

Given these complexities, we also urge the EEOC to link the discussion of severity (as well as pervasiveness) in the Proposed Guidance more closely to the discussion of whether the harassing conduct changed the terms and conditions of employment by creating a subjectively and objectively hostile work environment. As the EEOC correctly notes, Title VII does not create a minimum threshold of severity;⁸⁸ the relevant inquiry is whether the conduct unreasonably changed the terms and conditions of employment. Properly understood, the inquiry into severity or pervasiveness of harassment is meant to help guide that analysis, not to replace it or impose additional requirements that must be met to demonstrate unlawful harassment.⁸⁹ Yet by considering the severe or pervasive standard separately in Section III.B. from the discussion of a subjectively and objectively hostile work environment in Section III.C., the Proposed Guidance may contribute to continued misunderstanding of how to evaluate the hostile work environment claim. In addition to more closely linking the discussion of severity and pervasiveness to the discussion of whether conduct creates a hostile work environment, we encourage the EEOC to remove references to a “severe-or-pervasive standard,”⁹⁰ which implies a separate threshold for severity and pervasiveness, and to instead emphasize that the inquiry is whether conduct is sufficiently severe or pervasive to create a hostile work environment.⁹¹

⁸⁷ Importantly, the question of whether the conduct was severe is distinct from whether an employer is liable for the conduct.

⁸⁸ Proposed Guidance at 32.

⁸⁹ *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 67 (1986) (explaining that “not all workplace conduct that may be described as ‘harassment’ affects a ‘term, condition, or privilege’ of employment within the meaning of Title VII” and using “severe or pervasive” to describe the type of conduct that would change the terms and conditions of employment).

⁹⁰ See, e.g., Proposed Guidance at 30, 45.

⁹¹ For example, we recommend that the EEOC rephrase its summary of the holding in *Oncale v. Sundowner Offshore Servs., Inc.*, which does not outline a “requirement of severity or pervasiveness” but instead reiterates the principle that “Conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment...is beyond Title VII’s purview.” 523 U.S. 75, 81 (1998) (quoting *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 21 (1993)); Proposed Guidance at 30 & n. 107.

C. Strengthen the Discussion of Objective Hostility

To be actionable under EEO laws, harassing conduct must be both subjectively and objectively hostile. The Proposed Guidance clearly explains that whether conduct is objectively hostile is dependent on whether a reasonable person in the complainant's position would find the conduct hostile.⁹² We strongly support the Proposed Guidance's discussion of this inquiry, including the attention to the "personal or situational characteristics of a particular complainant"⁹³ and the overall context within which the conduct occurs. We believe, however, that the Final Guidance could be strengthened by providing additional clarity and examples.

We understand the "personal or situational characteristics of a particular complainant," to encompass the power differential between the complainant and the individual engaged in harassing conduct,⁹⁴ as well as the particular vulnerability of the individual complainant.⁹⁵ The Final Guidance, however, should make clear that the term "personal or situational characteristics" is not limited to the protected characteristics found in the EEO laws.⁹⁶ We also encourage the EEOC to include additional examples in the text of this particular section of the Final Guidance that more clearly discuss the "personal or situational characteristics of a particular complainant," including examples featuring an employee who is the only woman, or one of only a few women, in a predominately male workplace; persons with limited English proficiency; and survivors of gender-based violence.

We also appreciate the Proposed Guidance's strong discussion of the relevancy of the context in which harassing conduct occurs. Much of this discussion is in Section II.B. on causation, including examples of when the discriminatory character of conduct becomes clear only when examined in the "larger social context," such as the use of the term "boy" to refer to a Black man or use of the term "you people" in certain situations.⁹⁷ We urge the EEOC to incorporate that discussion into Section III.C.4. and link it to the reasonable person in the complainant's position.

⁹² Proposed Guidance at 42.

⁹³ *Id.* at 43.

⁹⁴ In explaining the "personal or situational characteristics of a particular complainant," the Proposed Guidance references a graduate student in a remote location being harassed by an expert in her field of study upon whom the student's "future was dependent" and a teenager being harassed by an adult. *Id.* at 43-44 & n. 162. In both situations, there is a significant power differential between the victim of the harassment and the harasser.

⁹⁵ This understanding is based on the example in the Proposed Guidance of an undocumented worker reluctant to report abuse because of fear of deportation. *See Id.* at 44.

⁹⁶ For example, in *Jenkins v. Univ. of Minnesota*, a sexual harassment case cited in the Proposed Guidance, the "personal or situational characteristics" to be considered included the "geographic isolation of the conduct," the fact that the victim, at the time of the harassing conduct, was "dependent on [the harasser] for her [physical] survival," and "her academic future was dependent upon him as well." None of these characteristics are connected to the victim's sex. 838 F.3d 938, 945-46 (8th Cir. 2016).

⁹⁷ Proposed Guidance at 24.

We also encourage the EEOC to provide more clarity on how to evaluate conduct “in the context of the specific work environment.”⁹⁸ The EEOC correctly notes that “there is no ‘crude environment’ exception to Title VII” and that “prevailing workplace culture does not excuse discriminatory conduct.”⁹⁹ The Proposed Guidance, however, does not provide any further discussion of the “context of the specific work environment,” within Section III.C.4., which may suggest, erroneously, that considering the context of the work environment is limited to consideration of “offensive” work environments to determine whether conduct was objectively hostile. We therefore urge the EEOC to include a more complete discussion of the “context of the specific work environment,” to include consideration of the location of the work environment; whether the work environment is isolated, decentralized, or homogenous; whether there are significant power disparities in the workplace; whether the work environment is dangerous or involves hazards; etc.¹⁰⁰

Finally, we appreciate the Proposed Guidance’s acknowledgement that “unwelcomeness may. . . be relevant to the showing of objective hostility.”¹⁰¹ We encourage the EEOC to make clear, however, that notice of unwelcomeness is not necessary to show objective hostility, including by moving the clarification in Footnote 169, which explains that the plaintiff does not need to “prove ‘unwelcomeness’ as a separate element of the prima facie case,” into the text of the Final Guidance.¹⁰²

VI. The EEOC Should Strengthen the Discussion in the Proposed Guidance Related to the Scope of a Hostile Work Environment Claim.

The Proposed Guidance’s discussion of the wide scope of hostile work environment claims will help ensure that workers enjoy the full protection of the EEO laws against workplace harassment. In particular, we appreciate the recognition in the Proposed Guidance that employers may be liable for failing to protect workers from harassment by non-employees.¹⁰³ The Proposed Guidance also appropriately acknowledges that harassing conduct can create a hostile work environment even if the conduct is not directed at the complainant, if the conduct occurs in a work-related context outside of the regular workplace, or if the conduct occurs in a

⁹⁸ *Id.* at 45.

⁹⁹ *Id.* at 45.

¹⁰⁰ See FELDBLUM & LIPNIC, *supra* note 8, at § E. We also note that in Section IV.C.3.b. of the Proposed Guidance, the EEOC lists the “adequacy of the employer’s steps to minimize known or obvious risks of harassment” as a consideration in determining whether an employer unreasonably failed to prevent harassment from occurring. Proposed Guidance at 80. Within this section, the EEOC lists “harassment by inmates incarcerated in a maximum-security person” as a “known or obvious risk of harassment,” but the remaining considerations address only the characteristics of a workplace. *Id.* Given the incongruence between this specific example and the rest of the list (which does not include other specific industries or workplaces where there are known risks of harassment and violence), we recommend that the EEOC remove the specific mention of prison (which may inadvertently serve to stigmatize individuals from communities that are disproportionately represented in the criminal justice system because of structural racism) and replace it with “whether the work environment is dangerous or involves hazards.”

¹⁰¹ Proposed Guidance at 45-46.

¹⁰² *Id.* at 46 & n. 169.

¹⁰³ *Id.* at 60.

non-work-related context but impacts the workplace.¹⁰⁴ Given the variety of ways that harassment manifests in these contexts—especially for low-paid workers and survivors of gender-based violence—we encourage the EEOC to strengthen its discussion as described below.

A. Harassment by Non-Employees

As we discussed at length in our comments to the 2017 proposed guidance, it is unfortunately not unusual for employees to experience harassment at the hands of non-employees.¹⁰⁵ Such harassment is particularly widespread and persistent in jobs where an employee’s compensation is tied to customer satisfaction, such as healthcare¹⁰⁶ or real estate,¹⁰⁷ for example, and particularly in low-paid industries where workers depend on tips or commissions from customers to supplement their wages.¹⁰⁸ Women make up a disproportionate share of the workforce in many of these low-paid service jobs, including, for example, food service, hospitality, and home healthcare.¹⁰⁹

Although the Proposed Guidance addresses harassment by non-employees in Section IV.A.C.3. on liability, given the prevalence of harassment by non-employees in industries with large numbers of women workers, including in industries that disproportionately employ women of color workers, we encourage EEOC to *also* include a discussion of harassment by non-employees in Section III.D. on the scope of hostile work environment claims. Such a discussion should also include salient examples of this type of harassing conduct by a broader range of non-employees. We encourage the EEOC to consider an example featuring harassment of a teacher. In the context of heightened attacks on inclusive curricula and scapegoating of LGBTQI+ educators, teachers have reported an increase in verbal, physical, and online harassment from students, parents, and other community members.¹¹⁰ Inclusion of an example featuring a teacher will signal to employers and other stakeholders that this conduct is not simply an unfortunate byproduct of our current politics but is unlawful harassment that must be swiftly addressed.

In addition to including a discussion of harassment by non-employees to illustrate the potential scope of hostile work environment claims, the Final Guidance should also strengthen its

¹⁰⁴ *Id.* at 50-55.

¹⁰⁵ NAT’L WOMEN’S LAW CTR., COMMENTS ON PROPOSED ENFORCEMENT GUIDANCE, *supra* note 86, at 10.

¹⁰⁶ *See, e.g.*, Woldegebriel Gebregziabher Kahsay et. al, *Sexual Harassment Against Female Nurses: A Systematic Review*, 19 BMC NURSING 58 (2020), <https://doi.org/10.1186/s12912-020-00450-w>.

¹⁰⁷ Debra Kamin, *Alone in an Empty House, Female Real Estate Agents Face Danger*, N. Y. TIMES (Jul. 8, 2023), <https://www.nytimes.com/2023/07/08/realestate/sexual-harassment-assault-real-estate-agents.html>.

¹⁰⁸ NAT’L WOMEN’S LAW CTR., COMMENTS ON PROPOSED ENFORCEMENT GUIDANCE, *supra* note 86, at 10.

¹⁰⁹ TUCKER & VOGTMAN, *supra* note 13, at 6, App. I (Of the 21 million people employed in the 40 lowest paid jobs in the United States, women make up 64.1%; women make up the large majority of employees in many of industries represented in this workforce, including, for example, fast food workers, cashiers, hotel employees, and home health workers).

¹¹⁰ *See How Should Educators Handle Harassment*, NAT’L EDUCATION ASSOC. (Apr. 5, 2023), <https://www.nea.org/resource-library/how-should-educators-handle-harassment>.

discussion of an employer’s obligation to take corrective action in these scenarios. In its current form, the Proposed Guidance appears to minimize the options available for employers to take appropriate action, stating, “Although employers are responsible for addressing harassment by anyone in the workplace, employers may have *fewer options* for influencing the conduct of some non-employees, thereby limiting the remedial options available”¹¹¹ It goes on to state that “corrective actions are to be assessed based on how [employers] deploy the ‘arsenal of incentives and sanctions’ they have available to address harassment,”¹¹² referencing the options that the EEOC just claimed were in short supply.

The Final Guidance should take a different approach and encourage employers to think broadly and creatively about effective corrective actions when a non-employee harasses an employee. Even without direct control over a non-employee, an employer may have some control—as in Example 37 in the Proposed Guidance concerning a server at a sports bar.¹¹³ Employers may also have control over which clients they maintain or over the assignment of patients or students.¹¹⁴ There are often a wide variety of options available to provide a safe working environment for the affected employee. That is, an employer’s “arsenal” of options may simply be different, not necessarily smaller.

B. Conduct that Occurs in a Non-Work-Related Context but With Impact on the Workplace

The EEOC correctly acknowledges that conduct that occurs in a non-work-related context but with impact on the workplace can form the basis of a hostile work environment claim. However, we encourage the Commission to provide additional examples of such conduct in order to provide more meaningful guidance.

As we urged previously, the Final Guidance should acknowledge, through the inclusion of examples in Section III.D.2.c., that for some working women, particularly those in low-paid jobs or working in industries that are traditionally dominated by men, sex-based harassment may take the form of sexual assault that occurs outside of the workplace.¹¹⁵ Sometimes this violence is an outgrowth of behavior that began in the workplace, as when a harasser who begins a pattern of harassment in the workplace dramatically escalates such behavior outside of the workplace, creating an impact on the affected employee at work. In one matter litigated by our office, a male supervisor at a manufacturing facility began to harass a female employee at

¹¹¹ Proposed Guidance at 91 (emphasis added).

¹¹² *Id.* at 91.

¹¹³ *Id.* at 92-93.

¹¹⁴ See, e.g. Jacquelyn Corley, *It’s Not Just Bosses Who Harass Health Workers: Hospitals Start Addressing Patients’ ‘Egregious’ Behavior*, STAT NEWS (Sept. 12, 2019), <https://www.statnews.com/2019/09/12/sexual-harassment-hospitals-start-addressing-patient-behavior/>.

¹¹⁵ NAT’L WOMEN’S LAW CTR., COMMENTS ON PROPOSED ENFORCEMENT GUIDANCE, *supra* note 86, at 13; see also *McGuinn-Rowe v. Foster’s Daily Democrat*, No. 94-623-SD, 1997 WL 669965at *4 (D.N.H. July 10, 1997) (employer could be liable for sexual assault by a manager of an employee that “occurred away from the workplace and outside normal working hours”).

work; later, the supervisor sexually assaulted the same employee at a private home.¹¹⁶ There, we argued that the employer should have taken corrective action after the affected employee reported the sexual assault, even though it occurred outside of work.¹¹⁷

We urge the EEOC to also include an example in the Final Guidance that illustrates harassment occurring outside of the workplace but that arose out of “a relationship that began and grew in the workplace.”¹¹⁸ Such scenarios can include an employee who stalks a colleague at their home,¹¹⁹ or a supervisor who makes harassing phone calls to their direct report on their personal cell phone, outside of work hours. Such scenarios can also include harassment that occurs in a quasi-work environment, such as an employee who sexually harasses a co-worker at an off-site happy hour organized and attended by employees when they are off-the-clock.¹²⁰ They could also include harassment by a non-employee. For example, if an employee is harassed by a client, and the sole relationship between the parties is related to the employee’s job, then harassment by that client outside of the workspace may contribute to a hostile work environment.¹²¹ Employers must understand that they are responsible for taking corrective action in these scenarios, which, if unchecked, can often escalate into tragic situations.¹²²

VII. The Proposed Guidance Provides Clarity on the Appropriate Liability Standards for Harassment by Supervisors as well as Non-Supervisors with Authority over the Complainant.

Whether an employee is a supervisor is critical to determining the appropriate standard for employer liability for harassment. The Proposed Guidance defines a “supervisor,” consistent

¹¹⁶ *NWLC Files Sexual Harassment Lawsuit Against California Manufacturing Company that Failed to Stop Harassment and Abuse by Supervisors*, NAT’L WOMEN’S LAW CTR. (Sept. 3, 2020), <https://nwlc.org/resource/nwlc-files-sexual-harassment-lawsuit-against-california-manufacturing-company-that-failed-to-stop-harassment-and-abuse-by-supervisors/>.

¹¹⁷ *Id.*

¹¹⁸ *Doe v. Oberweis Dairy*, 456 F.3d 704, 715-16 (7th Cir. 2006).

¹¹⁹ In stalking situations where the stalker and the victim are acquaintances, about one-quarter are professional acquaintances (including but not limited to coworkers, supervisors, employees, clients or customers, patients, or schoolmates). See RACHEL MORGAN & JENNIFER TRUMAN, U.S. DEP’T. OF JUST. BUREAU OF JUSTICE STAT., STALKING VICTIMIZATION, 2019 8 (2022), <https://bjs.ojp.gov/content/pub/pdf/sv19.pdf>; STALKING PREVENTION, AWARENESS AND RESOURCE CENTER AND FUTURES WITHOUT VIOLENCE, STALKING AND THE WORKPLACE FACTSHEET, <https://www.workplacesrespond.org/wp-content/uploads/2017/01/SPARC-FUTURES-Workplace-Stalking-Fact-Sheet.pdf>.

¹²⁰ See, e.g., *Echevarria v. Utitec*, 2017 WL 4316390, 7 (D.D.CT 2017) (although affected employee was not required to attend a happy hour organized by coworkers, repeated harassment by a coworker at the event contributed to a hostile work environment).

¹²¹ See *NWLC Files Workplace Justice/Survivors’ Rights Amicus Brief in Washington State Court of Appeals*, NAT’L WOMEN’S LAW CTR. (Jun. 23, 2023), <https://nwlc.org/resource/nwlc-files-workplace-justice-survivors-rights-amicus-brief-in-washington-state-court-of-appeals/> (public defender experienced severe harassment, including stalking, outside of the workplace by a client who had also harassed her at work); see also, *Christian v. Umpqua Bank*, 984 F.3d 801, 811-812 (9th Cir. 2020) (bank could be liable for stalking that started in the workplace and extended to an off-site function).

¹²² Stalking behavior, for example, may escalate to physical violence, including homicide. According to the National Coalition Against Domestic Violence, “54% of femicide victims reported stalking to the police before they were killed by their stalkers.” NAT’L COALITION AGAINST DOMESTIC VIOLENCE, STALKING (2020), https://assets.speakcdn.com/assets/2497/ncadv_fact_sheet_intimate_partner_stalking.pdf.

with *Vance v. Ball State University*,¹²³ as an individual who is empowered to take tangible employment actions against the complainant.¹²⁴ We appreciate the clear statement in the Proposed Guidance that an individual can be a *Vance* “supervisor” even if they do not have actual authority to take a tangible employment action against the complainant, so long as the harasser exercises apparent authority that causes the complainant to reasonably believe that the harasser is such a supervisor.¹²⁵ We also appreciate the clear explanation that even if the harasser is not the final decision maker, that they can still be considered a *Vance* “supervisor” if they have the power to “substantially influence tangible employment actions.”¹²⁶

Equally important, the Proposed Guidance also recognizes that employers may empower certain individuals—who arguably are not *Vance* “supervisors”¹²⁷—with supervisory authority over other employees. Employers are not vicariously liable for the harassing conduct of these individuals but instead are liable if the employer was negligent, meaning that the employer failed to act reasonably to prevent harassment or failed to take reasonable corrective action once it knew or should have known about the harassing behavior.

We appreciate the Proposed Guidance’s clear discussion of this negligence standard when the harasser is not a *Vance*-supervisor but nonetheless has authority over the complainant.¹²⁸ Not only does the caselaw support consideration of the authority granted to the harasser in the evaluation of whether the employer acted negligently and therefore should be held liable, but this approach is reflective of the realities of many workplaces where lower-level supervisors can have substantial power over their direct reports, including control over their work schedules, control over daily work assignments, control over professional development opportunities or performance evaluations that may impact career advancement, and more.¹²⁹ We therefore applaud the clear statement that “the nature and degree” of a harasser’s authority over the complainant should be considered in evaluating both (1) the action that the employer took to prevent harassment from occurring and (2) the adequacy of the corrective action in response to harassment.¹³⁰

¹²³ 570 U.S. 421 (2013).

¹²⁴ Proposed Guidance at 58.

¹²⁵ *Id.* at 59.

¹²⁶ *Id.* (quoting *Kramer v. Watsatch Cnty. Sheriff’s Office*, 743 F.3d 726, 738 (10th Cir. 2014)).

¹²⁷ Given overly broad interpretations of *Vance* and the incentive it created for employers to concentrate the power to hire and fire in the hands of a few, courts may determine that individuals who are empowered to wield significant day-to-day authority over employees are nonetheless not “supervisors” for the purpose of vicarious liability. See generally FATIMA GOSS GRAVES ET. AL, NAT’L WOMEN’S LAW CTR., REALITY CHECK: SEVENTEEN MILLION REASONS LOW-WAGE WORKERS NEED STRONG PROTECTIONS FROM HARASSMENT (2014), https://nwlc.org/wp-content/uploads/2015/08/final_nwlc_vancereport2014.pdf.

¹²⁸ See Proposed Guidance at 79, 89-90.

¹²⁹ See GOSS GRAVES ET. AL, *supra* note 127, at 5.

¹³⁰ Proposed Guidance at 78-79, 89-90.

VIII. The Proposed Guidance’s Discussion of Effective Employee Training to Prevent Harassment Should be Strengthened.

We strongly support the Proposed Guidance’s detailed discussion of the employer’s duty to take reasonable care to prevent and correct harassment.¹³¹ In particular, we appreciate the specific list of considerations for determining whether an employer has an effective anti-harassment policy, complaint process, and training.¹³² In the Final Guidance, we encourage the EEOC to consider adding the following considerations to its discussion of effective training.

First, we urge the EEOC to explicitly include in its list of features of effective training, information for co-workers on what to do if they observe or learn of workplace harassment. We agree that training should explain the harassment policy and the complaint process, give examples of prohibited harassment, and provide information about employees’ rights if they experience, become aware of, or report harassment. However, the Final Guidance should emphasize that in addition to telling employees about their rights, the training should include information about specific actions employees can take—which includes, but is not limited to, reporting—if they observe harassing conduct. Currently, the Proposed Guidance limits the discussion of providing “clear instructions for addressing and reporting harassment that they observe, that is reported to them, or that they otherwise become aware of” to supervisors and managers. Yet, co-workers may also be in a position to address, de-escalate, or stop harassing conduct when it occurs. Providing information to every employee about how to respond if they see abusive behavior at work, and providing examples tailored to situations they may likely encounter in their specific workplaces, equips every employee with the basic tools to prevent harassing conduct from escalating. In addition, research suggests that bystander intervention training helps to create and foster an organizational culture where harassing behavior is not tolerated.¹³³

Second, we urge the EEOC to provide more detail in its discussion of training on the complaint process. Specifically, we recommend that the Final Guidance include language that encourages employers to do more than explain to employees that a complaint process exists. An effective training on complaint processes must also include an explanation of the investigation process.¹³⁴ Employees may be more likely to report harassment if they know what to expect

¹³¹ *Id.* at 65-72, 78-96.

¹³² *Id.* at 66-71.

¹³³ See So Yun Lee et. al, *Incorporating Bystander Intervention Into Sexual Harassment Training*, 22 *INDUSTRIAL & ORGANIZATIONAL PSYCHOLOGY* 52, 53 (2019), https://www.researchgate.net/profile/Ho-Kwan-Cheung-2/publication/333111925_Incorporating_bystander_intervention_into_sexual_harassment_training/links/5ce32fd092851c4eabb16174/Incorporating-bystander-intervention-into-sexual-harassment-training.pdf (explaining that bystander intervention training “can further facilitate social consensus [around sexual harassment] among employees, in that everyone within an organization is responsible for taking action against [sexual harassment]” and that “implementing [bystander intervention] training can help organizations set a higher degree of moral intensity by communicating a stronger message of low organizational tolerance for [sexual harassment] than when simply implementing regular [sexual harassment] training.”)

¹³⁴ See FELDBLUM & LIPNIC, *supra* note 8, at 51 (explaining that compliance training should include “information on how an investigation will take place”).

from an investigation and believe that it will be conducted fairly.¹³⁵ As noted elsewhere in the Proposed Guidance, an investigation is “adequate” if it is “conducted by an impartial party” who is well-trained, the investigator collects “information about the conduct from all parties involved,” and upon completion, the employer informs both “the complainant and the alleged harasser of its determination.”¹³⁶ Victims of harassment must know that this is what they should expect. We recommend that the EEOC incorporate this information into its discussion of effective training.

In addition, the training should explain, generally, the range of potential corrective actions that an employer could take in response to harassing conduct. Some employees may not use a complaint process—especially if the harassing conduct was particularly severe, traumatic, or stigmatizing—if they have no information about what the end result of the process might be.¹³⁷

IX. The Proposed Guidance’s Discussion of Reasonable Corrective Action Should be Amended to Help Ensure that Corrective Action Does Not Impose Unnecessary Burdens on Complainants and that Employers Respond Appropriately to All Reports of Harassing Conduct.

As explained in the Proposed Guidance, once an employer has actual or constructive notice of potentially harassing conduct, the employer must take reasonable corrective action to stop the harassment from continuing.¹³⁸ We appreciate the EEOC’s detailed discussion of considerations that are relevant in determining whether an employer’s corrective actions were reasonable and offer the below recommendations to provide clarity and additional guidance for determining reasonableness.

¹³⁵ See, e.g., Amy Zeiden et al., “Why Bother?": Barriers to Reporting Gender and Sexual Harassment in Emergency Medicine, 29 ACADEMIC EMERGENCY MEDICINE 1067, 1073 (2022) (in a survey of emergency medicine faculty and residents in the U.S., participants identified a lack of knowledge of reporting systems and low levels of trust in formal reporting systems as barriers to reporting gender-based and sexual harassment, and participants expressed the need for more transparency about reporting processes, including what happens after someone reports an incident, when they will receive updates, and potential outcomes for the perpetrator); see also NAT’L ACADEMIES OF SCI., ENGINEERING, AND MED., SEXUAL HARASSMENT OF WOMEN: CLIMATE, CULTURE, AND CONSEQUENCES IN ACADEMIC SCIENCES, ENGINEERING, AND MEDICINE 145, (June 2018), <https://www.ncbi.nlm.nih.gov/pubmed/29894119> (noting the importance of providing transparency about what happens when reports are filed and about the outcomes of investigations).

¹³⁶ Proposed Guidance at 86-87.

¹³⁷ See, e.g., NAT’L ACADEMIES OF SCI., ENGINEERING, AND MED., *supra* note 135, at 143-44 (noting the importance of clearly communicating the range of disciplinary consequences for individuals who violate anti-harassment policies, and explaining that outlining what conduct would warrant different disciplinary actions can increase transparency and may increase reporting, because some individuals may choose not report because they do not want to cause a disruption).

¹³⁸ Proposed Guidance at 88-89.

First, we urge the EEOC to strengthen its discussion of how to evaluate the reasonableness of corrective actions that “place some burdens on the complaining employee.”¹³⁹ The Proposed Guidance notes that employers should make “every reasonable effort to minimize those burdens or adverse consequences,”¹⁴⁰ but it offers no examples showing what those efforts could be and does not offer any further clarification of how one might evaluate the reasonableness of those efforts when determining whether the employer acted negligently with respect to the hostile work environment claim. Instead, the Proposed Guidance refers, in a footnote, to a discussion earlier in the text explaining that corrective action that “leaves the complainant worse off” could constitute retaliation, and that employers “should take measures to ensure that retaliation does not occur.”¹⁴¹ While we fully agree that employers should take steps to prevent unlawful retaliation against a complainant, the Final Guidance should more clearly explain, with examples, that imposing a burden on a complainant either in service of a corrective action, or under the guise of a corrective action, may itself constitute harassment or may prove, depending on the circumstances, negligence by showing a failure to act reasonably.¹⁴²

We also request that the EEOC strike the language in Section IV.C.3.b. explaining that a complainant “should *ideally* face no burden” because of their employer’s corrective action.¹⁴³ The term “ideal,” suggests an aspirational goal. Using the term “ideally” may therefore suggest that complainants should expect to experience a burden as a consequence of their employer taking corrective action and may thus chill employees’ reporting of unlawful harassment. We request that the EEOC instead focus on the obligations of the employer—not what is or is not ideal—and clearly state at the outset of the discussion that it is not reasonable to impose burdens on a complainant because of a corrective action unless the employer has taken every reasonable effort to minimize any burdens, adverse impacts, or negative consequences.

¹³⁹ *Id.* at 91. We also note that any preventive steps an employer takes “to minimize known or obvious risks of harassment,” should not create burdens for people in a protected class or deny equal opportunity. See *EEOC v. New Prime, Inc.*, 42 F. Supp. 3d 1201 (W.D. Mo. 2014) (finding that “same-sex” training policy purportedly adopted to protect women trainees from sexual harassment limited training opportunities for women versus men, was facially discriminatory, and violated Title VII).

¹⁴⁰ Proposed Guidance at 91.

¹⁴¹ *Id.* at 88 (“Corrective action that leaves the complainant worse off also could constitute unlawful retaliation if motivated by retaliatory bias.”). We also recommend that the EEOC remove the reference to “retaliatory bias” from this discussion of corrective action. The term “retaliatory bias” suggests that complainants must provide some additional evidence of animus to substantiate a claim of retaliation, including retaliatory harassment. To make out a successful claim for retaliation, a complainant simply must demonstrate that the retaliation was motivated by a protected activity and need not prove bias or animus. See U.S. Equal Emp. Opportunity Comm’n, *Enforcement Guidance on Retaliation and Related Issues* at § II.C (2016), <https://www.eeoc.gov/laws/guidance/enforcement-guidance-retaliation-and-related-issues#C. Causal>.

¹⁴² The imposition of an unreasonable burden on a complainant may also lead other employees to reasonably believe that the employer’s complaint process is ineffective, opening up the employer to liability under the second prong of the Faragher-Ellerth defense to vicarious liability for the actions of a *Vance*-supervisor. See Proposed Guidance at 75-76 (“A failure to complain also might be reasonable if the complainant was aware of instances in which the employer had failed to take appropriate corrective action in response to prior complaints filed by the complainant or by coworkers.”).

¹⁴³ Proposed Guidance at 90 (emphasis added).

Second, we appreciate the EEOC for addressing situations in which an employee reports harassment but asks that the employer not tell anyone and take no action.¹⁴⁴ We disagree, however, that “it may be reasonable in some circumstances to honor the employee’s request when the conduct is relatively mild.”¹⁴⁵ While an employer may be able to keep the report confidential under certain circumstances, the duty to take corrective action is prompted by the report of harassing conduct, even when the conduct is “relatively mild.” As explained in the section of the Proposed Guidance discussing notice, “The employer’s duty to take corrective action is triggered if the notice it has received is sufficient to make a reasonable employer aware of the *possibility* that an individual is being subjected to harassment on a protected basis.”¹⁴⁶ This duty is consistent with the purpose of the EEO statutes—to prevent and address unlawful discrimination including harassment—and as the Proposed Guidance notes, notice of harassment directed at one individual “might serve as notice not only of the harasser’s potential for future harassment of the same employee but also of the harasser’s potential to harass others.”¹⁴⁷

Additionally, the duty to take corrective action to address harassment based on a protected characteristic, even in situations where the conduct is “relatively mild” and where a complainant has requested that no action be taken, comports with the realities of workplace harassment. According to the findings of the EEOC Select Task Force on the Study of Harassment in the Workplace, most individuals who experience workplace harassment do not report the harassing conduct to a supervisor, manager, or union representative. Instead, the more common responses include: avoiding the harasser; denying the gravity of the situation; and enduring the harassing behavior.¹⁴⁸ It is therefore critical that employers take seriously every report of harassing conduct, including those that are “relatively mild,” since many victims may not initially describe the entirety of the conduct or may attempt to downplay its severity.

Although the duty to take corrective action exists even when a complainant has requested that the employer tell no one and take no action, the corrective action chosen should be proportionate to what the complainant has reported¹⁴⁹ and designed to minimize burdens on the complainant. As suggested by the Proposed Guidance, general corrective action, which keeps completely confidential the identity of the complainant and the fact of the complaint, including recirculating the anti-harassment policy, conducting an additional training, or

¹⁴⁴ *Id.* at 93.

¹⁴⁵ *Id.* at 93.

¹⁴⁶ *Id.* at 83 (emphasis added). We acknowledge, however, that under certain circumstances it may be legally permissible for an employer to take no action when the conduct is mild and there is no indication that the harassment is based on a protected characteristic.

¹⁴⁷ *Id.* at 84.

¹⁴⁸ FELDBLUM & LIPNIC, *supra* note 8, at 15-16.

¹⁴⁹ Proposed Guidance at 89 (discussing the proportionality of the corrective action); FELDBLUM & LIPNIC, *supra* note 8, at 32 (“If leadership values a workplace free of harassment, then it will ensure that harassing behavior against employees is prohibited as a matter of policy; that swift, effective, and proportionate responses are taken when harassment occurs; and that everyone in the workplace feels safe in reporting harassing behavior.”)

increased monitoring of the workplace, could be a reasonable response depending on the circumstances.¹⁵⁰

X. The Final Guidance Should Include a Discussion of “Retaliatory Harassment.”

We appreciate that the Proposed Guidance includes a mention of harassment as a form of retaliation,¹⁵¹ and encourage the EEOC to clearly state the standard for unlawful retaliatory harassment in the Final Guidance and provide examples. Retaliation is the most common type of charge filed with the EEOC, making up 51.6 percent of all discrimination charges filed with the agency in 2022.¹⁵² In cases where a complainant reports both discrimination based on a protected class and related retaliation, it is common for the retaliation allegations to be substantiated even when allegations of the original discriminatory conduct are not.¹⁵³ This includes matters in which a complainant files charges of both retaliatory harassment and other form(s) of discriminatory harassment.¹⁵⁴

Because of the prevalence and success of retaliation charges, the EEOC should provide clear guidance around retaliatory harassment. The Proposed Guidance correctly notes that retaliation claims—including those involving alleged retaliatory harassment—are enforced under a different legal standard than claims involving harassment based on a protected class.¹⁵⁵ The threshold for establishing retaliatory harassment is less onerous than for discriminatory hostile work environment. The Final Guidance should provide greater clarity about the distinction between the two standards by including an explanation of the relevant differences in the text of the guidance, instead of simply referring readers to the EEOC’s 2016 Enforcement Guidance on Retaliation and Related Issues for additional information.¹⁵⁶

Specifically, we urge the Commission to incorporate its guidance of retaliatory harassment within the Final Guidance and explicitly state that, “If [] conduct would be sufficiently material

¹⁵⁰ See Proposed Guidance at 94 (discussing recirculation of the anti-harassment policy as a general corrective action).

¹⁵¹ *Id.* at 19.

¹⁵² *Charge Statistics FY 1997 Through FY 2022*, U.S. EQUAL EMP. OPPORTUNITY COMM’N, <https://www.eeoc.gov/data/charge-statistics-charges-filed-eeoc-fy-1997-through-fy-2022> (last visited Oct. 25, 2023).

¹⁵³ Romella Janene El Kharzazi, Mxolisi Siwatu, and Dexter R. Brooks, *Retaliation - Making It Personal*, U.S. EQUAL EMP. OPPORTUNITY COMM’N, https://www.eeoc.gov/retaliation-making-it-personal#_3 (last visited Oct. 25, 2023).

¹⁵⁴ Examples of employees being harassed in retaliation for filing a claim of discrimination, including harassment based on a protected class, are numerous, and the interplay between the forms of harassment can have a compounding effect. See, e.g., Nicole Buonocore Porter, *Ending Harassment by Starting with Retaliation*, 71 STAN. L. REV. ONLINE (2018), <https://www.stanfordlawreview.org/online/ending-harassment-by-starting-with-retaliation/>; Blair Druham Bullock, *Uncovering Harassment Retaliation*, 72 ALA. L. REV. 671, 677 (2021) (“[H]arassment retaliation is a unique and prevalent problem. Harassment charges are more than 90% more likely to include a retaliation charge than any other type of charge [filed with the EEOC].”).

¹⁵⁵ Proposed Guidance at 19.

¹⁵⁶ U.S. Equal Emp. Opportunity Comm’n, *Enforcement Guidance on Retaliation and Related Issues* (2016), <https://www.eeoc.gov/laws/guidance/enforcement-guidance-retaliation-and-related-issues>.

to deter protected activity in the given context, even if it were insufficiently severe or pervasive to create a hostile work environment, there would be actionable retaliation.”¹⁵⁷

* * *

Thank you for the opportunity to submit comments on the Proposed Enforcement Guidance. Please contact Gaylynn Burroughs, Director of Workplace Equality & Senior Counsel (gburroughs@nwlc.org) with any questions.

Sincerely,



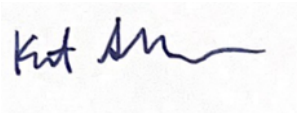
Emily Martin
Vice President for Education & Workplace Justice



Gaylynn Burroughs
Director of Workplace Equality & Senior Counsel



Liz Chacko
Senior Counsel, Legal Network for Gender Equity/ TIME'S UP Legal Defense Fund



Katie Sandson
Senior Counsel for Education & Workplace Justice

¹⁵⁷ *Id.* at § II.B.3.