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EEOC Guidance Evidences Tension Between Employee Rights, Legal Battles

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Many employers today feel pressured to take formal stances on political topics which could impinge on protected categories, such as student protests, abortion access, and Black Lives Matter. Even employers that decline these invitations must effectively manage conflicts between employees over topics such as Israel and Palestine, Russia and Ukraine, or gender-based, religious, or racial implications of opposing political positions, particularly those tied to the upcoming election.

Against this uncertain background, the Equal Employment Opportunity Commission ("EEOC") recently issued a comprehensive guidance document, "Enforcement Guidance on Harassment in the Workplace" (the "Guidance"), which has already been legally challenged.

Although a full summary of the Guidance would be impracticable, certain items of note include:

Gender Identity: Misgendering and Bathroom Usage

Despite numerous commenters suggesting that the EEOC exceeded its authority to interpret Title VII consistently with *Bostock v. Clayton County*, 590 U.S. 644 (2020) and successful previous legal challenges to similar guidance, the Guidance unambiguously states that transgender employees must be given access to bathroom facilities that are consistent with their gender identity. Similarly, the EEOC states that repeated, intentional misgendering can support a hostile work environment claim with respect to transgender employees.

Notably, while not directly mentioned in the Guidance, there are significant legal hurdles to enforcing the EEOC's position on gender identity, including ongoing litigation. For example, on April 9, 2024, a federal judge blocked a Florida law that prevented a transgender teacher from using her preferred pronouns. But, over the last several years, teachers in Ohio and Kansas have sued school districts for not allowing them to misgender transgender students, including on the basis of the teacher-plaintiffs' sincerely held religious beliefs. This suggests a significant tension between the two protected categories.

Similarly, in response to the United States Department of Education's ("DOE") newly-proposed Title

IX rules (issued on April 29, 2024), the Louisiana Attorney General swiftly announced her intention to sue, in part to prevent teachers from using transgender students' preferred pronouns. The Louisiana State Superintendent advised school systems not to adhere to the Title IX Regulations while Louisiana's lawsuit, which was filed on April 30, 2024, is pending. In total, twenty-six different states have now sued advancing various legal theories, and these suits are currently pending in several jurisdictions.

Then, on May 13, eighteen states sued the EEOC, Department of Justice ("DOJ"), and other federal defendants in Tennessee ("Second Tennessee Lawsuit"), seeking a declaratory judgement and vacatur of the Guidance on the basis that it (i) exceeds the EEOC's statutory authority, (ii) violates principles of state sovereignty, federalism, and the First Amendment, (iii) is arbitrary and capricious, and further, that (iv) the Guidance must be vacated because the fundamental independent-agency structure of the EEOC violates the separation of powers doctrine and Article II of the Constitution, and thus all EEOC rules are void. Separately, the Second Tennessee Lawsuit argues that the Guidance may conflict with religious expression, the Religious Freedom Restoration Act, and relevant state religious free-exercise laws, lending to a conclusion that the plaintiff states will be irreparably harmed if the Guidance is not vacated or otherwise enjoined.

Beyond these arguments, the Second Tennessee Lawsuit relies upon rulings in two earlier lawsuits. First, it cites an earlier lawsuit in Tennessee ("First Tennessee Lawsuit") against the EEOC, DOE, and other federal defendants, which was filed in part to challenge a 2021 EEOC guidance document entitled "Protections Against Employment Discrimination Based on Sexual Orientation or Gender Identity" (the "2021 Guidance"). The 2021 Guidance, like the Guidance here, required employers to give bathroom access and use pronouns consistent with gender identity. The judge in the First Tennessee Lawsuit *inter alia* prohibited the EEOC from enforcing the 2021 Guidance in the plaintiff states, but declined the invitation to issue a nationwide injunction.

Second, the Second Tennessee Lawsuit seeks support from an earlier lawsuit in the Northern District of Texas (the "Texas Lawsuit"). The Texas Lawsuit surpassed the localized injunction in the First Tennessee Lawsuit by vacating the 2021 Guidance in its entirety. The EEOC did not appeal.

Thus, it may be unsurprising that on May 21, 2024, Texas also took action by filing a motion for further relief in the still-pending Texas EEOC Lawsuit. Texas' motion seeks vacatur of this Guidance on the basis that it is substantially the same as the previously-vacated 2021 Guidance.

Given that the Northern District of Texas and Eastern District of Tennessee have already found gender identity requirements to exceed the EEOC's authority in previous challenges, it is possible that one of these courts will extend their analysis here, and on a nationwide level. If so, such a decision could result in total vacatur of the Guidance, even beyond those provisions concerning gender identity. Given its previous declination to do so, it is also an open question whether the EEOC would appeal.

Abortion and Birth Control

The Guidance also addresses abortion and birth control, stating that both fall within the protected categories of pregnancy, childbirth, or related medical conditions. As with the transgender topics noted above, the Guidance suggests that an employee with a sincerely held religious belief opposing abortion or birth control is not permitted to harass an employee planning to undertake procedures relating to the same. At the same time, however, we can assume that an employee who previously had an abortion should not harass or discriminate against another employee for maintaining sincerely

held beliefs opposing abortion.

Relatedly, the EEOC issued a Final Rule on April 19, 2024, interpreting the Pregnant Workers Fairness Act ("PWFA") to include abortion as a covered topic. Under the Final Rule, employers must offer employees reasonable accommodations, including, e.g., time off to have and recover from abortion procedures. Nineteen states have now filed suit in Louisiana and Arkansas to challenge this Final Rule, claiming that the EEOC exceeded its authority. These challenges likewise follow earlier lawsuits, including in the Northern District of Texas, where a narrow injunction was issued preventing the enforcement of the PWFA against the State of Texas. Thus, even if the Guidance clears the hurdles of the Texas Lawsuit or Second Tennessee Lawsuit, these separate, PWFA-based challenges may continue to be of interest to employers.

Intraclass Harassment; Colorism; National Origin

The Guidance also expresses the importance of monitoring and correcting intra-category discrimination. The EEOC put forth examples about a Chinese supervisor repeatedly lecturing a junior Chinese supervisee about not living up to the standards that would be expected of a Chinese person, as well as of a supervisor in his fifties discriminating against a subordinate in his sixties. Other examples may include one mother harassing another for working instead of focusing on her children, or one Christian person berating another for not coming to their church. All have the potential to meet the standard required to prove hostile work environment harassment.

Relatedly, the Guidance reminds readers about the importance of monitoring for colorism and national origin discrimination amongst apparently employees who share other protected categories in common. For example, a lighter-skinned person may be found to discriminate against a darker-skinned person of the same race, or vice versa (and similarly, it is no defense for a person outside the class to discriminate only against darker- or lighter-skinned individuals in the other class). In the context of national origin discrimination, the EEOC explained that permitting a Mexican-American employee to refer to a Mexican national employee using derogatory terms could create a hostile work environment based on national origin.

The takeaway from these provisions is that employers must not assume that inappropriate conduct is welcome because two employees share one or more protected characteristics. Employers must be vigilant about preventing and correcting any such harassing behavior which may occur, of which such employers have notice.

Managing Accommodation Resentments

Another recurrent theme throughout the Guidance is the importance of managing employee resentment of other employees who successfully obtained accommodations based on their protected status. To illustrate this point, the Guidance offers the following examples:

- A colleague complaining about a Sikh emergency medical technician (EMT) who had been granted an accommodation to wear a specialized respirator to protect his beard, because she felt he should wear the same respirator as everyone else;
- Colleagues saying that a pregnant woman should not be staffed on an important business account because her morning sickness and fatigue required her to work from home, and if she didn't feel well enough to be in the office, then she must not feel well enough to do such an important job from home;
- A colleague complaining that he is not allowed to take breaks in a private room, while his

lactating colleague was able to do so; and
- Colleagues complaining that a cashier with arthritis was permitted to sit or stand on a standing mat to obviate joint pain, while they were not able to be as “comfortable” as he was.

These types of scenarios may be familiar to many of us, but the Guidance clarifies that it must be strongly discouraged when and if it arises. While one stray comment may not be sufficient to support the legal definition of hostile work environment, when these resentful comments form a regular pattern of harassment, there is a threat of liability.

Social Media/Offsite Impact On The Workplace

The Guidance also states that “postings on a social media account generally will not, standing alone, contribute to a hostile work environment if they do not target the employer or its employees.” This means that if two employees get into a dispute because one allegedly made an allegedly-offensive, but untargeted, posting on social media, the posting itself will generally not be considered workplace conduct. However, a social media post directly or indirectly referencing colleagues or the workplace may contribute to a hostile work environment, and out-of-office conduct by supervisors may be more likely to be considered to contribute to a hostile work environment than similar conduct from an entry-level employee.

Retaliation

The Guidance provides that there are different standards for liability between retaliatory harassment and discriminatory harassment. Specifically, retaliatory harassment need not be sufficiently severe nor pervasive enough to alter the terms and conditions of employment. Instead, the Guidance provides that “anything that might deter a reasonable person from engaging in protected activity” is subject to challenge. *Cf. Burlington N. & Santa Fe Ry. Co. v. White*, 548 U.S. 53, 55 (2006)(internal citations omitted)(asking whether an action “well might have dissuaded a reasonable worker from making or supporting a charge of discrimination”).

Conclusion

The Guidance showcases the importance of investigation and corrective action where warranted. Though this Guidance has been legally challenged, it illustrates the ways in which hot-button disputes can cause conflict between employees, including conflicts between employees in one or more protected categories. Employers are advised to proceed with caution.

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