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**VIA ELECTRONIC SUBMISSION**

Victoria A. Lipnic, Acting Chair  
Commissioners Chai R. Feldblum, Jenny R. Yang, & Charlotte A. Burrows  
U.S. Equal Employment Opportunity Commission  
131 M Street NE  
Washington, D.C. 20507

**Re: Public Comment on EEOC's Proposed Guidance on Unlawful Harassment**

Dear Acting Chair Lipnic and Commissioners Feldblum, Yang and Burrows:

We respectfully submit the following comments on the EEOC's Proposed Enforcement Guidance on Unlawful Harassment for Public Input. See <https://www.regulations.gov/document?D=EEOC-2016-0009-0001>.

This firm represents employees and labor organizations in individual and class cases, including employment discrimination, retaliation, whistleblowing and harassment cases. Our clients come from all walks of life, from hourly workers to professionals and executives. We deal on a daily basis with the issues discussed in the EEOC's Proposed Guidance. I have had the honor of testifying before the Congress on the amendments to the Title VII and the promulgation of the 1991 Amendments. Title VII is an important law which must be maintained and expanded to insure that Civil Rights are a reality, not an illusion or forgotten promise of the past.

We applaud - and both sides of the labor and employment bar need - the EEOC's efforts to put together an up-to-date comprehensive guidance on harassment. The Guidance will provide much needed guidance to EEOC investigators, employers, the bar and the American people, and assist them in understanding the law. The Guidance will enhance the EEOC investigatory process.

**Sexual harassment as a form of harassment:** We concur with the EEOC's decision to address all forms of workplace harassment, including sexual harassment, together in a single Guidance, all subject to the same standards. The EEOC Guidance eliminates divergent and unfair standards as well as antiquated thinking which require only sexual harassment victims to prove "unwelcomeness." All other employee victims of harassment need only show that that the conduct was subjectively and objectively hostile. There is no rationale or fair reason to apply a different standard to sexual harassment victims. A dual standard continues to unfairly target these victims, and diverts attention to their personal lives, often in an embarrassing way (such as their dress, relationships, and other off-work behavior), and undermines the goal of preventing sexual harassment. The EEOC's Guidance sets forth a sensible approach.

**Social media postings:** We also concur with the EEOC that conduct that occurs outside the work-related context can create or contribute to a hostile environment (p. 36-38). The EEOC Guidance correctly acknowledges the modern reality of blurred lines between the workplace and outside the workplace, especially with respect to the prevalence of social media, email, texting, etc. The EEOC's position that that off work conduct can play a part in a hostile environment would not require employers to conduct surveillance of their employees' private social media accounts, as another commenter claimed. An employer that maintains and implements a truly effective harassment policy will have no need to do so. We note that some employers have begun to require or request access to employees' social media accounts, and the Guidance should clarify that doing so may result in a presumption of awareness of harassment and/or a heightened duty to act on the part of the employer.

**Practices:** The Guidance should make clear that the list of "promising practices" is not exhaustive (p. 68-75). In our experience, most employers have written harassment policies, which are often cited in their EEOC position statements as proof that harassment did not occur. Merely having harassment policies, even if they say all the right things, is not enough. The Guidance should recommend that employers have processes to monitor and evaluate the effectiveness of their harassment prevention and complaint-handling practices, in addition to seeking feedback from employees, as the Guidance suggests (p. 70). Second, the Guidance emphasizes the importance of an impartial investigator to investigate harassment. However, the employer's investigator often is a risk manager or loss prevention personnel whose task is to minimize liability rather than to effectively address harassment and take steps to prevent harassment from continuing. The Guidance should acknowledge that the employer's choice of investigator may result in reasonable skepticism of the fairness and effectiveness of the process (p. 47).

On behalf of our Firm and our clients, Potter Bolaños appreciates the opportunity to comment on the proposed Guidance. We are available to testify or provide any information which would be helpful to the Agency's process or to finalizing this Guidance or others to implement Title VII and other EEO laws.

Respectfully,

POTTER BOLANOS

  
Robin Potter