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Public Input, Equal Employment Opportunity Commission
Bernadette B. Wilson
Acting Executive Officer
131 M Street, N.E.,
Washington, D.C. 20507

RE: Comments: EEOC Proposed Enforcement Guidance on Unlawful Harassment

Dear Ms. Wilson:

Thank you for the opportunity to offer our comments on the EEOC's Proposed Enforcement Guidance on Unlawful Harassment. Jackson Lewis P.C. is a preeminent workplace law firm dedicated to serving our clients and passionate about providing high quality, creative and effective representation of employers on the full range of employment and labor law matters, through offices strategically located throughout the country. Our firm employs over 800 attorneys in 58 offices throughout the United States and Puerto Rico. We are guided by our commitment to assisting employers in their ongoing mission to better the workplace, including in the area of harassment prevention. Our Workplace Training Practice Group utilizes training strategies developed by renowned attorneys who can help clients develop the best approach for their workplace and also anticipate the workplace law of tomorrow.

In our experience, employers and human resource professionals place great emphasis in maintaining a workplace that is free of unlawful harassment. We appreciate the EEOC's efforts in providing updated guidance on this complex issue. While the goal for every employer is always a workplace that is free of unlawful harassment, employers recognize that harassment does occur, and that having clear policies and a well-trained team led by managers and human resources professionals is one of the key tools to combat harassment.

The Supreme Court's decisions in *Farragher* and *Ellerth*[1] clarified the affirmative defenses that may be available to employers in certain situations. These landmark decisions ushered in a new era of harassment prevention. In the almost 20 years since the Supreme Court issued its *Farragher* and *Ellerth* opinions, employers have enhanced anti-harassment policies in their employee handbooks and devoted significant resources to anti-harassment training. We know this to be the case because each year our Firm provides hundreds of hours of anti-harassment training to our clients during which we emphasize our clients' harassment prevention policies, practices and procedures. Each year, our Firm also updates hundreds, if not thousands, of anti-harassment policies contained in our clients' employee handbooks or issued in stand-alone documents.

In the context of our Firm and our clients' commitment to preventing and addressing harassment in the workplace, we offer these comments. Since the EEOC issued its Guidance on Current Issues on Sexual Harassment in 1990, the courts have issued numerous opinions and there is significant agreement on many issues addressed in the Proposed Guidance. On the whole, we agree with many of the positions taken by the EEOC in its Enforcement Guidance and believe the Guidance adequately captures the difficulty and fact-sensitive nature of resolving workplace harassment. We focus our comments on issues from the Proposed Guidance where either case law is not definitive or where the EEOC takes positions that contradict the general run of case law. Our comments are divided into three sections. First, we address several issues where we believe the Proposed Guidance provides employers with needed clarity. Second, we suggest changes to the Proposed Guidance. Third, we address portions of the Proposed Guidance where we request additional clarification from the EEOC.[2]

I. Key Points Where Proposed Guidance Provides Needed Clarity

- **Section IV.B.3.b.i – Conduct That is Not Harassment.** The Guidance accurately points out that an employee's complaints of unlawful harassment must be linked to some protected category. Employers cannot and should not have to unnecessarily speculate about whether unlawful harassment is at issue, because, when employees truly suspect that, they should be able to articulate it in some way. Mere complaints that a supervisor is "rude" or "bullying" may suggest that there is a personality conflict between employees, which is typically investigated and handled differently than a complaint about unlawful harassment, i.e., under an employer's respectful workplace

[1] *Farragher v. City of Boca Raton,* 524 U.S. 775 (1998); *Burlington Industries Inc. v. Ellerth*, 524 U.S. 742 (1998). These decisions set forth the standard for when an employer is vicariously liable for the action of its supervisors for unlawful harassment and have formed the basis for an employer's affirmative defense to supervisor harassment. Assuming no tangible employment action is taken, an employer may avoid liability for harassment by a supervisor by showing that: (1) the employer exercised reasonable care to prevent and correct any harassing behavior and (2) the employee unreasonably failed to take advantage of any preventive or corrective measures provided by the employer. *Id.*

[2] We focus our comments on certain aspects of the Proposed Guidance. In providing positive and constructive feedback in these comments we are not implying agreement or disagreement with portions of the Proposed Guidance not discussed.

policy. We agree that an employer is not on notice of unlawful harassment based only on allegations of rudeness.

- **Section IV.B.3.b.ii.(b)(4) – Bad Faith Complaints of Harassment.** The Proposed Guidance states that an employee who complains of harassment in "good faith" should face no adverse consequences from the employer. We are encouraged by the EEOC's implicit position that employers may take adverse action against employees who make complaints of harassment in bad faith. In some situations, a bad faith complaint of harassment may raise major concerns about the employee's integrity. If an employer can show that the allegations of harassment are in bad faith, proportionate discipline for the bad faith complaint would not constitute retaliation.

- **Section IV.B.3.b.ii.(b)(4) – Flexibility in Responding to Complaint.** Employers are guided by the principle that the complaining party should not be burdened by the steps an employer takes to prevent further harassment. Thus, when it becomes necessary to separate a complaining employee from an alleged harasser, employers will make every effort to ensure that the complaining party is not transferred to a shift or position that leaves the complaining party worse off. However, it is not always possible to separate the complaining party from the alleged harasser with no inconvenience to the complaining party. The Proposed Guidance takes an appropriate balancing approach: an employer may place some burdens on the complaining party as part of the corrective action it imposes on the harasser as long as it makes every reasonable effort to minimize those burdens or adverse consequences.

- **Section IV.B.3.b.ii.(b)(5) – Harassment by Non-Employees.** The Proposed Guidance acknowledges the challenges of addressing a hostile work environment caused by non-employees (e.g., customers). The EEOC encourages employers in this situation to consider the "arsenal of incentives and sanctions" available to address the harassment. However, the Proposed Guidance correctly notes that employers have fewer tools at their disposal for correcting harassment by a non-employee, because these harassers are not bound by company policies, or able to be proactively coached and trained in the same way by the employer. We are encouraged that the EEOC will be evaluating real life limitations on the employer when addressing complaints against non-employees.

II. Suggested Changes to the Proposed Guidance

- **Section III.C.3. – Workplace Culture.** The Proposed Guidance improperly indicates that workplace culture should never be taken into account in evaluating whether conduct constitutes an objectively hostile work environment. Prevailing culture does not excuse discriminatory conduct, but it may explain why the conduct does not meet the definition of harassment. Justice Scalia very accurately articulated how the social

context matters when evaluating what is harassment, *See Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 81 (1998) (pointing out the difference between a coach smacking his player on the buttocks at a game compared to the same conduct toward his secretary in an office). Similarly, the California Supreme Court found coarse sexual humor and vulgar and anatomical language did not constitute unlawful harassment where the communications were part of the creative process for developing the script for an adult television comedy. *Lyle v. Warner Bros. Television Productions*, 38 Cal. 4th 264 (2006). Along these lines, where harassment claims are based on overhearing foul language, it is certainly relevant if other employees have overheard many other colleagues, including plaintiff, using the same foul language on a regular basis. A proper analysis of whether the conduct objectively rises to the level of harassment should give accurate attention to the prevailing workplace culture and why any allegedly harassing conduct was appropriately perceived as hostile, severe and unwelcome.

- **Section III.D.2.a. – Second-Hand Knowledge of Alleged Harassment.** The Proposed Guidance goes too far in equating conduct never witnessed by a complaining party with conduct to which the complaining party actually experienced. Not only do second and third hand accounts of harassment not affect an employee to the same degree, but courts also must bear in mind the remoteness in time of these incidents, as well as the potential inaccuracies of this hearsay in considering whether they could possibly contribute to a presently hostile working environment. So, when an employee hears second-hand that her supervisor told an offensive unspecified joke about women five years ago at an office party, this type of grasping for straws is so vague in content and remote in time that it should not be relevant. We therefore urge the EEOC to clarify in the Guidance that second hand accounts of harassment are not relevant unless they are: reasonably proximate in time, corroborated to every extent possible, and detailed enough to ascertain whether they contribute to the employees' hostile work environment claim.

- **Section IV.A.2. – Supervisor Status Based Only on Belief of Employee.** Quoting *dicta* from *Ellerth*, the Proposed Guidance would find an alleged harasser to be a supervisor, and subjecting the employer to vicarious liability, even if the employer had not empowered the alleged harasser with the authority to take tangible employment actions (e.g., hire, fire, demote, etc.) against the complaining party. The Proposed Guidance would find constructive supervisor status if the complaining party "reasonably believed" the alleged harasser had the authority to take tangible employment actions. This constructive supervisor approach is foreclosed by the letter and spirit of *Vance v. Ball State Univ.*, 133, S. Ct. 2434, 2443 (2013). *Vance* allows vicarious liability "only when the employer has empowered that employee to take tangible employment actions against the victim," and does not leave room for the victim's "beliefs" to influence the determination. In reaching this conclusion, the

Supreme Court rejected the EEOC's 1999 Guidance on Vicarious Employer Liability for Unlawful Harassment by Supervisors. That 1999 Guidance contained the constructive supervisor theory now a part of the Proposed Guidance. In *Vance*, the Supreme Court found the EEOC's 1999 Guidance to be "murky" and a "study in ambiguity." *Vance* at 2459. Instead of following the EEOC's framework, the Supreme Court opted for a bright line rule—whether the alleged harasser was actually empowered with authority—with the goal of resolving supervisor status "as a matter of law before trial." *Vance* at 2450. In light of the clear mandates of *Vance*, and the ability of harassment victims to seek relief against non-supervisors under a negligence theory, we recommend the EEOC remove the concept of constructive supervisor by reasonable belief from the Proposed Guidance.

- **Section IV.B.2.a.iii(a) – Overlooking an Employee's Failure to Complain Due to Fear of Retaliation.** The statement that "An employee's failure to use the employer's complaint procedure would be reasonable if the employee reasonably feared retaliation based on the filing of the complaint" goes too far. The statement encourages employees to disregard complaint mechanisms that work to prevent harassment. This section deserves further explanation to point out how rarely a plaintiff can demonstrate reasonable fear of retaliation. In fact, "an employee's subjective fears of confrontation, unpleasantness or retaliation do not alleviate the employee's duty under *Ellerth* to alert the employer to the allegedly hostile environment." *Shaw v. AutoZone, Inc.*, 180 F.3d 806, 813 (7th Cir. 1999) (affirming summary judgment based on affirmative defense available where AutoZone had reasonable harassment policy, and trainings, in place, and employee never complained of harassment prior to quitting her job); *see also Deters v. Rock-Tenn Co.*, 245 Fed. Appx. 516 (6th Cir. 2007) (holding that even if a failure to complain was "understandable" it was not "reasonable" when the employee failed to complain for three years, and absolving employer from liability by finding affirmative defense established). Most employers, and generally all large employers, have numerous channels available for an employee to report a concern about harassment. In many cases, companies have toll-free hotlines where an employee may complain to a third party not affiliated with the company, often with the option of doing so anonymously. In light of all of these channels, courts have often rightfully dismissed the excuse that an employee need not complain out of a generalized fear of retaliation. The EEOC should be mindful of the fact that both the employee and the employer win when the employment relationship can be preserved; addressing concerns prior to the relationship breaking down and becoming adversarial is always the goal. So, we would encourage the Guidance to require employee complaints when there is a reasonable channel available for handling of internal complaints.

- **Section IV.B.2.b.ii. – Liability for Single-Incident Supervisor Harassment.** The Proposed Guidance would hold an otherwise diligent employer liable for one severe

and unexpected incident of harassment by a supervisor. The Proposed Guidance should be revised to avoid the injustice of what the Proposed Guidance admits are "harsh outcomes for otherwise law abiding employers." Holding an employer responsible for sexual harassment that it could not have done anything else to prevent or correct is inconsistent with the law and fundamental principles of fairness. As the Eighth Circuit has explained, it would be inconsistent with the intent of the *Farragher* affirmative defense if employers are held to a strict liability standard for single incident harassment in situations where there is nothing more the employer could have reasonably done to prevent or correct the harassment. *See McCurdy v. Ark. State Police,* 375 F.3d 762, 774 (8th Cir. 2004). In addition to that, it is only the most egregious single-incident harassment cases which are actionable, such as those involving physical bodily harm including sexual assault. In such cases, an employee typically has other recourse available (both criminal and civil) against the accused personally, so we should be careful that culpability is being placed on the responsible party, and not on an employer, absent any evidence of missteps.

III. Portions of Proposed Guidance Deserving of Additional Clarification

- **Section III.C.2 – Not Taking into Account an Employee's Delay in Reporting Hostile Conduct.** The Proposed Guidance takes the position that a delay in reporting harassment has no bearing on whether an employee subjectively believed his or her work environment to be hostile. Not only does a delay in reporting harassment impact whether employer liability should exist, but it is also one indicator of whether the conduct is subjectively perceived as hostile. We understand that there may be situations where there is some explanation for the delay, but the delay also demands consideration in the context of whether the working environment was in fact hostile. If an employee does not report harassment, this may be an indicator that the harassment is not rising to the level where it is substantially interfering with the employee's daily work. Consider a situation where the employee has been overhearing obscene language for years and thinking nothing of it, but complains about it after receiving a poor performance review or being terminated. Delay, in some cases, may be one factor in showing that the employee never perceived the working environment as hostile. This is also particularly relevant in the context of consensual romantic relationships that later hit a bump in the road. We would suggest clarification to articulate how delays can be relevant to an employee's requirement to show his/her environment is subjectively hostile.

- **Section III.D.2.c. – Conduct Outside the Workplace.** The Proposed Guidance gives an example of an employee being physically assaulted because of his race on the street outside of work, and how this employee's fears carry over into the workplace and may create a hostile environment. However, many out of work activities, even if they may be offensive

to someone, do not carry over into the workplace. For example, if an employee is Roman Catholic and knows that her supervisor belongs to a group that openly looks down on the Catholic Church, this itself does not amount to a hostile working environment. In situations where managers can appropriately separate their out of work associations or actions from the workplace, and they are not directly impacting the employee outside of work, a claim for hostile work environment does not arise. This distinction should be made in the Guidance.

- **Section IV.B.3.b.ii.(b)(6) – Appropriate Corrective Action.** In addressing the extent to which harassment is substantiated, the Proposed Guidance notes that if findings are inconclusive, discipline may not be warranted, but the employer should still take preventative measures. While we agree that preventive measures should regularly be monitored and updated, there are, not uncommonly, reports of harassment that reveal no evidence and are completely unfounded. For example, the employee who says they are being harassed when they receive a write-up and the investigation reveals that the employee is a poor performer and the write-up is fair and justified. In such circumstances, we do not believe there is an automatic obligation on an employer to bolster their preventative measures, because there is absolutely no showing of any harassment in the workplace. Employers would appreciate if the Guidance can recognize and clarify this distinction and specify in what situations some obligation for additional preventative measures may exist.

IV. Conclusion

In closing, we again thank the EEOC for its attention to updating this Proposed Guidance and for consideration of our feedback. We look forward to continuing to work with employers to uphold their commitment to preventing unlawful harassment.

Very truly yours,
JACKSON LEWIS P.C.

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PP/ss