

Blog Post

LGBTQ+ Protections, Virtual Harassment, and Social Media Posts: The EEOC Updates Its Harassment Guidance for the 21st Century

October 9, 2023

By M. Adil Yaqoob

The Equal Employment Opportunity Commission (EEOC) has published draft enforcement guidance regarding workplace harassment, entitled “Proposed Enforcement Guidance on Harassment in the Workplace.” The proposed guidance sets forth the legal standards applicable to harassment claims under federal law and provides a variety of examples with extensive citations to applicable case law. If made final, this would be the EEOC’s first updated workplace harassment guidance in effect since 1999 and would supersede all prior guidelines addressing the same issues. The EEOC previously sought public input on harassment guidance in 2017, but that proposed guidance was never finalized. Then came the #MeToo Movement, the COVID-19 Pandemic and the evolution of the remote workplace, the proliferation of social media, and a landmark decision by the U.S. Supreme Court regarding LGBTQ+ discrimination protection. The EEOC’s current proposed guidance on workplace harassment addresses several of these issues unique to the 21st century, especially pertinent to the modern day workplace. Highlights include broad protections for LGBTQ+ employees, virtual workplace harassment, and non-work related social media activity that contributes to a hostile work

Related People

M. Adil Yaqoob

Related Work

Employment
Administrative Claims
Defense
Employment Litigation
Labor and Employment

Related Offices

New York

HR Defense

Akerman Perspectives
on the Latest
Developments in Labor
and Employment Law

[Visit this Akerman blog](#)

environment. This may be a signal for employers to refocus their policies, as it's no longer time to party like its 1999.

LGBTQ+ Protections

The proposed guidance seeks to incorporate the holding in the U.S. Supreme Court's 2020 landmark decision in *Bostock v. Clayton*, in which the Court ruled that discrimination based on sexual orientation and gender identity violated Title VII of the Civil Rights Act. According to the proposed guidance, examples of harassment based on an individual's gender identity may include (i) harassment because an individual does not present in a manner that would stereotypically be associated with that person's gender; (ii) intentional and repeated use of a name or pronoun inconsistent with the individual's gender identity (misgendering); or (iii) denial of access to a bathroom or other sex-segregated facility consistent with the individual's gender identity.

This is not the first time the EEOC has offered guidance suggesting that misgendering and denial of bathroom or facility access consistent with an individual's gender identity could be considered unlawful sex discrimination under Title VII. In June 2021, the EEOC released guidance in Q&A format based upon the *Bostock* decision expressing its intent to provide clarity as to existing protections against discrimination based on sexual orientation or gender identity under the law, citing similar examples. However, a Texas federal court struck down this guidance, holding that the EEOC exceeded its authority and did not follow proper notice-and-comment procedure in attempting to regulate "conduct" (like bathrooms and use of pronouns) beyond prohibition of discrimination "because of" an employee's LGBTQ+ "status."

Unlike the June 2021 Q&A, the EEOC has opened the proposed guidance to public comment and will not finalize and publish the guidance until the 30-day comment period ends. But aside from that

procedural fix, the harassment guidance appears susceptible to a similar challenge as to whether the EEOC has stretched its interpretation of *Bostock* too far. Regardless of whether the proposed guidance becomes final and is not struck down, it may not be the final word on this issue. The EEOC's interpretation of Title VII does not create any new legal rights or obligations and is typically followed by courts only to the extent they find EEOC's positions to be persuasive. In other words, courts may not defer to the EEOC's position that misgendering or denial of bathroom access can constitute discriminatory conduct, and will instead use their own legal reasoning to determine whether such conduct violates Title VII. Employers should note that, as the EEOC observes, courts — even prior to the *Bostock* decision — have viewed evidence of intentional misgendering as supportive of a hostile work environment claim. Moreover, the EEOC would certainly rely upon its own administrative interpretation when investigating and reaching a determination of a charge asserting sexual orientation and/or gender identity discrimination.

Virtual Workplace Harassment

As a result of the COVID-19 pandemic, many employers offered their employees the ability to work remotely either full- or part-time. In light of this significant expansion of the virtual workplace, the EEOC suggests that certain conduct within a virtual work environment can contribute to a hostile work environment. The proposed guidance cites examples of conduct that could be considered harassing, including: (i) sexist comments made during a video meeting; (ii) racist imagery that is visible in an employee's workspace while the employee participates in a video meeting; and (iii) sexual comments made during a video meeting about a bed being near an employee in the video image. While these examples cited by the agency focus on video conference technology, the EEOC opines that harassing conduct can also occur over instant messaging systems, internal electronic

bulletin boards, and other virtual communications systems.

Harassment Over Social Media

While noting that employers are generally not responsible for conduct that occurs in non-work related contexts, the EEOC advises that an employer can be held liable when the conduct has consequences in the workplace and therefore contributes to a hostile work environment. In the context of social media, the EEOC notes that communications through social media accounts can affect the “terms and conditions of employment” and therefore may constitute harassing conduct. To illustrate this point, the proposed guidance offers the following example: “If an Arab-American employee is the subject of ethnic epithets that a coworker posts on a personal social media page, and either the employee learns about the post directly or other coworkers see the comment and discuss it at work, then the social media posting can contribute to a racially hostile work environment.” Put starkly, according to the EEOC, social media posts that an employee has not personally viewed can contribute to a hostile work environment simply because the employee learned about the post as a result of the employee’s coworkers discussing the post at work.

Employer Takeaways

While the EEOC’s new proposed harassment guidance, even if it becomes final, does not have the force of law, it is clear that the modern workplace environment can create opportunities for workplace harassment that can catch employers by surprise. Accordingly, it may be a good idea for employers to review and update their existing policies and procedures based on these changes to the workplace. For guidance related to the newest trends in workplace harassment law, consult your Akerman Labor & Employment attorney.

This information is intended to inform firm clients and friends about legal developments, including recent decisions of various courts and administrative bodies. Nothing in this Practice Update should be construed as legal advice or a legal opinion, and readers should not act upon the information contained in this Practice Update without seeking the advice of legal counsel. Prior results do not guarantee a similar outcome.