

Withdrawal/Redaction Sheet

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
001. memo	Carol H. Rasco to Donsia Strong re: EEOC Hearing (1 page)	6/1/1994	P5
002. memo	Donsia Strong to Carol H. Rasco re: EEOC Hearing (2 pages)	6/1/1994	P5
003. memo	Claire Gonzales to Donsia Strong et al re: Background on Religious Harassment Guidelines Issue (4 pages)	5/26/1994	P5
004. draft	Background on Proposed Consolidated Harassment Guidelines (7 pages)	5/25/1994	P5
005. memo	Donsia Strong to Katherine Darwin re: EEOC (1 page)	6/7/1994	P5

COLLECTION:

Clinton Presidential Records
 Domestic Policy Council
 Stephen Warnath (Civil Rights)
 OA/Box Number: 9592

FOLDER TITLE:

[Harassment - Religious and Consolidated Guidelines] [1]

ds60

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
- P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
- P5 Release would disclose confidential advise between the President and his advisors, or between such advisors [(a)(5) of the PRA]
- P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

RR. Document will be reviewed upon request.

Freedom of Information Act - [5 U.S.C. 552(b)]

- b(1) National security classified information [(b)(1) of the FOIA]
- b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
- b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
- b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
- b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
- b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
- b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

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For a complete list of items withdrawn from this folder, see the
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**U.S. Equal Employment Opportunity Commission
Office of Communications and Legislative Affairs
1801 L Street, NW, Room 9024
Washington, DC 20507
FAX # (202) 663-4912**

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DATE : 5/31/94 TIME: _____

TO : Steve Warnath & Donsia Strong

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SENDER: Claire Gonzales

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OEO
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DOCUMENT: EEOC's Response to Senator Heflin

NUMBER OF PAGES TRANSMITTED (INCLUDING COVERSHEET): 7

SPECIAL INSTRUCTIONS: Eric asked for a copy and I thought you might like to see it also.

Please telephone the appropriate office above if you do not receive all documents.



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

MAY 31 1994

The Honorable Howell Heflin
United States Senate
Washington, DC 20510-0101

Dear Senator Heflin:

This is in response to your letter dated May 2, 1994, expressing concern about the inclusion of religion in our Proposed Consolidated Guidelines on Harassment Based on Race, Color, Religion, Gender, National Origin, Age or Disability, 58 Fed. Reg. 51,266 (Oct. 1, 1993). We appreciate your concerns and will address them in the process of revising and clarifying the Proposed Consolidated Guidelines.

Some background about the Proposed Guidelines may be helpful. They were issued in an effort to educate employers and employees about existing law and were not intended to create any new obligations on employers. They were based on over twenty years of case law and Commission precedent, as well as the Commission's pre-existing Guidelines on National Origin Harassment, the Guidelines on Sexual Harassment and the Commission's Policy Guidance on Sexual Harassment.

Accordingly, the Proposed Guidelines are not designed to alter employees' existing rights to express religion in the workplace. In fact, under Title VII, the Commission can only issue interpretive Guidelines; its rules do not have the force or effect of law.

As you are aware, in enacting Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq., Congress prohibited discrimination on the basis of race, color, religion, gender or national origin. The Supreme Court has repeatedly noted that Title VII "on its face treats each of the enumerated categories exactly the same." Price Waterhouse v. Hopkins, 490 U.S. 228, 242 n.9 (1989) (Brennan, J., plurality); see Harris v. Forklift Sys., Inc., 114 S. Ct. 367, 371 (1993).

Title VII's ban against discrimination includes a prohibition on discriminatory "terms, conditions, or privileges of employment." For over twenty years the federal courts and the Commission have held that harassment based on a statutorily protected classification is a discriminatory term or condition of employment and thus is prohibited by Title VII. Harassment based

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Page Two

on religion violates the law in the same manner as harassment based on other protected bases. See, e.g., Weiss v. United States, 595 F. Supp. 1050, 1056 (E.D.Va. 1984) ("when an employee is repeatedly subjected to demeaning and offensive religious slurs before his fellows by a co-worker and by his supervisor, such activity necessarily has the effect of altering the conditions of his employment within the meaning of Title VII").

We note your concern that the Commission cited Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986), a case involving sexual harassment, for the proposition that "Title VII affords employees the right to work in an environment free from discriminatory intimidation, insult, and ridicule." While Meritor did involve a cause of action based on sexual harassment, the Court indicated that it was applying principles applicable to other bases covered by Title VII. The Court specifically endorsed the principle that creation of a hostile environment based on discriminatory racial, religious, national origin, or sexual harassment constitutes a violation of Title VII. See id. at 66. It should be noted that, more recently, the Court in Harris v. Forklift Sys., Inc., 114 S. Ct. 367, 371 (1993), reiterated the position that harassment on the basis of race, color, religion, gender or national origin constitutes a violation of Title VII. See also id. at 373 (Ginsburg, J., concurring) ("Title VII declares discriminatory practices based on race, gender, religion, or national origin equally unlawful").

Based on some of the earliest comments on the Proposed Guidelines that the Commission received, the agency understood that there was concern that the Guidelines could be misconstrued to broadly suppress religious expression in a manner that the Commission did not intend. Indeed, as Commission staff explained to representatives of several Christian organizations, any such broad prohibition on religious expression or apparel could violate Title VII's requirement that employers accommodate employees' requests to exercise religion, unless doing so would be an undue hardship. Thus, from the outset, the Commission has intended to address these concerns.

You have asked us whether a number of specific situations would constitute harassment. It is important to note that our answers to these questions are based upon our understanding of existing law. The answers to them will remain constant whether or not the Guidelines exist. As explained above, the Guidelines were intended to explain, rather than change, existing law.

We also point out that, like harassment on other bases, religious harassment will not be found unless the challenged conduct is hostile or denigrating on the basis of religion and is sufficiently severe and pervasive to alter the conditions of employment. The Commission recognizes that expressing one's own

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*I a reasonable person
the ~~exclusive~~ test used
under Title VII?*

beliefs is far different than disparaging the religion or beliefs of others.

More specifically, we will address your questions seriatim:

1) **Would a foreman or supervisor be able to wear a cross, a religious symbol such as a Christian fish, or a St. Christopher Medal, and may an employee wear a yarmulke?** It is not religious harassment for a supervisor or a co-worker merely to state his/her religious affiliation. Nor is it religious harassment when an individual wears a badge of religion, a yarmulke, a turban or a cross to work, even if that individual is a foreman or a supervisor. A reasonable person would not find that such conduct rises to the level of harassment. Indeed, Title VII requires an employer to accommodate employees' exercise of their religion unless doing so would create an undue hardship. Thus, the Commission has consistently supported employees' rights to wear religious garb.

2) **Are religious holidays allowed?** This, too, is an accommodation issue. The Commission has frequently sued employers who declined to grant employees time off to practice their religion. Certainly taking a religious holiday would not be considered harassment by a reasonable individual -- it in no way infringes on anyone else's rights.

3) **Can a business offer more holidays for one faith than another?** Initially, we note that this is not a harassment issue and that ordinary principles of discrimination would apply in such an instance. If an employer permitted individuals of one faith to observe its holidays while denying that right to individuals of different faiths, a cause of action for discrimination may be asserted. As long as all individuals are allowed to take time off to observe their religion when doing so creates no undue hardship, then Title VII would not be violated.

4) **May a foreman sell tickets to a church pancake breakfast?** As noted above, the alleged conduct must be severe or pervasive enough to create a hostile or abusive environment in order to constitute a violation of Title VII. Thus, if an employer or supervisor speaks of religion periodically, asks another employee to worship with him/her or sells tickets to a church function, it is unlikely that courts would find a violation of Title VII. Your question recognizes that some conduct can be more threatening or coercive when engaged in by a supervisor than by a co-worker. Therefore, if the employer or supervisor continually solicits fellow employees to worship with him/her even after his/her requests have repeatedly been rejected or if the employer

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Page Four

or supervisor bombards employees with religious materials although employees have indicated they are not interested in receiving such information, courts may find that a hostile environment has been created.

5) **May a business employ a chaplain?** Again, this is not an issue of harassment. A business can choose to employ any individual for any position that it so chooses without running afoul of Title VII.

6) **May employees at a business conduct a weekly prayer breakfast in which supervisors participate with some, but not all, employees?** We note that at least one court has concluded that Title VII is not violated when an employer conducts Bible study meetings in the workplace, as long as the employer does not require employees to attend and does not take adverse action against those employees who choose not to attend. See EEOC v. Townley Engineering & Mfg. Co., 859 F.2d 610 (9th Cir. 1988). Accordingly, the Commission believes that conducting Bible study or prayer meetings in the workplace would not, in and of itself, constitute a violation of Title VII.

7) **Could an officer of a company have a Bible on his/her office desk?** A reasonable person would not find the placement of a Bible, the Koran or any other religious text on another individual's desk to create a hostile or abusive environment. Therefore it would not be religious harassment for an individual to keep such a religious document on his/her desk.

8) **Can athletes still kneel and make the sign of the cross in celebration of some accomplishments?** It is worth reiterating that Title VII applies only to employment. Thus, our response refers to athletic events related to the workplace. Here again, making the sign of a cross would not be considered hostile or abusive conduct that was so severe or pervasive that a reasonable person could find that a hostile environment was created.

You suggest that application of the "reasonable person in the same or similar circumstances test" will burden requiring them to consider the religion of every single person in the workplace. Again, we note that harassment law will not be implicated by expression that does not denigrate or create hostility toward those with other beliefs.

Many commentators have expressed concern about this test. It is clearly one that needs to be addressed in any future Guidelines. However, some background may be useful to you. The Supreme Court has made clear that the question of whether an environment is sufficiently severe or pervasive to create a hostile environment will be judged from the standpoint of the reasonable person.

You have lots of citations - why not here? Is reasonable person standard

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Page Four

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You suggest that application of the "reasonable person in the same or similar circumstances test" will burden employers by requiring them to consider the religion of every single person in the workplace. Again, we note that harassment law would not even be implicated by expression that does not denigrate or show hostility toward those with other beliefs.

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press standard.

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Page Five

In 1990, in its Policy Guidance on Sexual Harassment, the Commission stated that "[t]he reasonable person standard should consider the victim's perspective and not stereotyped notions of acceptable behavior." "Current Issues of Sexual Harassment," EEOC Policy Guidance No. N-915-050 at 15, CCH ¶ 3112 (Mar. 19, 1990). In discussing the issue, the Commission noted the dissent of Judge Keith in Rabidue v. Osceola Refining Co., 805 F.2d 611 (6th Cir. 1986), cert. denied, 481 U.S. 1041 (1987). Judge Keith stated, in relevant part, that he "would have courts adopt the perspective of the reasonable victim which simultaneously allows courts to consider salient sociological differences as well as shield employers from the neurotic complainant[; otherwise] the defendants as well as the courts are permitted to sustain ingrained notions of reasonable behavior fashioned by the offenders" Id. at 626 (citation omitted).

The Commission's Policy Guidance makes clear that its standard is an objective one and is not a "'vehicle for vindicating the petty slights suffered by the hypersensitive.'" "Current Issues of Sexual Harassment," at 14 (quoting Zabkowitz v. West Bend Co., 589 F. Supp. 780 (E.D. Wisc. 1984)). In other words, the Guidelines' admonition to consider the perspective of the victim is merely intended to remind triers of fact to take into account historical discrimination against particular groups. It is clear for example that placing a noose in the workplace is likely to have a psychological impact on African Americans not shared by Whites. Because this point has been misunderstood, however, some clarifications and revisions are in order.

With respect to the Religious Freedom Restoration Act, we note that at the time the Notice of Proposed Rulemaking was issued, the Religious Freedom Restoration Act had not yet been enacted. Accordingly, as we review the Guidelines we will consider what impact, if any, the Religious Freedom Restoration Act will have on them.

Finally, your letter suggests that it may be advisable to delete religion from the Guidelines. The Commission is considering your suggestion. We note, however, that the purpose of the Guidelines is to inform employers and employees of their respective responsibilities and rights. Even if the Guidelines do not mention religion, employers are, as a matter of law, obliged to maintain a workplace free of religious harassment. Unfortunately, religious harassment does occur. Case law documents instances of Jewish employees being taunted as "Christ killers" and being subjected to "jokes" about the holocaust. Similarly, if an individual is repeatedly taunted and denigrated because s/he attends church on a regular basis or has professed devotion to a Supreme Being, a hostile environment on the basis of religion may have been created under existing law.

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We appreciate all of your comments. They will be quite helpful in our deliberations. We hope that this response has been of assistance to you. If you have any further questions, please do not hesitate to contact us.

Sincerely,

Claire Gonzales

Claire Gonzales
Director of Communications
and Legislative Affairs

STEVE W

**U.S. Equal Employment Opportunity Commission
Office of Communications and Legislative Affairs
1801 L Street, NW, Room 9024
Washington, DC 20507
FAX # (202) 663-4912**

FAX TRANSMITTAL FORM

DATE : 6/3/94 TIME: 3:30

TO : Donsia Strong, Domestic Policy

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SENDER: Claire Gonzales

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DOCUMENT: Draft Testimony on Harassment Guidelines
for Senate Hearing Thursday June 9 at 2pm

NUMBER OF PAGES TRANSMITTED (INCLUDING COVERSHEET): 11

SPECIAL INSTRUCTIONS:
Donsia - sorry this took so long but it got
caught in the Chair's office. Call me if you have
any questions, comments or hear anything.
Claire.

Please telephone the appropriate office above if you do not receive all documents.

Proposed Consolidated Harassment Guidelines

Thank you for providing the opportunity to discuss the Equal Employment Opportunity Commission's Proposed Consolidated Guidelines on Harassment. My comments today will be necessarily limited because the comment period on these Guidelines is still open and the comments will have to be evaluated before any final decisions can be made. As you know, on October 1, 1993, the Commission published a Notice of Proposed Rulemaking in the Federal Register promulgating Proposed Guidelines on Harassment Based on Race, Color, Religion, Gender, National Origin, Age or Disability and invited public comment. The original comment period ran for sixty days and, due to an unexpected interest in the Guidelines after the comment period closed, the Commission extended the comment period to June 13, 1994.

There has been a lot of confusion about the purpose and effect of the Proposed Guidelines, as well as the law on which they are based, with regard to religious harassment. This has prompted an outpouring of concern by thousands of Americans who care deeply about religious freedom, and we are grateful for the opportunity to set the record straight.

The gist of the criticism leveled at the inclusion of religion in the Proposed Guidelines is that it represents an attempt by the Commission to articulate a new rule designed to suppress religious

expression by employees in the workplace. This is simply wrong. As you know, for thirty years Title VII has protected this country's workers from discrimination in employment on the basis of their religious beliefs. The Commission has strongly defended the right of employees to exercise their religion in the workplace, even when employers have found it inconvenient to accommodate those beliefs.

As originally enacted by Congress, Title VII of the Civil Rights Act of 1964 prohibits employment discrimination on the bases of race, color, religion, sex and national origin. Congress has also afforded employees protection against discrimination on the bases of age and, more recently, disability. From its inception, Title VII has prohibited discrimination that affects hiring, firing or other tangible job benefits. In construing Title VII, courts have consistently held that it also protects employees who are subjected to severe or pervasive hostility because of their race, religion, or other covered bases. That is the definition of harassment. The Supreme Court in Meritor Savings v. Vinson, 477 U.S. 57, 66 (1986) and in Harris v. Forklift Systems, 62 U.S. L.W. 4004, 4005 (November 9, 1993) has held that harassment violates Title VII, and that Title VII applies to all of the statutorily covered bases.

To clear up the misunderstandings surrounding the Proposed Guidelines, it may be helpful to provide some historical context.

The primary force behind the initiation of the Guidelines was former Commissioner Joy Cherian who was concerned about the lack of guidance on the subject of racial harassment. Prior to the development of the Proposed Guidelines, the Commission had issued separate Guidelines for only sexual and national origin harassment. Instead of continuing to address harassment on a piecemeal basis, the Commission determined that guidelines addressing all protected bases of prohibited harassment in the workplace should be developed.

In drafting the Proposed Consolidated Guidelines, EEOC's Office of Legal Counsel sought to consolidate twenty years of judicial and Commission precedent. The Proposed Guidelines were intended to explain and interpret existing law rather than to create new legal theories. The Commission simply combined information and interpretations that courts and the Commission had articulated for many years.

Conduct that denigrates personal characteristics such as race, religion, or gender is never nice or pleasant to experience, but it is not always unlawful. The established body of law does not protect employees from every insult or offense that comes their way and it does not cover the hypersensitive employee's every complaint. The Supreme Court has made clear that harassing conduct is unlawful only when it is unwelcome and when it severely or pervasively denigrates or shows hostility on the basis of race,

religion, gender, national origin, age or disability. The law of workplace harassment recognizes that when conduct is severely or pervasively abusive because of one of those protected bases, it "offends Title VII's broad rule of workplace equality". Harris v. Forklift Systems, 62 U.S. L.W. at 4005. Thus, contrary to suggestions by their critics, the Proposed Guidelines do not provide that it would be unlawful to wear a cross or a yarmulke, have a Bible on your desk or invite a colleague to church. Such actions would be neither hostile nor severe nor pervasive. The Commission appreciates the concern that overly cautious employers may misconstrue the Proposed Guidelines and resort to blanket prohibitions of religious expression to avoid any possible liability. Not only are the Proposed Guidelines not intended to create such result, such a broad policy would likely run afoul of Title VII's requirement that employers reasonably accommodate an employee's religious exercise unless doing so would be an undue hardship. Any final Guidelines could make clear that such blanket prohibitions are neither required nor permissible.

Commission staff acknowledge that commentors have raised some valid concerns. For example:

- The Proposed Guidelines definition of harassment includes, as one of three definitions, conduct that "otherwise adversely affects employment opportunities." [§1609.1(b)(1)(iii)]. This language was taken directly

from the Guidelines on National Origin harassment that have been in effect since 1980. Critics are correct, however, in stating that courts have not used this language. Hence, the concern that the language might be misconstrued as an attempt to create a new category of harassment is well taken.

- .. Much of the criticism focuses on the Proposed Guidelines' articulation of the "reasonable person" standard used in determining whether a hostile work environment exists. [§ 1609.1(c)]. This standard for "reasonable person" allows "consideration of the perspective of persons of the alleged victim's race, ... religion, etc."

Critics argue that this may be interpreted to mean that alleged harassing conduct will be judged solely from the subjective, and ever changing, standpoint of the complaining party. They further contend that the standard is so subjective and vague that wary employers will feel forced to prohibit any religious expression in the workplace rather than risk offending anyone.

In articulating the standard, the Commission's intent was to retain an objective rather than a subjective perspective while taking account of historical discrimination aimed at various groups. It was not

intended to provide special protection for the hypersensitive employee. Given the amount of controversy generated by this provision, however, it is clear that the language should be revised to more accurately reflect the intended meaning.

- There has also been a substantial amount of comment on that portion of the definition of harassment that includes hostility toward an individual because of a covered characteristic of their relatives or associates. Some commentators have misconstrued this language to mean that an employee's associates can bring suit against an employer. Its intent was simply that an employee has a claim under anti-discrimination laws if s/he is subjected to severe or pervasive hostility because, for example, he/she is married to a person of another race or religion.

- The final and overarching concern expressed in the comments is the interaction of the Proposed Guidelines and the First Amendment right of free exercise of religion. The Commission is sensitive to the First Amendment concerns that have been raised by the Guidelines' critics. During the original comment period in the fall, some of the eighty-six comments received focused on whether the inclusion of religion in the

Proposed Guidelines violated the First Amendment's guarantee of free exercise. Legal Counsel staff immediately began and is continuing to explore the First Amendment issue.

Many critics are particularly concerned that the Guidelines conflict with the recently enacted Religious Freedom Restoration Act (RFRA). RFRA generally provides that the government may not substantially burden free exercise, even by a neutral rule, unless the government has a compelling interest and does so using the least restrictive means. RFRA had not been enacted when the Guidelines were originally published for comment. RFRA's potential impact on the Proposed Guidelines is being analyzed by Legal Counsel and will certainly be addressed by the Commission during its reconsideration of the Proposed Guidelines.

In order to understand and respond to these and other concerns involving the inclusion of religion in the Proposed Guidelines, Commission staff have met with representatives of several interest groups, including an "Ad Hoc Coalition" composed of the Traditional Values Coalition, the Family Research Council, the National Association of Evangelicals, the Center for Law & Religious Freedom, the Christian Legal Society, the American Civil Liberties Union. The representatives at that February 24th meeting expressed

concern that the Proposed Guidelines were overly broad and ultimately would force employers wishing to avoid liability to ban religion from the workplace entirely. Several representatives suggested that religion should be removed from the Guidelines.

On March 18, 1994, Commission staff met with another group of religious and civil liberties organizations that argued that removing religion from the Proposed Guidelines would send the wrong signal to employers by undermining Title VII's protection of religious expression in the workplace. Among the groups represented in that meeting were the Baptist Joint Committee, the American Jewish Congress, the General Conference of Seventh-day Adventists, the American Jewish Committee, the Anti-Defamation League of B'nai B'rith and People for the American Way. It should be noted that those representatives also expressed concern that, as proposed, portions of the Guidelines were subject to misinterpretation. They suggested that any problems with vagueness could best be solved by including specific examples of what does and does not constitute prohibited religious harassment.

Through the comments received, the Commission better understands the Proposed Guidelines' strengths and weaknesses, particularly in terms of how the public might construe them. The comments have made the point well that some parts of the Proposed Guidelines might be interpreted far differently than the Commission intended. We are continuing to receive, analyze and evaluate the

comments. One effective response to these concerns might be to revise the language in any final Guidelines to clarify the intended meaning and to include easy to understand examples of both permissible and prohibited conduct.

Although deletion of religion from the Proposed Guidelines seems like a simple solution, Commission staff remains extremely cautious about treating one protected basis differently than all others. Religious discrimination, including harassment, is an unfortunate reality in today's workplace. Any action that would weaken the protections afforded by Title VII for religion expression should be very closely examined.

One of the most critical elements of the Commission's mandate is the education of employers and employees about applicable law in the area of employment discrimination. The Proposed Guidelines were intended to explain existing law in the complex area of harassment, and the principles set forth are neither new nor solely the creation of the Commission. The EEOC is deeply committed to promoting equal employment opportunities for all people in this society. Properly understood and applied, anti-harassment law can be a tool that helps employers provide working conditions in which people of diverse beliefs and backgrounds can work together productively.

I would be glad to answer any questions you may have. However, because we are still in the comment period and because any action on these Proposed Guidelines requires approval by the full Commission, it would be inappropriate to commit at this time to any conclusions concerning or suggested changes to the Guidelines.

Withdrawal/Redaction Marker

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
003. memo	Claire Gonzales to Donsia Strong et al re: Background on Religious Harassment Guidelines Issue (4 pages)	5/26/1994	P5

**This marker identifies the original location of the withdrawn item listed above.
For a complete list of items withdrawn from this folder, see the
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COLLECTION:

Clinton Presidential Records
Domestic Policy Council
Stephen Warnath (Civil Rights)
OA/Box Number: 9592

FOLDER TITLE:

[Harassment - Religious and Consolidated Guidelines] [1]

ds60

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

Freedom of Information Act - [5 U.S.C. 552(b)]

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
- P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
- P5 Release would disclose confidential advise between the President and his advisors, or between such advisors [a)(5) of the PRA]
- P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

- b(1) National security classified information [(b)(1) of the FOIA]
- b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
- b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
- b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
- b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
- b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
- b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

C. Closed in accordance with restrictions contained in donor's deed of gift.

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

RR. Document will be reviewed upon request.

THE WHITE HOUSE
WASHINGTON

Woy will try to
limit F-10C appropriations
for country funds @
on Wednesday.

- Phil Lader
- Joel Klein
- Bill Calm
- Chris Edley
- Dennis Stang
- Veranna Byggis
- Paul Deann
- Newirth

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DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
004. draft	Background on Proposed Consolidated Harassment Guidelines (7 pages)	5/25/1994	P5

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COLLECTION:

Clinton Presidential Records
Domestic Policy Council
Stephen Warnath (Civil Rights)
OA/Box Number: 9592

FOLDER TITLE:

[Harassment - Religious and Consolidated Guidelines] [1]

ds60

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- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

"Heating Degree Days", the phrase "and Cooling Degree Days".

Dated: August 17, 1993.

Joseph Shuldiner,
Assistant Secretary for Public and Indian
Housing.

(FR Doc. 93-23233 Filed 9-30-93; 8:45 am)
BILLING CODE 4210-39-M

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

29 CFR Part 1609

Guidelines on Harassment Based on Race, Color, Religion, Gender, National Origin, Age, or Disability

AGENCY: Equal Employment
Opportunity Commission (EEOC).

ACTION: Notice of proposed rulemaking.

SUMMARY: The Equal Employment Opportunity Commission is issuing Guidelines covering harassment that is based upon race, color, religion, gender (excluding harassment that is sexual in nature, which is covered by the Commission's Guidelines on Discrimination Because of Sex), national origin, age, or disability. The Commission has determined that it would be useful to have consolidated guidelines that set forth the standards for determining whether conduct in the workplace constitutes illegal harassment under the various antidiscrimination statutes. Thus, these Guidelines consolidate, clarify and explicate the Commission's position on a number of issues relating to harassment. The Guidelines supersede the Commission's Guidelines on Discrimination Because of National Origin.

DATES: Comments must be received by November 30, 1993.

ADDRESSES: Comments should be addressed to the Office of the Executive Secretariat, EEOC, 10th Floor, 1801 L Street, NW., Washington, DC 20507. Copies of comments submitted by the public will be available for review at the Commission's library, room 6502, 1801 L Street, NW., Washington, DC, between the hours of 9:30 a.m. and 5 p.m. Copies of this notice of proposed rulemaking are available in the following alternative formats: Large print, braille, electronic file on computer disk, and audio tape. Copies may be obtained from the Office of Equal Employment Opportunity by calling (202) 663-4895 (voice) or (202) 663-4399 (TDD).

FOR FURTHER INFORMATION CONTACT:
Elizabeth M. Thornton, Deputy Legal
Counsel, or Dianna B. Johnston,
Assistant Legal Counsel, Office of Legal

Counsel, EEOC, 1801 L Street, NW.,
Washington, DC 20507; telephone (202)
663-4679 (voice) or (202) 663-7026
(TDD).

SUPPLEMENTARY INFORMATION: This proposed rule is not a major rule for purpose of Executive Order 12291.

The Commission has long recognized that harassment on the basis of race, color, religion, sex, or national origin violates section 703 of title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e *et seq.* (title VII). The Commission has also recognized that harassment based on age is prohibited by the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. 621 *et seq.* (ADEA). The Commission has interpreted the Rehabilitation Act of 1973, as amended, 29 U.S.C. 701 *et seq.*, and the Americans with Disabilities Act of 1990, 42 U.S.C. 12101 *et seq.* (ADA), as prohibiting harassment based on a person's disability. Regarding the ADA, see § 1630.12 of the Commission's regulations on Equal Employment Opportunity for Individuals With Disabilities, 56 FR 35,737 (1991) (codified at 29 CFR 1630.12) (1992).

For more than twenty years, the federal courts have held that harassment violates the statutory prohibition against discrimination in the terms and conditions of employment.¹ The Commission has held and continues to hold that an employer has a duty to maintain a working environment free of harassment based on race, color, religion, sex, national origin, age, or disability, and that the duty requires positive action where necessary to eliminate such practices or remedy their effects. The Commission has previously issued guidelines on sex-based harassment that is sexual in nature, EEOC Guidelines on Discrimination Because of Sex, 29 CFR 1604.11 (1992), and guidelines on national origin harassment. EEOC Guidelines on Discrimination Because of National Origin, 29 CFR 1606.8 (1992).

For several reasons, the Commission has determined that there is a need for new guidelines that emphasize that

¹ See, e.g., *Rogers v. EEOC*, 454 F.2d 234 (5th Cir. 1971) (segregation of employer's patients on the basis of national origin could create discriminatory work environment for Spanish-surnamed employees affecting the terms, conditions, and privileges of her employment), cert. denied, 406 U.S. 957 (1972); *EEOC v. International Longshoremen's Ass'n*, 511 F.2d 273 (5th Cir.) (by racially segregating union locals, union denied equal employment opportunities because of the psychological harm inflicted), cert. denied, 423 U.S. 994 (1975); *Weiss v. United States*, 595 F. Supp. 1050 (E.D. Va. 1984) (patterned use of religious slurs and taunts by co-worker and supervisor against plaintiff violated plaintiff's right to non-discriminatory terms and conditions of employment).

harassment based upon race, color, religion, gender,² age, or disability is egregious and prohibited by title VII, the ADEA, the ADA, and the Rehabilitation Act.³ First, the Commission has determined that it would be useful to have consistent and consolidated guidelines that set forth the standards for determining whether conduct in the workplace constitutes illegal harassment under the various antidiscrimination statutes. Second, because of all the recent attention on the subject of sexual harassment, the Commission believes it important to reiterate and emphasize that harassment on any of the bases covered by the Federal antidiscrimination statutes is unlawful. Third, doing so at this time is particularly useful because of the recent enactment of the Americans with Disabilities Act. Fourth, these guidelines offer more detailed information about what is prohibited than did the national origin guidelines. Finally, they put in guideline form the rule that sex harassment is not limited to harassment that is sexual in nature, but also includes harassment due to gender-based animus.

Section 1606.8 of the National Origin Guidelines will be incorporated into and superseded by these proposed Guidelines on Harassment. This does not represent a change in the Commission's position on harassment; rather, it is an effort to combine and clarify.

Sexual harassment continues to be addressed in separate guidelines because it raises issues about human interaction that are about extent unique in comparison to other harassment and, thus, may warrant

² There are forms of harassment that are gender-based but non-sexual in nature. See *Hall v. Gus Construction Co.*, 842 F.2d 1010, 1014 (8th Cir. 1988) (harassment that is not of a sexual nature but would not have occurred but for the sex of the victim is actionable under title VIII); *Robinson v. Jacksonville Shipyards*, 760 F. Supp. 1488, 1522 (M.D. Fla. 1991) (harassing behavior lacking sexually explicit content but directed at women and motivated by animus against women is sex discrimination).

Although the Commission has always recognized that gender-based harassment is actionable, the Guidelines on Discrimination Because of Sex describe the only conduct of a sexual nature. These proposed guidelines simply state the applicable rule in guideline form. See *Hall v. Gus Construction Co.*, 842 F.2d 1010, 1014 (8th Cir. 1988) (EEOC Guidelines emphasize explicitly sexual behavior but do not state that other types of harassment should not be considered).

³ Indeed, much of sexual harassment law derives from principles developed in the area of racial and national origin harassment. See *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 65-66 (1986) (discusses principles of hostile environment harassment developed in racial and national origin harassment cases and applied to sexual harassment).

separate emphasis. In addition to the guidelines, more extensive guidance on sexual harassment can be found in EEOC Policy Guidance No. N-915-050, "Current Issues of Sexual Harassment," March 19, 1990 (Sexual Harassment Policy Guidance). The Commission's Sex Discrimination Guidelines remain in effect and there is no change in the Commission's policy regarding sexual harassment.

Proposed § 1609.1(a) reiterates the Commission's position that harassment on the basis of race, color, religion, gender, national origin, age, or disability constitutes discrimination in the terms, conditions and privileges of employment and, as such, violates title VII, the ADEA, the ADA, or the Rehabilitation Act, as applicable. The Supreme Court, in *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), endorsed the Commission's position that title VII affords employees the right to work in an environment free from discriminatory intimidation, insult, and ridicule. See also *Patterson v. McLean Credit Union*, 491 U.S. 164, 180 (1989) (Court acknowledged that racial harassment was actionable under section 703(a)(1) of title VII).

Proposed § 1609.1(b) sets out the criteria for determining whether an action constitutes unlawful behavior. These criteria are that the conduct: (i) Has the purpose or effect of creating an intimidating, hostile, or offensive work environment; (ii) has the purpose or effect of unreasonably interfering with an individual's work performance; or (iii) otherwise adversely affects an individual's employment opportunities.

It also defines and gives examples of the types of verbal and physical conduct in the workplace that constitute harassment under title VII, and ADEA, the ADA, and the Rehabilitation Act. Actionable harassment includes harassment based on an individual's race, color, religion, gender, national origin, age, or disability, as well as on the race, color, religion, gender, national origin, age, or disability of one's relatives, friends, or associates.

Proposed § 1609.1(c) sets forth the standard for determining whether the alleged harassing conduct is sufficiently severe or pervasive to alter the conditions of employment and create an intimidating, hostile, or abusive work environment. The standard is whether a reasonable person in the same or similar circumstances would find the challenged conduct intimidating, hostile, or abusive. In determining whether that standard has been met, consideration is to be given to the perspective of individuals of the claimant's race, color, religion, gender,

national origin, age, or disability.⁴ Recent case law on this issue emphasizes the importance of considering the perspective of the victim of the harassment rather than adopting notions of acceptable behavior that may prevail in a particular workplace. See, e.g., *Ellison v. Brady*, 924 F.2d 872, 878-79, 55 EPD ¶ 40,520 (9th Cir. 1991); *Robinson v. Jacksonville Shipyards*, 760 F.Supp. 1486, 55 EPD ¶ 40,535 (M.D. Fla. 1991). As the Ellison court observed, applying existing standards of acceptable behavior runs the risk of reinforcing the prevailing level of discrimination. "Harassers could continue to harass merely because a particular discriminatory practice was common * * *" 924 F.2d at 878.

The Commission explicitly rejects the notion that in order to prove a violation, the plaintiff must prove not only that a reasonable person would find the conduct sufficiently offensive to create a hostile work environment, but also that his/her psychological well-being was affected. Compare *Harris v. Forklift Systems*, ___ F. Supp. ___, 60 EPD ¶ 42,070 (M.D. Tenn. 1990) (plaintiff must prove psychological injury), *aff'd per curiam*, ___ F.2d ___, 60 EPD ¶ 42,071 (6th Cir. 1992), with *Ellison v. Brady*, 924 F.2d 872, 878 n.1 (9th Cir. 1991) (plaintiff need not demonstrate psychological effects). The Supreme Court has granted *certiorari* in *Harris*, ___ U.S. ___, 60 EDP ¶ 42,072 (1993), and the Commission has joined the Department of Justice in an *amicus curiae* brief opposing the Sixth Circuit rule. Brief for the United States and the EEOC (April 1993) (No. 92-1168).

As noted above, the determination of whether the complained of conduct violates antidiscrimination laws turns on its severity and pervasiveness. Those factors interact. Courts do not typically find violations based on isolated or sporadic use of verbal slurs or epithets; nevertheless, they recognize that an isolated instance of such conduct—particularly when perpetrated by a supervisor—can corrode the entire employment relationship and create a hostile environment. For example, a supervisor's isolated use of inflammatory and patently offensive racial epithets and slurs such as "nigger" and "spic" may be enough to establish a violation. See, e.g., *Rogers v. Western-Southern Life Ins. Co.*, 792 F. Supp. 628 (E.D. Wis. 1992) (supervisor's infrequent use of racial comments such as "nigger" and "you Black guys are 'too f***ing dumb to be insurance

⁴ This standard is consistent with the standard applied to sexual harassment, as set out in the Sexual Harassment Policy Guidance.

agents" created a hostile work environment). See also *Daniels v. Essex Group, Inc.*, 937 F.2d 1264, 1274 & n. 4 (7th Cir. 1991) (court noted that even where harasser was a co-worker, one egregious incident, such as performing KKK ritual in workplace, would create hostile environment).

Under title VII, the ADEA, the ADA, and the Rehabilitation Act, all employees should be afforded a working environment free of discriminatory intimidation. Thus, proposed § 1609.1(d) provides that employees have standing to challenge a hostile or abusive work environment even if the harassment is not targeted specifically at them. See, e.g., *Rogers v. EEOC*, 454 F.2d 234 (5th Cir. 1971) (discriminatory work environment was created for Spanish-surnamed employee by segregation of employer's patients on the basis of national origin), cert. denied, 406 U.S. 957 (1972); *Robinson v. Jacksonville Shipyards*, 760 F. Supp. 1486 (M.D. Fla. 1991) ("behavior that is not directed at a particular individual or group of individuals, but is disproportionately more offensive or demeaning to one sex [can be challenged]").

Proposed § 1609.1(e) states that, in determining whether the alleged conduct constitutes harassment, the Commission will look at the record as a whole and the totality of the circumstances, including the nature of the conduct and the context in which it occurs. Whether particular conduct in the workplace is harassing in nature and rises to the level of creating a hostile or abusive work environment depends upon the facts of each case and must be determined on a case-by-case basis.

Proposed § 1609.2(a) applies agency principles to the issue of employer liability for harassment by the employer's agents and supervisory employees. The Supreme Court in *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), declined to issue a definitive rule on the issue of employer liability for claims of environmental harassment, but ruled "that Congress wanted courts to look to agency principles for guidance in this area." *Id.* at 72.

Subsection (i) of § 1609.2(a) states that the employer is liable where it knew or should have known of the conduct and failed to take immediate and appropriate corrective action. A written or verbal grievance or complaint, or a charge filed with the EEOC, provides actual notice. Evidence that the harassment is pervasive may establish constructive knowledge.

Subsection (ii) states that the employer is liable for the acts of its

supervisors, regardless of whether the employer knew or should have known of the conduct, if the harassing supervisory employee is acting in an "agency capacity." It notes that the Commission will examine the circumstances of the particular employment relationship and the job functions performed by the harassing individual in determining whether the harassing individual is acting in an "agency capacity."

If the employer fails to establish an explicit policy against harassment, or fails to establish a reasonably accessible procedure by which victims of harassment can make their complaints known to appropriate officials, apparent authority to act as the employer's agent is established. In the absence of an explicit policy against harassment and a complaint procedure, employees could reasonably believe that a harassing supervisor's actions will be ignored, tolerated, or even condoned by the employer. This is the same standard of liability for harassment by supervisors applied by the Commission to cases of sexual harassment. See *Sexual Harassment Policy Guidance*.

Proposed § 1609.2(b) provides that an employer is responsible for acts of harassment in the workplace by an individual's co-workers where the employer, its agents, or supervisory employees knew or should have known of the conduct, unless the employer can show that it took immediate and appropriate corrective action. This section recognizes that an employer is only liable for non-supervisory employee harassment where it was aware or should have been aware of the harassing conduct.

Proposed § 1609.2(c) provides that, because an employer is obligated to maintain a work environment free of harassment, its liability may extend to acts of non-employees. It states that an employer may be responsible for the acts of non-employees with respect to environmental harassment of employees where the employer, its agents, or supervisory employees knew or should have known of the conduct and failed to take immediate and appropriate corrective action, as feasible. Important factors to consider are the extent of the employer's control over the non-employees and the employer's legal responsibility for the conduct of such non-employees.

Proposed § 1609.2(d) sets forth the Commission's position that taking measures to prevent harassment is the best way to eliminate harassment. It states that an employer should take all steps necessary to prevent harassment from occurring, including having an

explicit policy against harassment that is clearly and regularly communicated to employees, explaining sanctions for harassment, developing methods to sensitize all supervisory and non-supervisory employees to issues of harassment, and informing employees of their right to raise and how to raise the issue of harassment under title VII, the ADEA, the ADA, and the Rehabilitation Act. Establishing an effective complaint procedure by which employees can make their complaints known to appropriate officials who are in a position to act on complaints is an important preventive measure.

Regulatory Flexibility Act

The proposed guidelines, if promulgated in final form, are not expected to have a significant economic impact on small business entities, within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*

List of Subjects in 29 CFR Part 1609

Race, color, religion, gender, national origin, age, and disability discrimination.

For the Commission.

Tony E. Gallegos,
Chairman.

For the reasons set forth in the Preamble, the EEOC proposes to add 29 CFR part 1609, §§ 1609.1 and 1609.2, as follows:

PART 1609—GUIDELINES ON HARASSMENT BASED ON RACE, COLOR, RELIGION, GENDER, NATIONAL ORIGIN, AGE, OR DISABILITY

Sec.

1609.1 Harassment.

1609.2 Employer Liability for Harassment.

Authority: 42 U.S.C. 2000e *et seq.*; 29 U.S.C. 621 *et seq.*; 29 U.S.C. 12101, *et seq.*; 29 U.S.C. 701, *et seq.*

§ 1609.1 Harassment.

(a) Harassment on the basis of race, color, religion, gender,¹ national origin,² age, or disability constitutes discrimination in the terms, conditions, and privileges of employment and, as such, violates title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e *et seq.* (title VII); the Age Discrimination in Employment Act, as amended, 29 U.S.C. 621 *et seq.* (ADEA);

¹ These Guidelines cover sex-based harassment that is non-sexual in nature. Sexual harassment is covered by the Commission's Guidelines on Discrimination Because of Sex, 29 CFR 1604.11 (1992).

² Because they are more comprehensive, these Guidelines supersede § 1606.8 of the Commission's Guidelines on Discrimination Because of National Origin, 29 CFR 1606.8 (1992).

the Americans with Disabilities Act, 42 U.S.C. 12101 *et seq.* (ADA); or the Rehabilitation Act of 1973, as amended, 29 U.S.C. 701 *et seq.*, as applicable.

(b)(1) Harassment is verbal or physical conduct that denigrates or shows hostility or aversion toward an individual because of his/her race, color, religion, gender, national origin, age, or disability, or that of his/her relatives, friends, or associates, and that:

- (i) Has the purpose or effect of creating an intimidating, hostile, or offensive work environment;
- (ii) Has the purpose or effect of unreasonably interfering with an individual's work performance; or
- (iii) Otherwise adversely affects an individual's employment opportunities.

(2) Harassing conduct includes, but is not limited to, the following:

- (i) Epithets, slurs, negative stereotyping, or threatening, intimidating, or hostile acts, that relate to race, color, religion, gender, national origin, age, or disability;³ and
- (ii) Written or graphic material that denigrates or shows hostility or aversion toward an individual or group because of race, color, religion, gender, national origin, age, or disability and that is placed on walls, bulletin boards, or elsewhere on the employer's premises, or circulated in the workplace.

(c) The standard for determining whether verbal or physical conduct relating to race, color, religion, gender, national origin, age, or disability is "sufficiently severe" or pervasive to create a hostile or abusive work environment is whether a reasonable person in the same or similar circumstances would find the conduct intimidating, hostile, or abusive. The "reasonable person" standard includes consideration of the perspective of persons of the alleged victim's race,

³ This includes acts that purport to be "jokes" or "pranks," but that are hostile or demeaning with regard to race, color, religion, gender, national origin, age, or disability. *Snell v. Suffolk County*, 782 F.2d 1094, 1098 (2d Cir. 1986) (dressing Hispanic prisoner in straw hat with sign saying "epic" and "[plaintiff's] son"); *Rochon v. FBI*, 691 F. Supp. 1548, 1551 n.1 (D.D.C. 1992) (characterizing as "pranks" such things as hate mail, threats of castration, use of defaced photographs—including one of plaintiff's children—and forging plaintiff's name to an insurance policy against death and dismemberment is almost as disturbing as the acts themselves).

⁴ See, e.g., *Rodgers v. Western-Southern Life Ins. Co.*, 792 F. Supp. 628 (E.D. Wis. 1992) (supervisor's infrequent use of racial comments such as "nigger" and "you Black guys are too f***ing dumb to be insurance agents," created a hostile work environment). See also *Danzels v. Essex Group, Inc.*, 937 F.2d 1264, 1274 & n.4 (7th Cir. 1991) (court noted that even where harasser was a co-worker, one egregious incident, such as performing KICK ritual in workplace, would create hostile environment).

color, religion, gender, national origin, age, or disability. It is not necessary to make an additional showing of psychological harm.

(d) An employer, employment agency, joint apprenticeship committee, or labor organization (hereinafter collectively referred to as "employer") has an affirmative duty to maintain a working environment free of harassment on any of these bases.⁵ Harassing conduct may be challenged even if the complaining employee(s) are not specifically intended targets of the conduct.

(e) In determining whether the alleged conduct constitutes harassment, the Commission will look at the record as a whole and at the totality of the circumstances, including the nature of the conduct and the context in which it occurred. The determination of the legality of a particular action will be made from the facts, on a case-by-case basis.

§ 1606.2 Employer liability for harassment.

(a) An employer is liable for its conduct and that of its agents and supervisory employees with respect to workplace harassment on the basis of race, color, religion, gender, national origin, age, or disability:

(1) Where the employer knew or should have known of the conduct and failed to take immediate and appropriate corrective action; or

(2) Regardless of whether the employer knew or should have known of the conduct, where the harassing supervisory employee is acting in an "agency capacity." To determine whether the harassing individual is acting in an "agency capacity," the circumstances of the particular employment relationship and the job functions performed by the harassing individual shall be examined.

"Apparent authority" to act on the employer's behalf shall be established where the employer fails to institute an explicit policy against harassment that is clearly and regularly communicated to employees, or fails to establish a reasonably accessible procedure by which victims of harassment can make their complaints known to appropriate officials who are in a position to act on complaints.

(b) With respect to conduct between co-workers, an employer is responsible for acts of harassment in the workplace that relate to race, color, religion,

⁵ See Commission Decision Nos. YSF 9-103 (racial harassment), 73-1114 (religious harassment), 71-3725 (gender-based harassment), OCH EEOC Decisions (1973) ¶¶ 6030, 6347, and 6290, respectively; Commission Decision No. 76-41, OCH EEOC Decisions (1983) ¶ 6632 (national origin harassment).

gender, national origin, age, or disability where the employer or its agents or supervisory employees knew or should have known of the conduct, and the employer failed to take immediate and appropriate corrective action.

(c) An employer may also be responsible for the acts of non-employees with respect to harassment of employees in the workplace related to race, color, religion, gender, national origin, age, or disability where the employer or its agents or supervisory employees knew or should have known of the conduct and failed to take immediate and appropriate corrective action, as feasible. In reviewing these cases, the Commission will consider the extent of the employer's control over non-employees and any other legal responsibility that the employer may have had with respect to the conduct of such non-employees on a case-by-case basis.

(d) Prevention is the best tool for the elimination of harassment. An employer should take all steps necessary to prevent harassment from occurring, including having an explicit policy against harassment that is clearly and regularly communicated to employees, explaining sanctions for harassment, developing methods to sensitize all supervisory and non-supervisory employees on issues of harassment, and informing employees of their right to raise, and the procedures for raising, the issue of harassment under title VII, the ADEA, the ADA, and the Rehabilitation Act. An employer should provide an effective complaint procedure by which employees can make their complaints known to appropriate officials who are in a position to act on them.

[FR Doc. 93-23869 Filed 9-30-93; 8:45 am]
BILLING CODE 4710-01-M

DEPARTMENT OF THE TREASURY

31 CFR Part 103

Bank Secrecy Act Regulations; Transmittal Orders for Funds Transfers and Transmittals of Funds by Financial Institutions; Correction

AGENCY: Departmental Offices, Treasury.

ACTION: Proposed rule; correction; extension of comment period.

SUMMARY: On August 31, 1993, the Department of the Treasury (Treasury) published a Notice of Proposed Rulemaking Relating to Transmittal Orders for Funds Transfers and Transmittals of Funds by Financial Institutions. 58 FR 46021. The Department of Treasury is making a

specific legislation. Under paragraph (c)(5)(i) of this section, the assignment of B to assist the legislative affairs department in analyzing the bill and in drafting a position letter in opposition to the bill evidences a purpose to influence legislation. Based on these facts, neither the activity of periodically confirming the procedural status of the bill nor the activity of preparing the routine, brief summary of the bill before March 31 constitutes influencing legislation. With respect to periodically confirming the procedural status of the bill on or after March 31, it is presumed, under paragraph (c)(4) of this section, that E engaged in the activity solely to make or support the lobbying communication because the activity commenced in the same taxable year as the lobbying communication. These facts indicate that after March 31, E determined the procedural status of the bill for the purpose of supporting the lobbying communication by B and, accordingly, E cannot rebut the presumption as it relates to this activity.

Example 8. Taxpayer Z prepares a report that it is required by state law to submit to a state corporation commission. Z sends a copy of the report to its delegate in the state legislature along with the taxpayer's letter opposing a bill that would increase the state sales tax. Even though the letter to the delegate is a lobbying communication (because it refers to, and reflects a view on, specific legislation), under paragraph (c)(5)(ii) of this section, the preparation of the report does not constitute influencing legislation.

Example 9. Taxpayer Y purchases an annual subscription to a commercial, general circulation newsletter that provides legislative updates on proposed tax legislation. Employees in Y's legislative affairs department read the newsletter in order to keep abreast of legislative developments. Even if Y attempts to influence legislation that is identified and tracked in the newsletter, under paragraph (c)(5)(iii) of this section, the time spent by employees of Y reading the newsletter does not constitute influencing legislation.

(d) *Special imputation rule.* If one taxpayer, for the purpose of making or supporting a lobbying communication, uses the services or facilities of a second taxpayer and does not compensate the second taxpayer for the full cost of the services or facilities, the purpose and actions of the first taxpayer are imputed to the second taxpayer. Thus, for example, if a trade association uses the services of a member's employee, at no cost to the association, to conduct research or similar activities to support the trade association's lobbying communication, the trade association's purpose and actions are imputed to the member. As a result, the member is treated as influencing legislation with respect to the employee's work in support of the trade association's lobbying communication.

(e) *Anti-avoidance rule.* If a taxpayer, alone or in coordination with one or

more other taxpayers, purposely structures its attempts to influence legislation to achieve results that are unreasonable in light of the purposes of section 162(e) and section 6033(e), the Commissioner can take such steps as are appropriate to achieve reasonable results consistent with the purposes of section 162(e), section 6033(e), and this section.

(f) *Effective date.* This section is effective for amounts paid or incurred on or after May 13, 1994. Taxpayers must adopt a reasonable interpretation of section 162(e)(1)(A) for amounts paid or incurred prior to this date.

Par. 3. In § 1.162-20, paragraph (c)(5) is added to read as follows:

§ 1.162-20 Expenditures attributable to lobbying, political campaigns, attempts to influence legislation, etc., and certain advertising.

* * * * *

(c) * * *
(5) *Expenses paid or incurred after December 31, 1993, in connection with influencing legislation other than certain local legislation.* The provisions of paragraphs (c)(1) through (c)(3) of this section are superseded for expenses paid or incurred after December 31, 1993, in connection with influencing legislation (other than certain local legislation) to the extent inconsistent with section 162(e)(1)(A) (as limited by section 162(e)(2)) and §§ 1.162-20T(d) and 1.162-29.

Margaret Milner Richardson,

Commissioner of Internal Revenue.

[FR Doc. 94-11613 Filed 5-10-94; 11:23 am]

BILLING CODE 4830-01-U

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

29 CFR Part 1609

Guidelines on Harassment Based on Race, Color, Religion, Gender, National Origin, Age, or Disability

AGENCY: Equal Employment Opportunity Commission (EEOC).

ACTION: Proposed rule; extension of comment period.

SUMMARY: The period for commenting on the proposed guidelines on harassment based on race, color, religion, national origin, age, or disability (58 FR 51266, October 1, 1993) has been extended to June 13, 1994. After the comment period closed, the Commission received numerous comments and requests by individuals to submit comments. Since the Commission has informally been accepting and reviewing comments and

letters received after the comment period officially closed, it has thus decided to formally extend the comment period in order to give all parties an opportunity to express their views.

DATES: Comments must be received by June 13, 1994.

ADDRESSES: Comments should be addressed to the Office of the Executive Secretariat, EEOC, 10th Floor, 1801 L Street, NW., Washington, DC 20507. Copies of comments submitted by the public will be available for review at the Commission's library, room 6502, 1801 L Street, NW., Washington, DC, between the hours of 9:30 a.m. and 5 p.m. Copies of the notice of proposed rulemaking are available in the following alternative formats: Large print, braille, electronic file on computer disk, and audio tape. Copies may be obtained from the Office of Equal Employment Opportunity by calling (202) 663-4895 (voice) or (202) 663-4399 (TDD).

FOR FURTHER INFORMATION CONTACT: Elizabeth M. Thornton, Acting Legal Counsel, or Dianna B. Johnston, Assistant Legal Counsel, Office of Legal Counsel, EEOC 1801 L Street, NW., Washington, DC 20507; telephone (202) 663-4679 (voice) or (202) 663-7026 (TDD).

Tony E. Gallegos,
Chairman, Equal Employment Opportunity Commission.

[FR Doc. 94-11707 Filed 5-12-94; 8:45 am]

BILLING CODE 6750-01-M

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 906

Colorado Permanent Regulatory Program

AGENCY: Office of Surface Mining Reclamation and Enforcement (OSM), Interior.

ACTION: Proposed rule; public comment period and opportunity for public hearing on proposed amendment.

SUMMARY: OSM is announcing the receipt of a proposed amendment to the Colorado permanent regulatory program (hereinafter, the "Colorado program") under the Surface Mining Control and Reclamation Act of 1977 (SMCRA). The proposed amendment consists of revisions to the Colorado rules pertaining to bonding of surface coal mining and reclamation operations and revegetation success criteria for areas to be developed for industrial, commercial, or residential use.



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

FACT SHEET ON PROPOSED GUIDELINES ON HARASSMENT BASED ON RACE, COLOR, RELIGION, SEX, NATIONAL ORIGIN, AGE OR DISABILITY

There has been some misunderstanding about the purpose of the proposed Guidelines, which has generated considerable constituent mail. To help you respond, we've provided the following information.

1. The Guidelines were issued to help employers understand existing law. Employers are constantly seeking guidance on these issues. There were already Guidelines on sexual harassment and on national origin harassment, but none on race, color or religious harassment or on the other bases covered by federal employment discrimination statutes: age and disability. Because of the recent emphasis on sexual harassment, it was important to clarify the fact that workplace harassment was prohibited on any and all of the bases covered by the laws the Commission enforces. To omit religion from the Guidelines is likely to mislead employers into believing that religious based harassment is permissible.

2. Since Title VII was passed in 1964, it has been illegal to subject employees to different and hostile working conditions because of their race, color, religion, sex or national origin. This is because Title VII prohibits employers from "discriminat[ing] against any individual with respect to his . . . terms, conditions, or privileges of employment."

3. The Guidelines simply explain to employers the existing rules about harassment. They were derived from case law, the Commission's pre-existing Guidelines on National Origin Harassment, the Guidelines on Sexual Harassment and the Policy Guidance on Sexual Harassment. If clarifications are needed, they will be made before any Guidelines are issued.

4. Critical point: Not all offensive conduct violates the law. Harassing conduct rises to the level of unlawful discrimination only when a reasonable person would regard it as hostile or abusive.

5. Because the law is violated only when the complained of conduct is sufficiently severe and pervasive to be found hostile or abusive, Title VII would not be implicated when a supervisor merely tells subordinates that he or she is Jewish, Muslim, Christian, etc. Reasonable people would not deem a statement of one's own affiliation, by itself, to amount to severe or pervasive hostility to those who do not share the same belief. Nor could it reasonably be deemed to be hostile to another's religious beliefs to wear a cross or a yarmulke. It is one thing to express one own beliefs; another to disparage the religion or beliefs of others. In a diverse workforce, this is a critical distinction and is the heart of non-discrimination law.

6. The Commission has never taken the position that Title VII prohibits the statement of one's own beliefs in the workplace. To the contrary the Commission has repeatedly ruled that employers must permit employees to wear yarmulkes and other religious garb to work unless doing otherwise would cause safety problems or other undue hardship. In addition, Title VII explicitly permits religious organizations to employ individuals of a particular religion to carry out the religious activities of those entities.

7. As the Guidelines explain, however, the law does protect employees from having to endure severe or pervasive conduct that is hostile or abusive on the basis of religion. This is merely an extension of Title VII's basic protection against discrimination on the basis of religion. Thus, for example, an employee has redress if s/he is subjected to repeated epithets or insults hostile to his/her religion, just as an African-American employee has redress when subjected to repeated racial epithets at work. This affords protection to employees of all persuasions. Thus, a Christian employee would have recourse under Title VII if a "secular humanist" employer engaged in a pattern of ridiculing the employee's religious beliefs.

8. Although the public is most familiar with sexual harassment, the rule that it is unlawful discrimination to make work conditions hostile or abusive because of race, color, religion, national origin and sex, first arose in contexts other than gender. In 1971, in a case called Rogers v. EEOC, 454 F.2d 234 (5th Cir. 1971), cert. denied, 406 U.S. 957 (1972), a court held that segregating Hispanic patients can create hostile and discriminatory work conditions for an Hispanic employee, in violation of Title VII. See also Rodgers v. Western-Southern Life Ins., 792 F.Supp. 628 (E.D. Wisc. 1992) (statements that "you Black guys are too f---ing dumb to be insurance agents" created a hostile working environment), aff'd, -- F.2d --, 63 FEP Cases 694 (7th Cir. 1993).

9. The portion of Title VII quoted above in ¶ 2 makes no distinction between the various bases covered; race, color, religion, sex or national origin. Neither have the courts. Title VII has always prohibited employers from subjecting employees to workplace harassment because of the employee's religion. For example, in Weiss v. United States, 595 F. Supp. 1050, 1056 (E.D. Va. 1984) the court said: "when an employee is repeatedly subjected to demeaning and offensive religious slurs before his fellows by a co-worker and by his supervisor, such activity necessarily has the effect of altering the conditions of his employment within the meaning of Title VII."

10. The principle that employees have a right to "work in an environment free from discriminatory intimidation, ridicule and insult," was recognized by the Supreme Court in 1986 in Meritor Savings Bank v. Vinson, 477 U.S. 57, 65 (1986). Though Meritor was a sexual harassment case, the Court made clear that it was

applying principles applicable to other classes covered by Title VII. The Court specifically accepted the principle that creation of a hostile environment based on discriminatory racial, religious, national origin, or sexual harassment constitutes a violation of Title VII. See id. at 66. Just this year, in Harris v. Forklift Systems, a sexual harassment case, the Supreme Court indicated that all bases covered by Title VII are treated the same. See Harris v. Forklift Sys., Inc., No. 92-1168 slip op. at 4 (Nov. 9, 1993); id. at 2 (Ginsburg, J., concurring) ("Title VII declares discriminatory practices based on race, gender, religion, or national origin equally unlawful").

Draft Questions and Answers on the Guidelines on Harassment Based on Race, Color, Religion, Gender, National Origin, Age or Disability

1. Q. Could it be considered religious harassment if an individual placed a Bible on his/her desk or wore a cross, a turban, a yarmulke, a star of David or any kind of religious talisman to work?

A. The Guidelines provide that harassment is conduct that a reasonable individual would view as severe or pervasive enough to create a hostile or abusive environment based on, among other things, religion. It is inconceivable that a reasonable person would view as creating a hostile or abusive environment an individual's statement that he or she belongs to a particular church, placement of a religious tome like the Bible on a bookshelf or desk, or another's decision to wear a religious symbol to work. Indeed, according to cases involving "reasonable accommodation," employers are required to accommodate their employees' expressed religious need to wear religious garb, provided that doing so would not create an undue hardship.

2. Q. Is it permissible under the Guidelines for an employer to conduct Bible study or prayer meetings in the workplace, even though all of the individuals in the workplace do not belong to the same religion?

A. An employer would have the right to conduct such meetings, provided that individuals who do not wish to attend or take part are not forced to and are not penalized in any way by their decision not to attend. See, e.g., EEOC v. Townley Engineering & Mfg., Co., 859 F.2d 610 (9th Cir. 1988).

3. Q. Do the Proposed Guidelines affect an employer's freedom to share his/her faith with an employee?

A. The Proposed Guidelines are not intended to create any new obligations on employers. They were derived from case law, the Commission's pre-existing Guidelines on National Origin Harassment, the Guidelines on Sexual Harassment and the Policy Guidance on Sexual Harassment and they merely explain to employers the existing rules about harassment. Accordingly, the Proposed Guidelines do not alter an employer's existing right to express religion in the workplace.

4. Q. If a supervisor who constantly preaches the benefits of his/her religion repeatedly asks subordinates to accompany him/her to religious services and the supervisor is constantly rebuffed, could a charge of harassment ultimately be asserted?

A. This is a fact dependent question. As the Proposed Guidelines note, the totality of the circumstances will be considered in making such a determination. But, if employees make

clear that such invitations are unwelcome and the supervisor persists in pressing his/her religion on his/her subordinates, existing principles of harassment law suggests that a cause of action for harassment could be asserted.

5. Q. Could one incident, such as placing a mug with an offensive symbol such as a swastika on one's desk, constitute harassment?

A. It is extremely unusual for one instance of hostile conduct to violate the law, but when the conduct is especially hostile it may do so. Some symbols are so patently offensive or abusive that any reasonable individual would conclude that they polluted the workplace environment. See Yudovich v. P.W. Stone, 839 F. Supp. 382 (E.D. Va. 1993) (supervisor's expression of anti-Jewish hostility such as keeping a coffee mug with a swastika on his desk prominently displayed and in public view may by itself violate Title VII).

6. Q. May an individual discuss his/her religious beliefs in the office?

A. Discussions of religious beliefs with those who welcome such conversations would not violate the law. General statements of belief that do not denigrate or show hostility to those of other beliefs would generally not violate the law, unless the speaker consistently persisted in lecturing or discussing religion after the listener has asked not to be subjected to such discussions.

103D CONGRESS

H. Res. _____

2D SESSION

IN THE HOUSE OF REPRESENTATIVES

Mr. MCKEON (for himself) submitted the following resolution; which was referred to the Committee on _____

RESOLUTION

Expressing the sense of the House of Representatives regarding the issuance under Title VII of the Civil Rights Act of 1964 of administrative guidelines applicable to religious harassment in employment.

Whereas the liberties protected by our Constitution include the religious liberty clauses of the first amendment;

Whereas citizens of the United States profess the beliefs of almost every conceivable religion;

Whereas Congress has historically protected religious expression even from governmental action not intended to be hostile to religion;

Whereas the Supreme Court of the United States has written "the free exercise of religion means, first and foremost, the right to believe and profess whatever religious doctrine one desires";

Whereas the Supreme Court has finally settled that under our Constitution the public expression of ideas may not be prohibited merely because the content of the ideas is offensive;

Whereas the Equal Employment Opportunity Commission has written proposed guidelines to Title VII of the Civil Rights Act of 1964, published in the Federal Register on October 1, 1993, which expand the definition of "harassment" beyond established legal standards set forth by the Supreme Court which may thus result in the infringement of religious liberties;

Whereas the Commission has not offered sufficient evidence that such guidelines are necessary to deal with religious harassment or to remedy some gap or weakness in existing law: Now, therefore, be it Resolved.

That it is the sense of the House of Representatives that for purposes of issuing under Title VII of the Civil Rights Act of 1964 final guidelines in connection with the Proposed Guidelines relating to unlawful harassment in employment published by the Equal Employment Opportunity Commission on October 1, 1993 (58 Fed. Reg. 51266) the commission should exclude harassment based on religion.

HOWARD P. "BUCK" MCKEON LETTERHEAD -- 05/23/94 (818) 885-1032

***** E E O C *****

Dear Colleague: In February of this year I gathered 45 co-signors for a letter to the Chairman of the Equal Employment Opportunity Commission requesting that "religion" be categorically removed from the Commission's proposed guidelines to Title VII of the 1964 Civil Rights Act. Since that time, a number of Members' offices have contacted my office regarding this issue.

Calls and letters from business owners, labor leaders, religious leaders and alarmed constituents continue to flow into Congressional offices expressing concern over the EEOC's Proposed Guidelines. In response to what I have been Hearing in my office, I obtained two legal opinions of what the potential implications of the enactment of the Proposed Guidelines would be for employers and their employees. Both opinions, one from a labor perspective and the other from a Constitutional perspective, support the claims that the end result of the inclusion of religion in the Guidelines would be a stifling of religious expression; a violation of the First Amendment.

As a result, I will be introducing a Sense of the House Resolution that the EEOC should exclude harassment based on religion from the Guidelines. Because the Guidelines are so subjectively written, for an employer to follow them to the letter without fear of legal action, he/she must essentially create a "religion free workplace." To permit these guidelines to be implemented with the category of religion included is to invite litigation against employers who allow their employees to exercise their First Amndment rights.

Religion has special Constitutional protection and coverage under the Religious Freedom Restoration Act which passed last year with strong bi-partsan support. This freedom should not be compromised by the actions of the EEOC, however well intended.

I will be introducing this legislation on Thursday, May 26 and would be delighted to have you join me as an original co-sponsor. Should you have any questions or wish to cosponsor Sense of the House Resolution, please contact my Legislative Assistant, Heather Lee Ingram, at X51956.

Kind Regards,

HOWARD P. "BUCK" MCKEON

CONGRESSMAN DICK ARMEY
26TH DISTRICT, TEXAS

COMMITTEE
EDUCATION AND LABOR
JOINT ECONOMIC COMMITTEE
REPUBLICAN CONFERENCE
CHAIRMAN



Congress of the United States

House of Representatives

Washington, DC 20515-4326

May 24, 1994

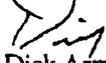
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Support Religious Freedom in the Workplace

It is becoming increasingly clear that the proposed EEOC rules on religious harassment are a solution in search of a problem. In case you missed it, I commend to your attention last Sunday's op-ed in the *Washington Times*.

Respectfully,


Dick Arme
Member of Congress

PAGE B4 / SUNDAY, MAY 22, 1994

The Washington Times

GARY BAUER

If you think watching the federal government try to micromanage relationships between men and women is fun, just wait until it tries to micromanage relationships between men and God.

That pleasure is what awaits us all as the federal Equal Employment Opportunity Commission (EEOC) moves ahead with plans to devise a dramatic expansion of the laws governing various forms of harassment in the workplace.

Let's clear out the cobwebs first.

Religious discrimination is serious business. The EEOC has clear statutory responsibility to enforce the laws against prejudice in hiring, promotions and other aspects of employment on the basis of an employee's religious affiliation or beliefs (or lack of same).

Harassment is also serious business. If an employer cannot refuse to hire an individual because he happens to be Jewish, or Catholic, it makes little sense to permit that employer, or his agent, to make an employee miserable because of his Catholic or Jewish beliefs.

But the regulations proposed by the EEOC go much further than

Religious harassment rules required?

what the law or common sense requires. In fact, they have all the sensitivity of an armored personnel carrier in Waco.

Rather than rely on an unambiguous standard that requires a showing of significant and actual harm to an employee, the EEOC has set forth a legal framework that will make it of doubtful legality for any company employee to place a calendar with a religious theme on his bulletin board; share her faith with coworkers around the donut cart at break time; invite another employee to come to his church or Bible study;

Sen. Howell Heflin, Alabama Democrat, a former judge of the Alabama Supreme Court, has an eye for the real life situations that escape the broad-brush theorists at the EEOC. As he wrote Acting Chairman Tony Gallegos on May 2, "Would a foreman be able to wear a cross around the neck or on a lapel pin? Could a foreman sell tickets to a church pancake breakfast? Could an employee wear a yarmulke?"

As Mr. Heflin pointed out to Mr.

Gallegos, EEOC's proposed regulations bar "intimidation" in the religious context without defining what is meant. The regulations borrow language from sexual harassment law and bar words or words that would "insult" and "ridicule" a "reasonable person." But that term refers not to people generally but to people of the particular faith (or no faith) "offended." To add injury to insult, the regulations also make it actionable for an employer to permit harassment that offends the faith of an employee's "relatives, friends or associates."

The EEOC may be friendless, but I, like most people, am not. With friends and relatives of various religious persuasions, my opportunity to be offended under these rules would be virtually infinite. A court bending my claim would inevitably have to arrive at some definition of what constitutes a "reasonable Christian," or perhaps a friend of a "reasonable Muslim," or a cousin of a "reasonable Jew."

If courts are well suited to these

tasks, that will come as astonishing news to the Founders, who gave us some very explicit constitutional guarantees regarding free exercise of religion.

I don't pretend to know what

The regulations also make it actionable for an employer to permit harassment that offends the faith of an employee's "relatives, friends or associates"!

reasonable adherents of various faiths might do in every circumstance, but I do know what reasonable employers will do if confronted with the EEOC regulations:

in their current form: They will protect themselves against lawsuits by barring all religious expressions in the workplace. That strikes me not only as too bad, but as unconstitutional.

At root, the EEOC must ask itself this: If an employer orders a worker to remove a religious lapel pin because it offends another worker, whose religion is really being harassed?

The proper answer is, "Everybody's." Yes, we need strong enforcement of laws against religious discrimination, but not a strong-arm tactics against free exercise. As written, the proposed EEOC regulations do not prevent harassment; they constitute it.

Gary Bauer, president of the Family Research Council, was domestic policy adviser to President Reagan and undersecretary of education under Bill Bennett. This article was written for Scripps Howard News Service.

HOWARD P. "BUCK" McKEON
25TH DISTRICT, CALIFORNIA

COMMITTEES
**PUBLIC WORKS AND
TRANSPORTATION**
EDUCATION AND LABOR

PRESIDENT
REPUBLICAN FRESHMAN MEMBERS

**REPUBLICAN LEADER'S TASK FORCE
ON HEALTH CARE**

**BIPARTISAN TASK FORCE
ON NATURAL DISASTERS**



Congress of the United States

House of Representatives
Washington, DC 20515-0525

May 20, 1994

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Mr. Tony Gallegos
Acting Chairman
EEOC
1801 L Street, NW
Washington,, DC 20507

Dear Mr. Gallegos:

Thank you for re-opening the comment period from May 13 through June 13. I was pleased to see this occur and believe it will allow the public to make the Commission more acutely aware of its keen interest in the Proposed Guidelines to Title VII of the 1964 Civil Rights Act.

I am concerned, however, about the status of the comments received in between the first comment period of last year and the second comment period. It is my understanding that over 4,000 comments have been received in the interim. These comments are representative of the concern the general public has over these guidelines and should be made a part of the official comment file. I would like to see them included in the official comment file.

I look forward to hearing of your decision regarding this matter.

Sincerely,

HOWARD P. "BUCK" McKEON
Member of Congress

HPM/hli

RECEIVED
MAY 23 5 04 PM '94
OFFICE OF THE
CHAIRMAN

RECEIVED
MAY 24 1994
EEOC
Office of Communications
Washington, DC

66/022 (28)
Comments on Harassment
Guidelines (gh)

United States Senate

WASHINGTON, DC 20510-0101

May 2, 1994

RECEIVED

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16115

Office of Communications
Washington, DC

Mr. Tony E. Gallegos
Acting Chairman
The Equal Employment Opportunity Commission
10th Floor
1801 L Street, NW
Washington, D.C. 20507

Dear Mr. Gallegos:

I am writing to express my concern regarding the proposed Guidelines on Harassment Based on Race, Color, Religion, Gender, National Origin, Age, or Disability proposed in the Federal Register Vol. 58, No. 189. I believe that these rules could, in an unjustified manner, restrict individuals' religious freedom.

The language which the EEOC relies upon to set the standard for religious harassment in the workplace was derived from a sexual harassment case before the Supreme Court, Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986). In this case, the Supreme Court was discussing sexual harassment in that specific context. While there has been a great deal of attention focused recently on the issue of sexual harassment, the EEOC's attempt to define religious harassment by transposing the standards for sexual harassment only adds to any confusion that may exist.

The Commission's Guidelines state in the introductory paragraph that religious harassment and sexual harassment tests are to be viewed in the same context "the right to work in an environment free from discriminatory intimidation, insult, and ridicule." There could be problems with the application of this to religion. Freedom of religion is specifically protected by the first amendment. As such, any actions that might infringe on this Constitutional right should be given consideration and review. Before any such standard is finalized, it must be made clear what constitutes "intimidation" in a religious context.

The lack of any clear definitions for religious harassment will cause problems at the implementation level for the many employers who would be forced to apply these confusing standards to every day situations. I am afraid, and there is mounting empirical evidence to support this fear, that many employers in an effort to minimize their liability will move to limit or prohibit religious expressions in the workplace. For instance:

-Would a foreman be able to wear a cross around the neck or on a lapel pin?

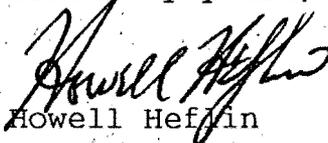
- Could a supervisor wear a religious symbol such as a Christian fish on a tie pin?
- Are religious holidays allowed?
- Can a business take more holidays for one faith than another?
- Could a supervisor wear a St. Christopher Medal?
- Could a foreman sell tickets to a church pancake breakfast?
- Could an employee wear a Yarmulke?
- Could a business employ a chaplain?
- Could employees at a business have a weekly prayer breakfast in which supervisors participated with some, but not all, employees?
- Could an officer of the company have a Bible on his office desk?
- Could athletes still kneel and make the sign of the cross in celebration of some accomplishment?

These examples are just some of the real life questions that need to be addressed. Most employers will have difficulty with these standards because of the vague and subjective nature of the Commission's "reasonable person" test. The "reasonable person" test is a generally accepted legal standard; however, the Commission's provision that "consideration is to be given to the perspective of individuals of the claimant's...religion" Section 1609.1(c) makes this test a confusing and possibly onerous burden for employers that could ultimately lead to the suppression of religious freedom. Employers may be forced to anticipate the reaction of employees of every religious faith to any form of religious expression that could possibly occur.

I am also concerned that these Guidelines fail to take into account the Religious Freedom Restoration Act (RFRA), P.L. 103-141 (November 16, 1993). Under RFRA a law cannot "substantially burden a person's exercise of religion" unless the government can show that the law is the least restrictive means of furthering a compelling government interest. I urge the Commission to reconsider these Guidelines in light of RFRA.

The proposed Guidelines, as currently worded and applied to religious discrimination, may ultimately encourage a workplace in which religious expression and freedom are suppressed, which is not the intent of Title VII of the Civil Rights Act or the Constitution. Therefore, I urge the Commission to delete the category of religion from the proposed Guidelines or clarify the issues pertaining to religion.

Sincerely yours,



Howell Heflin

Congress of the United States

Washington, DC 20515

Mr. Tony E. Gallegos
Acting Chairman
The Equal Employment Opportunity Commission
10th Floor
1801 L Street, NW
Washington, DC 20507

February 15, 1994

Dear Mr. Gallegos:

We are writing to express our concerns regarding the proposed Guidelines on Harassment Based on Race, Color, Religion, Gender, National Origin, Age or Disability ("Guidelines") which apply the definition and interpretation of the "hostile environment" type of sexual harassment to the religious context, combining it with all the other categories of discrimination prohibited by the Title VII of the Civil Rights Act and the Age Discrimination Act.

In the introductory discussion, the Equal Employment Opportunity Commission (EEOC) states that "the Supreme Court has endorsed the Commissions' position that Title VII affords employees the right to work in an environment free from discriminatory intimidation, insult, and ridicule." However, in Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986), the case to which the EEOC refers, the Supreme Court was specifically discussing the issue of sexual harassment in that context. The limits of "intimidation" have not been well-defined in the context of religious belief. The extent to which an employer may make his or her religious beliefs or affiliation known to employees of differing beliefs in the face of a prohibition on discriminatory "intimidation" is unclear under the Guidelines; certainly such an act should not constitute "harassment."

In Section 1609.1(b)(1), the Guidelines define harassment as "verbal or physical conduct that denigrates or shows hostility or aversion toward an individual because of his/her... religion... and ...has the purpose or effect of creating an intimidating, hostile, or offensive work environment; has the purpose or effect of unreasonably interfering with an individual's work performance; or otherwise adversely affects an individual's employment opportunities." This standard is quite subjective and leaves the employer responsible for unintentional as well as intentional activity.

The effect on the employee constitutes harassment when a "reasonable person in the same or similar circumstances would find the conduct intimidating, hostile, or abusive." Guidelines Section 1609.1 (c). The

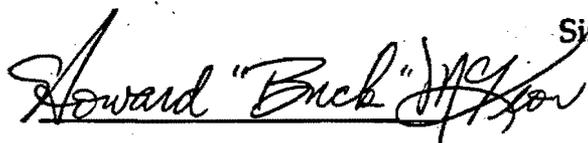
intimidating, hostile, or abusive." Guidelines Section 1609.1 (c). The "reasonable person" test is generally considered an objective legal standard, but the EEOC makes clear that it is not meant to be objective: "the reasonable person standard includes consideration of the perspective of persons of the alleged victim's religion." Section 1609.1 (c). In the introduction, the EEOC further explains that "[r]ecent case law on this issue emphasizes the importance of considering the perspective of the victim of harassment rather than adopting notions of acceptable behavior that may prevail in a particular workplace." These provisions seemingly place employers of every religious faith in the untenable position of having to anticipate the reaction of each employee, taking into account each employee's individual religious beliefs, to every manifestation of religious expression in the workplace.

Freedom of religion is specifically protected by the first amendment and therefore has Constitutional significance that cannot be ignored. We are not convinced that it is wise to simply transpose the Guidelines developed for sexual harassment to harassment on the basis of religion as the nature and the magnitude of the problems are very different. While the pervasiveness of sexual harassment and the lack of recourse for many of its victims has been well-demonstrated, there is very little evidence that religious harassment is a major problem in the modern workplace.

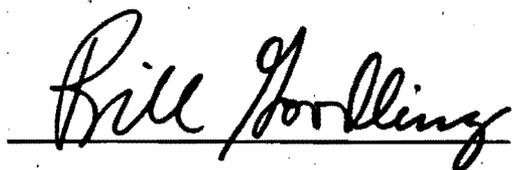
Moreover, we are concerned that, in promulgating the Guidelines, the EEOC failed to consider the significance of the recently enacted Religious Freedom Restoration Act (RFRA), P.L. 103-141 (November 16, 1993). RFRA prohibits a law from "substantially burden[ing] a person's exercise of religion" unless the government can demonstrate that the law is the least restrictive means of furthering a compelling government interest. We fear that the broad definitions of the Guidelines may suppress non-harassing religious expression in the workplace to an extent that may not be justified under the strict scrutiny contemplated by RFRA.

The proposed Guidelines, as applied to religious discrimination, go far beyond existing law and may result in a workplace in which religious expression and religious freedom are suppressed, which is not the intention of either Title VII or the U.S. Constitution. Since the guidelines cover several categories of harassment in addition harassment based on religion, it would be awkward and cumbersome to reword the proposed Guidelines to address these concerns.

Therefore, we urge The Commission to delete the category of religion from the proposed Guidelines.

Howard "Buck" McLean

Sincerely,

Bill Golling

Mike Smith

Red Long

Art Long

Dick Amey

Chas. T. Carody

Sam V. Hoffman

Jane Camp

Greg Callahan

Pill Cinger

Rue Baker

Steve Baker

Aris Cat

Ken Colvert

Carl Monkeel

Mel Hancock

Edward Baker

Dan Wells

John Binder

Peter Hoekstra

Maye Ronkema

Sten G. D.

Winfredson

John Goehner

Tom Lantz

Cass Ballinger

Howard H. Benson

Ransom Jewell

Ed. Duff

Dana Robinson

John T. Dabille

Jim Talbot

Wm. H. D.

Bice Emerson

Wally Huger

Gett White

Jerry Lewis

Pat Adams

Phil A. Long

Jim R. Wooly

Phil Crane

Joe Bays

BR Livingston

Randy 'Dede' Cunningham

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FEB 16 1994

EEOC
Office of Communications
Washington, DC

26TH DISTRICT, CALIFORNIA

COMMITTEE:

FOREIGN AFFAIRS

CHAIRMAN, SUBCOMMITTEE ON
INTERNATIONAL OPERATIONS

BUDGET

JUDICIARY

Congress of the United States

House of Representatives

Washington, DC 20515-0526

HOWARD L. BERMAN

April 7, 1994

Mr. Tony E. Gallegos
Acting Chairman
Equal Employment Opportunity Commission
1801 L Street N.W.
Washington, DC 20507

*Claire,
Received today
by Fax*

Dear Mr. Chairman:

I am writing with some embarrassment to disassociate myself from a letter dated February 15 and addressed to you concerning the Commission's Proposed Consolidated Guidelines on Harassment Based on Race, Color, Religion, Gender, National Origin, Age or Disability, 58 Fed. Reg. 51,266 (Oct. 1, 1993).

I indeed signed the letter initiated by my colleague Rep. McKeon, but in all candor I must say that I did so by mistake.

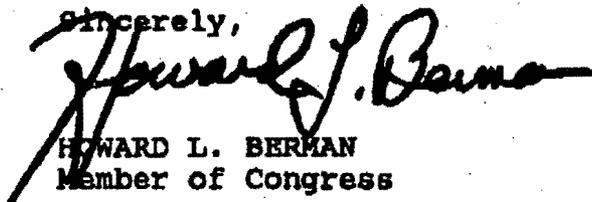
I realized my error even before I received the response dated March 22 from Philip B. Calkins, but his explanation reinforces my determination to disassociate myself from the joint Congressional letter.

For the record, I urge you not to delete religion from the Guidelines. I certainly do not question whether religious harassment occurs in the workplace; I know for a fact that it does.

The Proposed Guidelines have been criticized as compelling a religion-free workplace, but in my view that is not the case. The mere expression of religious belief is protected, while conduct which goes beyond that to disparage or denigrate the religion or beliefs of others is not. It is entirely appropriate for the agency responsible for enforcing Title VII's prohibition on discrimination on the basis of religion to make clear to employers that the latter conduct is impermissible.

The foregoing, and not the February 15, 1994 letter, is an accurate reflection of my views concerning the Proposed Guidelines. I request that this letter be made a part of the record in the Commission's rulemaking.

Sincerely,



HOWARD L. BERMAN
Member of Congress

HLB/bs



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

March 22, 1994

The Honorable Howard P. (Buck) McKeon
U.S. House of Representatives
Washington, DC 20515

Dear Congressman McKeon:

This is in response to your letter dated February 15, 1994, expressing concern about the inclusion of religion in our Proposed Consolidated Guidelines on Harassment Based on Race, Color, Religion, Gender, National Origin, Age or Disability, 58 Fed. Reg. 51,266 (Oct. 1, 1993). We appreciate your comments and will find them useful in determining the scope of needed clarifications to the Proposed Consolidated Guidelines.

Initially, we note that the Commission is an enforcement agency; our purpose is to enforce the law created by Congress to effectuate congressional intent. Therefore, in investigating and processing charges, and in developing policy and formulating Guidelines, the Commission applies the law as written. As the preamble to the Proposed Consolidated Guidelines notes, the Guidelines are intended merely to explain this existing law -- they are a restatement of rules enunciated by court cases, Commission decisions and guidelines. Interpretive Guidelines issued under Title VII create no new obligations.

As you are aware, in enacting Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq., Congress prohibited discrimination on the basis of race, color, religion, gender or national origin. The Supreme Court has repeatedly noted that Title VII "on its face treats each of the enumerated categories exactly the same." Price Waterhouse v. Hopkins, 490 U.S. 228, 242 n.9 (1989) (Brennan, J., plurality); see Harris v. Forklift Sys., Inc., No. 92-1168 slip op. at 4 (Nov. 3, 1993).

Title VII's ban against discrimination includes a prohibition on discriminatory "terms, conditions, or privileges of employment." For over twenty years the federal courts and the Commission have held that harassment based on a statutorily protected classification is a discriminatory term or condition of employment and thus is prohibited by Title VII. Harassment based

The Honorable Howard P. (Buck) McKeon
Page Two

on religion violates the law in the same manner as harassment based on other protected bases. See, e.g., Weiss v. United States, 595 F. Supp. 1050, 1056 (E.D.Va. 1984) ("when an employee is repeatedly subjected to demeaning and offensive religious slurs before his fellows by a co-worker and by his supervisor, such activity necessarily has the effect of altering the conditions of his employment within the meaning of Title VII"). Like harassment on other bases, religious harassment will not be found unless the challenged conduct is hostile or denigrating on the basis of religion and is sufficiently severe and pervasive to alter the conditions of employment.

Thus, it is not religious harassment for a supervisor or a co-worker merely to state his/her religious affiliation. Nor is it religious harassment when an individual wears a yarmulke, a turban or a cross to work. The Commission recognizes that expression of one's own beliefs is far different than disparaging the religion or beliefs of others. Use of the reasonable person test in the Guidelines is intended to account for this. For example, a reasonable person would not find placement of a Bible or the Koran on his/her supervisor's desk to be hostile and intimidating. Nevertheless, because your comments and others have indicated that the Guidelines may be misinterpreted, the Commission will consider how to alleviate such misunderstanding.

We note your concern that the Commission cited Meritor Savings Bank v. Vinson, 477 U.S. 57 (1986), a case involving sexual harassment, for the proposition that "Title VII affords employees the right to work in an environment free from discriminatory intimidation, insult, and ridicule." While Meritor did involve a cause of action based on sexual harassment, the Court indicated that it was applying principles applicable to other bases covered by Title VII. The Court specifically endorsed the principle that creation of a hostile environment based on discriminatory racial, religious, national origin, or sexual harassment constitutes a violation of Title VII. See id. at 66. It should be noted that, more recently, the Court in Harris v. Forklift Sys., Inc., No. 92-1168 slip op. at 4 (Nov. 9, 1993), reiterated the position that harassment on the basis of race, color, religion, gender or national origin constitutes a violation of Title VII. See also id. at 2 (Ginsburg, J., concurring) ("Title VII declares discriminatory practices based on race, gender, religion, or national origin equally unlawful").

The Honorable Howard P. (Buck) McKeon
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In addition, you suggest that application of the "reasonable person in the same or similar circumstances test" will require employers to consider the religion of every single person in the workplace before these employers may express religious views in any way. Again, harassment law would not even be implicated by expression that does not denigrate or show hostility toward those with other beliefs. On the other hand, to the extent that the conduct at issue consists of epithets that denigrate others, it seems likely that reasonable people of all faiths would find such conduct offensive. In any case, the Commission's intent in using the "reasonable person in the same or similar circumstances test" was not to make new law. Thus, in issuing any final Guidelines, the Commission will consider how to address the concerns you raised.

Your letter also questions whether religious harassment is a particular problem in the modern workplace. Although the topic of sexual harassment has recently received much attention, other forms of invidious harassment, including religious harassment, unfortunately do exist. Indeed, one reason that the Guidelines were promulgated was to alleviate public confusion about whether harassment on other protected bases was illegal. Religious harassment does occur and does have concrete effects on the victims. See, e.g., Turner v. Barr, 811 F. Supp. 1, 2 (D.D.C. 1993) (religious harassment found when plaintiff's co-workers and supervisors made negative references about Jews to plaintiff, who was Jewish, and made jokes about the Holocaust).

With respect to the Religious Freedom Restoration Act, we note that at the time the Notice of Proposed Rulemaking was issued, the Religious Freedom Restoration Act had not yet been enacted. Accordingly, as we review the Guidelines we will consider what impact, if any, the Religious Freedom Restoration Act will have on them.

We note that the Commission has never taken the position that an individual is not entitled to exercise his/her religious freedom in the workplace. In fact, the Commission has brought suit to require employers to accommodate an individual's desire to wear yarmulkes and turbans in the workplace or to be excused from Sunday work in order to worship, unless the accommodation

The Honorable Howard P. (Buck) McKeon
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would cause undue hardship. Title VII does not, however, permit one individual's practice of religion to interfere with another individual's right to a workplace free of hostility. Cf. Sherbert v. Verner, 374 U.S. at 409 (Court implies that its analysis in free exercise case might have been different if appellant's right to free exercise "abridge[d] any other person's religious liberties").

Your letter suggests that religion be deleted from the Guidelines. The Commission will consider your suggestion. We note, however, that the purpose of the Guidelines is to inform employers and employees of their respective responsibilities and rights. Even if the Guidelines do not mention religion, employers are, as a matter of law, obliged to maintain a workplace free of religious harassment. For example, if an individual is taunted, teased and denigrated because s/he has stated at various times that s/he attends church on a regular basis, or has professed devotion to a Supreme Being, a hostile environment on the basis of religion may have been created under existing law. To the extent that, as your comments suggest, clarification is necessary to achieve the goal of accurately informing the public, modifications will be made. However, the Commission will have to consider whether deleting religion from the Guidelines may mislead an employer to believe that s/he has no obligation to protect employees from such religious based hostility.

Again, we appreciate your comments; they will be quite helpful in our deliberations. We hope this response is helpful to you.

Sincerely,



Philip B. Calkins
Acting Director of Communications
and Legislative Affairs

Standard Form 83
(Rev. September 1983)

Request for OMB Review

Important

Read instructions before completing form. Do not use the same SF 83 to request both an Executive Order 12291 review and approval under the Paperwork Reduction Act.

Answer all questions in Part I. If this request is for review under E.O. 12291, complete Part II and sign the regulatory certification. If this request is for approval under the Paperwork Reduction Act and 5 CFR 1320, skip Part II, complete Part III and sign the paperwork certification.

Send three copies of this form, the material to be reviewed, and for paperwork—three copies of the supporting statement, to:

Office of Information and Regulatory Affairs
Office of Management and Budget
Attention: Docket Library, Room 320
Washington, DC 20503

PART I.—Complete This Part for All Requests.

1. Department/agency and Bureau/office originating request

Equal Employment Opportunity Commission

2. Agency code

3 0 4 6

3. Name of person who can best answer questions regarding this request

Dianna B. Johnston, Assistant Legal Counsel

Telephone number

(202) 663-4679

4. Title of information collection or rulemaking

Guidelines on Harassment Based on Race, Color, Religion, Gender, National Origin, Age, or Disability

5. Legal authority for information collection or rule (cite United States Code, Public Law, or Executive Order)

42 USC 2000e-12 or

6. Affected public (check all that apply)

1 Individuals or households

3 Farms

5 Federal agencies or employees

2 State or local governments

4 Businesses or other for-profit

6 Non-profit institutions

7 Small businesses or organizations

PART II.—Complete This Part Only If the Request is for OMB Review Under Executive Order 12291

7. Regulation Identifier Number (RIN)

or, None assigned

8. Type of submission (check one in each category)

Classification

1 Major

2 Nonmajor

Stage of development

1 Proposed or draft

2 Final or interim final, with prior proposal

3 Final or interim final, without prior proposal

Type of review requested

1 Standard

2 Pending

3 Emergency

4 Statutory or judicial deadline

9. CFR section affected

29 CFR 1609

10. Does this regulation contain reporting or recordkeeping requirements that require OMB approval under the Paperwork Reduction Act and 5 CFR 1320? Yes No

11. If a major rule, is there a regulatory impact analysis attached? Not a major rule

1 Yes 2 No

If "No," did OMB waive the analysis?

3 Yes 4 No

Certification for Regulatory Submissions

In submitting this request for OMB review, the authorized regulatory contact and the program official certify that the requirements of E.O. 12291 and any applicable policy directives have been complied with.

Signature of program official

Elizabeth M. Thornton, Acting Legal Counsel

Date

7/14/93

Signature of authorized regulatory contact

Elizabeth M. Thornton, Acting Legal Counsel

Date

7/14/93

12. (OMB use only)



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

September 9, 1993

MEMORANDUM

TO: Tony E. Gallegos
Chairman

FROM: *Elizabeth M. Thornton*
Acting Legal Counsel

SUBJECT: Notice of Proposed Rulemaking Guidelines on Harassment
Based on Race, Color, Religion, Gender, National Origin,
Age, or Disability

The subject document is attached for your signature. It was approved by the Commission on July 14, 1993, has been transmitted pursuant to Executive Order 12067 and subsequently approved by OMB. In order for it to be published in the Federal Register, we must forward three (3) signed original copies.

If you have any questions, please call me at 663-4638.

Information Statement on EEOC Guidelines and Opinions

One of the tools the Equal Employment Opportunity Commission (EEOC) employs in carrying out its enforcement responsibilities for the various civil rights statutes under its jurisdiction is the issuance of guidelines, which are published in the Federal Register and codified in the Code of Federal Regulations. While Commission guidelines do not have the force and effect of law or regulations, they serve several significant purposes.

The Commission has traditionally used guidelines as a means of stating for the public's information its position on a variety of employment discrimination issues. Guidelines, in effect, serve to put affected parties on notice of how the Commission interprets the law and how it will apply it in cases brought before it. Thus, by means of guidelines, both entities covered by and subject to the federal laws and individuals whose rights these laws protect may make informed decisions about contemplated employment actions and avoid unnecessary and costly involvement with the legal system. However, should a legal action arise, courts are not bound by Commission guidelines. Courts, in their discretion, may give Commission guidelines the deference the court feels is deserved, ranging from great weight to none.

Although the Commission is not statutorily or otherwise required to publish proposed guidelines for notice and comment, the Commission has always sought public comment on its guidelines. It has done so in the deeply held belief that guidelines benefit from and are strengthened by the insights, perspectives, and practical suggestions offered by the public.

The two-way exchange of information created by the Commission's publication of proposed guidelines for notice and public comment followed by issuance of the final (and often revised) guidelines for public information makes guidelines a unique enforcement vehicle. No other Commission policy document provides the same level of public access, in terms of either input or availability. Other issuances -- for example, EEOC Compliance Manual sections or enforcement guidances -- although available to the public, are primarily for internal staff use in processing discrimination charges.

In contrast to guidelines, which have universal application, written interpretations or opinions by the Commission (known as opinion letters) have extremely narrow applicability. Opinion letters have legal significance only to the persons or entities to whom they are issued. As provided by statute, opinion letters provide that specific person a defense against liability for actions taken in good faith, in conformity with, and in reliance on the Commission's written opinion. Opinion letters, however, are issued only in rare and exceptional circumstances. Further, because of their fact-specific nature, they have limited

precedential value even though they are published and available to the public.

Unlike opinion letters, advisory or informal opinions have no legal significance and do not insulate the recipient from liability under the law. Informal opinions are not issued by the Commission itself but, rather, by a Commission official or representative. Such opinions are provided in the course of routine correspondence, offer general information, and have no precedential value. Informal opinions are private in nature and limited to the addressee.

Because of the use of notice and comment on the proposed harassment guidelines, Commission staff recognizes, based on those comments, that there is considerable confusion concerning the intent and the scope of the guidelines. As a consequence, Commission staff has become increasingly aware that any final guidelines that are issued need clarification. For this reason, it has been suggested that Questions and Answers be appended to the guidelines. Such an approach was followed in issuing the Commission's Pregnancy Discrimination Guidelines in 1980, and it greatly clarified the guidelines themselves.

EEOC Office of Legal Counsel
6/3/94

"Heating Degree Days", the phrase "and Cooling Degree Days".

Dated: August 17, 1993.

Joseph Shuldiner,

Assistant Secretary for Public and Indian Housing.

[FR Doc. 93-23233 Filed 9-30-93; 8:45 am]

BILLING CODE 4210-33-M

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

29 CFR Part 1609

Guidelines on Harassment Based on Race, Color, Religion, Gender, National Origin, Age, or Disability

AGENCY: Equal Employment Opportunity Commission (EEOC).

ACTION: Notice of proposed rulemaking.

SUMMARY: The Equal Employment Opportunity Commission is issuing Guidelines covering harassment that is based upon race, color, religion, gender (excluding harassment that is sexual in nature, which is covered by the Commission's Guidelines on Discrimination Because of Sex), national origin, age, or disability. The Commission has determined that it would be useful to have consolidated guidelines that set forth the standards for determining whether conduct in the workplace constitutes illegal harassment under the various antidiscrimination statutes. Thus, these Guidelines consolidate, clarify and explicate the Commission's position on a number of issues relating to harassment. The Guidelines supersede the Commission's Guidelines on Discrimination Because of National Origin.

DATES: Comments must be received by November 30, 1993.

ADDRESSES: Comments should be addressed to the Office of the Executive Secretariat, EEOC, 10th Floor, 1801 L Street, NW., Washington, DC 20507. Copies of comments submitted by the public will be available for review at the Commission's library, room 6502, 1801 L Street, NW., Washington, DC, between the hours of 9:30 a.m. and 5 p.m. Copies of this notice of proposed rulemaking are available in the following alternative formats: Large print, braille, electronic file on computer disk, and audio tape. Copies may be obtained from the Office of Equal Employment Opportunity by calling (202) 663-4895 (voice) or (202) 663-4399 (TDD).

FOR FURTHER INFORMATION CONTACT: Elizabeth M. Thornton, Deputy Legal Counsel, or Dianna B. Johnston, Assistant Legal Counsel, Office of Legal

Counsel, EEOC, 1801 L Street, NW., Washington, DC 20507; telephone (202) 663-4678 (voice) or (202) 663-7026 (TDD).

SUPPLEMENTARY INFORMATION: This proposed rule is not a major rule for purpose of Executive Order 12291.

The Commission has long recognized that harassment on the basis of race, color, religion, sex, or national origin violates section 703 of title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e *et seq.* (title VII). The Commission has also recognized that harassment based on age is prohibited by the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. 621 *et seq.* (ADEA). The Commission has interpreted the Rehabilitation Act of 1973, as amended, 29 U.S.C. 701 *et seq.*, and the Americans with Disabilities Act of 1990, 42 U.S.C. 12101 *et seq.* (ADA), as prohibiting harassment based on a person's disability. Regarding the ADA, see § 1630.12 of the Commission's regulations on Equal Employment Opportunity for Individuals With Disabilities, 56 FR 35,737 (1991) (codified at 29 CFR 1630.12) (1992).

For more than twenty years, the federal courts have held that harassment violates the statutory prohibition against discrimination in the terms and conditions of employment.¹ The Commission has held and continues to hold that an employer has a duty to maintain a working environment free of harassment based on race, color, religion, sex, national origin, age, or disability, and that the duty requires positive action where necessary to eliminate such practices or remedy their effects. The Commission has previously issued guidelines on sex-based harassment that is sexual in nature, EEOC Guidelines on Discrimination Because of Sex, 29 CFR 1604.11 (1992), and guidelines on national origin harassment, EEOC Guidelines on Discrimination Because of National Origin, 29 CFR 1606.8 (1992).

For several reasons, the Commission has determined that there is a need for new guidelines that emphasize that

¹ See, e.g., *Rogers v. EEOC*, 454 F.2d 234 (5th Cir. 1971) (segregation of employer's patients on the basis of national origin could create discriminatory work environment for Spanish-surnamed employee affecting the terms, conditions, and privileges of her employment), *cert. denied*, 406 U.S. 957 (1972); *EEOC v. International Longshoremen's Ass'n*, 511 F.2d 273 (5th Cir.) (by racially segregating union locals, union denied equal employment opportunities because of the psychological harm inflicted), *cert. denied*, 423 U.S. 994 (1975); *Weiss v. United States*, 595 F. Supp. 1050 (E.D. Va. 1984) (patterned use of religious slurs and taunts by co-worker and supervisor against plaintiff violated plaintiff's right to non-discriminatory terms and conditions of employment).

harassment based upon race, color, religion, gender,² age, or disability is egregious and prohibited by title VII, the ADEA, the ADA, and the Rehabilitation Act.³ First, the Commission has determined that it would be useful to have consistent and consolidated guidelines that set forth the standards for determining whether conduct in the workplace constitutes illegal harassment under the various antidiscrimination statutes. Second, because of all the recent attention on the subject of sexual harassment, the Commission believes it important to reiterate and emphasize that harassment on any of the bases covered by the Federal antidiscrimination statutes is unlawful. Third, doing so at this time is particularly useful because of the recent enactment of the Americans with Disabilities Act. Fourth, these guidelines offer more detailed information about what is prohibited than did the national origin guidelines. Finally, they put in guideline form the rule that sex harassment is not limited to harassment that is sexual in nature, but also includes harassment due to gender-based animus.

Section 1606.8 of the National Origin Guidelines will be incorporated into and superseded by these proposed Guidelines on Harassment. This does not represent a change in the Commission's position on harassment; rather, it is an effort to combine and clarify.

Sexual harassment continues to be addressed in separate guidelines because it raises issues about human interaction that are to some extent unique in comparison to other harassment and, thus, may warrant

² There are forms of harassment that are gender-based but non-sexual in nature. See *Hall v. Gus Construction Co.*, 842 F.2d 1010, 1014 (6th Cir. 1988) (harassment that is not of a sexual nature but would not have occurred but for the sex of the victim is actionable under title VIII); *Robinson v. Jacksonville Shipyards*, 760 F. Supp. 1486, 1522 (M.D. Fla. 1991) (harassing behavior lacking sexually explicit content but directed at women and motivated by animus against women is sex discrimination).

Although the Commission has always recognized that gender-based harassment is actionable, the Guidelines on Discrimination Because of Sex describe only conduct of a sexual nature. These proposed guidelines simply state the applicable rule in guideline form. See *Hall v. Gus Construction Co.*, 842 F.2d 1010, 1014 (6th Cir. 1988) (EEOC Guidelines emphasize explicitly sexual behavior but do not state that other types of harassment should not be considered).

³ Indeed, much of sexual harassment law derives from principles developed in the area of racial and national origin harassment. See *Meritor Savings Bank v. Vinson*, 477 U.S. 87, 85-86 (1986) (discusses principles of hostile environment harassment developed in racial and national origin harassment cases and applied to sexual harassment).

separate emphasis. In addition to the guidelines, more extensive guidance on sexual harassment can be found in EEOC Policy Guidance No. N-915-050, "Current Issues of Sexual Harassment," March 19, 1990 (Sexual Harassment Policy Guidance). The Commission's Sex Discrimination Guidelines remain in effect and there is no change in the Commission's policy regarding sexual harassment.

Proposed § 1609.1(a) reiterates the Commission's position that harassment on the basis of race, color, religion, gender, national origin, age, or disability constitutes discrimination in the terms, conditions and privileges of employment and, as such, violates title VII, the ADEA, the ADA, or the Rehabilitation Act, as applicable. The Supreme Court, in *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), endorsed the Commission's position that title VII affords employees the right to work in an environment free from discriminatory intimidation, insult, and ridicule. See also *Patterson v. McLean Credit Union*, 491 U.S. 164, 180 (1989) (Court acknowledged that racial harassment was actionable under section 703(a)(1) of title VII).

Proposed § 1609.1(b) sets out the criteria for determining whether an action constitutes unlawful behavior. These criteria are that the conduct: (i) Has the purpose or effect of creating an intimidating, hostile, or offensive work environment; (ii) has the purpose or effect of unreasonably interfering with an individual's work performance; or (iii) otherwise adversely affects an individual's employment opportunities.

It also defines and gives examples of the types of verbal and physical conduct in the workplace that constitute harassment under title VII, and ADEA, the ADA, and the Rehabilitation Act. Actionable harassment includes harassment based on an individual's race, color, religion, gender, national origin, age, or disability, as well as on the race, color, religion, gender, national origin, age, or disability of one's relatives, friends, or associates.

Proposed § 1609.1(c) sets forth the standard for determining whether the alleged harassing conduct is sufficiently severe or pervasive to alter the conditions of employment and create an intimidating, hostile, or abusive work environment. The standard is whether a reasonable person in the same or similar circumstances would find the challenged conduct intimidating, hostile, or abusive. In determining whether that standard has been met, consideration is to be given to the perspective of individuals of the claimant's race, color, religion, gender,

national origin, age, or disability.⁴ Recent case law on this issue emphasizes the importance of considering the perspective of the victim of the harassment rather than adopting notions of acceptable behavior that may prevail in a particular workplace. See, e.g., *Ellison v. Brady*, 924 F.2d 872, 878-79, 55 EPD ¶ 40,520 (9th Cir. 1991); *Robinson v. Jacksonville Shipyards*, 760 F.Supp. 1486, 55 EPD ¶ 40,535 (M.D. Fla. 1991). As the Ellison court observed, applying existing standards of acceptable behavior runs the risk of reinforcing the prevailing level of discrimination. "Harassers could continue to harass merely because a particular discriminatory practice was common * * *" 924 F.2d at 878.

The Commission explicitly rejects the notion that in order to prove a violation, the plaintiff must prove not only that a reasonable person would find the conduct sufficiently offensive to create a hostile work environment, but also that his/her psychological well-being was affected. Compare *Harris v. Forklift Systems*, ___ F. Supp. ___, 60 EPD ¶ 42,070 (M.D. Tenn. 1990) (plaintiff must prove psychological injury), *aff'd per curiam*, ___ F.2d ___, 60 EPD ¶ 42,071 (6th Cir. 1992), with *Ellison v. Brady*, 924 F.2d 872, 878 n.1 (9th Cir. 1991) (plaintiff need not demonstrate psychological effects). The Supreme Court has granted *certiorari* in *Harris*, ___ U.S. ___, 60 EDP ¶ 42,072 (1993), and the Commission has joined the Department of Justice in an *amicus curiae* brief opposing the Sixth Circuit rule. Brief for the United States and the EEOC (April 1993) (No. 92-1168).

As noted above, the determination of whether the complained of conduct violates antidiscrimination laws turns on its severity and pervasiveness. Those factors interact. Courts do not typically find violations based on isolated or sporadic use of verbal slurs or epithets; nevertheless, they recognize that an isolated instance of such conduct—particularly when perpetrated by a supervisor—can corrode the entire employment relationship and create a hostile environment. For example, a supervisor's isolated use of inflammatory and patently offensive racial epithets and slurs such as "nigger" and "spic" may be enough to establish a violation. See, e.g., *Rogers v. Western-Southern Life Ins. Co.*, 792 F. Supp. 628 (E.D. Wis. 1992) (supervisor's infrequent use of racial comments such as "nigger" and "you Black guys are 'too f***ing dumb to be insurance

⁴ This standard is consistent with the standard applied to sexual harassment, as set out in the Sexual Harassment Policy Guidance.

agents" created a hostile work environment). See also *Daniels v. Essex Group, Inc.*, 937 F.2d 1264, 1274 & n. 4 (7th Cir. 1991) (court noted that even where harasser was a co-worker, one egregious incident, such as performing KKK ritual in workplace, would create hostile environment).

Under title VII, the ADEA, the ADA, and the Rehabilitation Act, all employees should be afforded a working environment free of discriminatory intimidation. Thus, proposed § 1609.1(d) provides that employees have standing to challenge a hostile or abusive work environment even if the harassment is not targeted specifically at them. See, e.g., *Rogers v. EEOC*, 454 F.2d 234 (5th Cir. 1971) (discriminatory work environment was created for Spanish-surnamed employee by segregation of employer's patients on the basis of national origin), *cert. denied*, 406 U.S. 957 (1972); *Robinson v. Jacksonville Shipyards*, 760 F. Supp. 1486 (M.D. Fla. 1991) ("behavior that is not directed at a particular individual or group of individuals, but is disproportionately more offensive or demeaning to one sex [can be challenged]").

Proposed § 1609.1(e) states that, in determining whether the alleged conduct constitutes harassment, the Commission will look at the record as a whole and the totality of the circumstances, including the nature of the conduct and the context in which it occurs. Whether particular conduct in the workplace is harassing in nature and rises to the level of creating a hostile or abusive work environment depends upon the facts of each case and must be determined on a case-by-case basis.

Proposed § 1609.2(a) applies agency principles to the issue of employer liability for harassment by the employer's agents and supervisory employees. The Supreme Court in *Meritor Savings Bank v. Vinson*, 477 U.S. 57 (1986), declined to issue a definitive rule on the issue of employer liability for claims of environmental harassment, but ruled "that Congress wanted courts to look to agency principles for guidance in this area." *Id.* at 72.

Subsection (i) of § 1609.2(a) states that the employer is liable where it knew or should have known of the conduct and failed to take immediate and appropriate corrective action. A written or verbal grievance or complaint, or a charge filed with the EEOC, provides actual notice. Evidence that the harassment is pervasive may establish constructive knowledge.

Subsection (ii) states that the employer is liable for the acts of its

supervisors, regardless of whether the employer knew or should have known of the conduct, if the harassing supervisory employee is acting in an "agency capacity." It notes that the Commission will examine the circumstances of the particular employment relationship and the job functions performed by the harassing individual in determining whether the harassing individual is acting in an "agency capacity."

If the employer fails to establish an explicit policy against harassment, or fails to establish a reasonably accessible procedure by which victims of harassment can make their complaints known to appropriate officials, apparent authority to act as the employer's agent is established. In the absence of an explicit policy against harassment and a complaint procedure, employees could reasonably believe that a harassing supervisor's actions will be ignored, tolerated, or even condoned by the employer. This is the same standard of liability for harassment by supervisors applied by the Commission to cases of sexual harassment. See *Sexual Harassment Policy Guidance*.

Proposed § 1609.2(b) provides that an employer is responsible for acts of harassment in the workplace by an individual's co-workers where the employer, its agents, or supervisory employees knew or should have known of the conduct, unless the employer can show that it took immediate and appropriate corrective action. This section recognizes that an employer is only liable for non-supervisory employee harassment where it was aware or should have been aware of the harassing conduct.

Proposed § 1609.2(c) provides that, because an employer is obligated to maintain a work environment free of harassment, its liability may extend to acts of non-employees. It states that an employer may be responsible for the acts of non-employees with respect to environmental harassment of employees where the employer, its agents, or supervisory employees knew or should have known of the conduct and failed to take immediate and appropriate corrective action, as feasible. Important factors to consider are the extent of the employer's control over the non-employees and the employer's legal responsibility for the conduct of such non-employees.

Proposed § 1609.2(d) sets forth the Commission's position that taking measures to prevent harassment is the best way to eliminate harassment. It states that an employer should take all steps necessary to prevent harassment from occurring, including having an

explicit policy against harassment that is clearly and regularly communicated to employees, explaining sanctions for harassment, developing methods to sensitize all supervisory and non-supervisory employees to issues of harassment, and informing employees of their right to raise and how to raise the issue of harassment under title VII, the ADEA, the ADA, and the Rehabilitation Act. Establishing an effective complaint procedure by which employees can make their complaints known to appropriate officials who are in a position to act on complaints is an important preventive measure.

Regulatory Flexibility Act

The proposed guidelines, if promulgated in final form, are not expected to have a significant economic impact on small business entities, within the meaning of the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.*

List of Subjects in 29 CFR Part 1609

Race, color, religion, gender, national origin, age, and disability discrimination.

For the Commission.

Tony E. Gallegos,
Chairman.

For the reasons set forth in the Preamble, the EEOC proposes to add 29 CFR part 1609, §§ 1609.1 and 1609.2, as follows:

PART 1609—GUIDELINES ON HARASSMENT BASED ON RACE, COLOR, RELIGION, GENDER, NATIONAL ORIGIN, AGE, OR DISABILITY

Sec.

1609.1 Harassment.

1609.2 Employer Liability for Harassment.

Authority: 42 U.S.C. 2000e *et seq.*; 29 U.S.C. 621 *et seq.*; 29 U.S.C. 12101, *et seq.*; 29 U.S.C. 701, *et seq.*

§ 1609.1 Harassment.

(a) Harassment on the basis of race, color, religion, gender,¹ national origin,² age, or disability constitutes discrimination in the terms, conditions, and privileges of employment and, as such, violates title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e *et seq.* (title VII); the Age Discrimination in Employment Act, as amended, 29 U.S.C. 621 *et seq.* (ADEA);

¹ These Guidelines cover sex-based harassment that is non-sexual in nature. Sexual harassment is covered by the Commission's Guidelines on Discrimination Because of Sex, 29 CFR 1604.11 (1992).

² Because they are more comprehensive, these Guidelines supersede § 1606.8 of the Commission's Guidelines on Discrimination Because of National Origin, 29 CFR 1606.8 (1992).

the Americans with Disabilities Act, 42 U.S.C. 12101 *et seq.* (ADA); or the Rehabilitation Act of 1973, as amended, 29 U.S.C. 701 *et seq.*, as applicable.

(b)(1) Harassment is verbal or physical conduct that denigrates or shows hostility or aversion toward an individual because of his/her race, color, religion, gender, national origin, age, or disability, or that of his/her relatives, friends, or associates, and that:

- (i) Has the purpose or effect of creating an intimidating, hostile, or offensive work environment;
- (ii) Has the purpose or effect of unreasonably interfering with an individual's work performance; or
- (iii) Otherwise adversely affects an individual's employment opportunities.

(2) Harassing conduct includes, but is not limited to, the following:

(i) Epithets, slurs, negative stereotyping, or threatening, intimidating, or hostile acts, that relate to race, color, religion, gender, national origin, age, or disability;³ and

(ii) Written or graphic material that denigrates or shows hostility or aversion toward an individual or group because of race, color, religion, gender, national origin, age, or disability and that is placed on walls, bulletin boards, or elsewhere on the employer's premises, or circulated in the workplace.

(c) The standard for determining whether verbal or physical conduct relating to race, color, religion, gender, national origin, age, or disability is "sufficiently severe" or pervasive to create a hostile or abusive work environment is whether a reasonable person in the same or similar circumstances would find the conduct intimidating, hostile, or abusive. The "reasonable person" standard includes consideration of the perspective of persons of the alleged victim's race,

³ This includes acts that purport to be "jokes" or "pranks," but that are hostile or demeaning with regard to race, color, religion, gender, national origin, age, or disability. *Snell v. Suffolk County*, 782 F.2d 1094, 1098 (2d Cir. 1986) (dressing Hispanic prisoner in straw hat with sign saying "epic" and "[plaintiff's] son"); *Rochon v. FBI*, 691 F. Supp. 1548, 1551 n.1 (D.D.C. 1988) (characterizing as "pranks" such things as hate mail, threats of castration, use of defaced photographs—including one of plaintiff's children—and forging plaintiff's name to an insurance policy against death and dismemberment is almost as disturbing as the acts themselves).

⁴ See, e.g., *Rodgers v. Western-Southern Life Ins. Co.*, 792 F. Supp. 628 (E.D. Wis. 1992) (supervisor's infrequent use of racial comments such as "nigger" and "you Black guys are too f***ing dumb to be insurance agents," created a hostile work environment). See also *Daniels v. Essex Group, Inc.*, 937 F.2d 1264, 1274 & n.4 (7th Cir. 1991) (court noted that even where harasser was a co-worker, one egregious incident, such as performing KKK ritual in workplace, would create hostile environment).

color, religion, gender, national origin, age, or disability. It is not necessary to make an additional showing of psychological harm.

(d) An employer, employment agency, joint apprenticeship committee, or labor organization (hereinafter collectively referred to as "employer") has an affirmative duty to maintain a working environment free of harassment on any of these bases.⁵ Harassing conduct may be challenged even if the complaining employee(s) are not specifically intended targets of the conduct.

(e) In determining whether the alleged conduct constitutes harassment, the Commission will look at the record as a whole and at the totality of the circumstances, including the nature of the conduct and the context in which it occurred. The determination of the legality of a particular action will be made from the facts, on a case-by-case basis.

§ 1609.2 Employer liability for harassment.

(a) An employer is liable for its conduct and that of its agents and supervisory employees with respect to workplace harassment on the basis of race, color, religion, gender, national origin, age, or disability:

(1) Where the employer knew or should have known of the conduct and failed to take immediate and appropriate corrective action; or

(2) Regardless of whether the employer knew or should have known of the conduct, where the harassing supervisory employee is acting in an "agency capacity." To determine whether the harassing individual is acting in an "agency capacity," the circumstances of the particular employment relationship and the job functions performed by the harassing individual shall be examined.

"Apparent authority" to act on the employer's behalf shall be established where the employer fails to institute an explicit policy against harassment that is clearly and regularly communicated to employees, or fails to establish a reasonably accessible procedure by which victims of harassment can make their complaints known to appropriate officials who are in a position to act on complaints.

(b) With respect to conduct between co-workers, an employer is responsible for acts of harassment in the workplace that relate to race, color, religion,

⁵ See Commission Decision Nos. YSF 9-108 (racial harassment), 72-1114 (religious harassment), 71-2725 (gender-based harassment), CCH EEOC Decisions (1973) ¶¶ 6030, 6347, and 6290, respectively; Commission Decision No. 76-41, CCH EEOC Decisions (1983) ¶ 6632 (national origin harassment).

gender, national origin, age, or disability where the employer or its agents or supervisory employees knew or should have known of the conduct, and the employer failed to take immediate and appropriate corrective action.

(c) An employer may also be responsible for the acts of non-employees with respect to harassment of employees in the workplace related to race, color, religion, gender, national origin, age, or disability where the employer or its agents or supervisory employees knew or should have known of the conduct and failed to take immediate and appropriate corrective action, as feasible. In reviewing these cases, the Commission will consider the extent of the employer's control over non-employees and any other legal responsibility that the employer may have had with respect to the conduct of such non-employees on a case-by-case basis.

(d) Prevention is the best tool for the elimination of harassment. An employer should take all steps necessary to prevent harassment from occurring, including having an explicit policy against harassment that is clearly and regularly communicated to employees, explaining sanctions for harassment, developing methods to sensitize all supervisory and non-supervisory employees on issues of harassment, and informing employees of their right to raise, and the procedures for raising, the issue of harassment under title VII, the ADEA, the ADA, and the Rehabilitation Act. An employer should provide an effective complaint procedure by which employees can make their complaints known to appropriate officials who are in a position to act on them.

[FR Doc. 93-23869 Filed 9-30-93; 8:45 am]
BILLING CODE 4710-01-M

DEPARTMENT OF THE TREASURY

31 CFR Part 103

Bank Secrecy Act Regulations; Transmittal Orders for Funds Transfers and Transmittals of Funds by Financial Institutions; Correction

AGENCY: Departmental Offices, Treasury.

ACTION: Proposed rule; correction; extension of comment period.

SUMMARY: On August 31, 1993, the Department of the Treasury (Treasury) published a Notice of Proposed Rulemaking Relating to Transmittal Orders for Funds Transfers and Transmittals of Funds by Financial Institutions. 58 FR 46021. The Department of Treasury is making a

specific legislation. Under paragraph (c)(5)(i) of this section, the assignment of B to assist the legislative affairs department in analyzing the bill and in drafting a position letter in opposition to the bill evidences a purpose to influence legislation. Based on these facts, neither the activity of periodically confirming the procedural status of the bill nor the activity of preparing the routine, brief summary of the bill before March 31 constitutes influencing legislation. With respect to periodically confirming the procedural status of the bill on or after March 31, it is presumed, under paragraph (c)(4) of this section, that E engaged in the activity solely to make or support the lobbying communication because the activity commenced in the same taxable year as the lobbying communication. These facts indicate that after March 31, E determined the procedural status of the bill for the purpose of supporting the lobbying communication by B and, accordingly, E cannot rebut the presumption as it relates to this activity.

Example 8. Taxpayer Z prepares a report that it is required by state law to submit to a state corporation commission. Z sends a copy of the report to its delegate in the state legislature along with the taxpayer's letter opposing a bill that would increase the state sales tax. Even though the letter to the delegate is a lobbying communication (because it refers to, and reflects a view on, specific legislation), under paragraph (c)(5)(ii) of this section, the preparation of the report does not constitute influencing legislation.

Example 9. Taxpayer Y purchases an annual subscription to a commercial, general circulation newsletter that provides legislative updates on proposed tax legislation. Employees in Y's legislative affairs department read the newsletter in order to keep abreast of legislative developments. Even if Y attempts to influence legislation that is identified and tracked in the newsletter, under paragraph (c)(5)(iii) of this section, the time spent by employees of Y reading the newsletter does not constitute influencing legislation.

(d) *Special imputation rule.* If one taxpayer, for the purpose of making or supporting a lobbying communication, uses the services or facilities of a second taxpayer and does not compensate the second taxpayer for the full cost of the services or facilities, the purpose and actions of the first taxpayer are imputed to the second taxpayer. Thus, for example, if a trade association uses the services of a member's employee, at no cost to the association, to conduct research or similar activities to support the trade association's lobbying communication, the trade association's purpose and actions are imputed to the member. As a result, the member is treated as influencing legislation with respect to the employee's work in support of the trade association's lobbying communication.

(e) *Anti-avoidance rule.* If a taxpayer, alone or in coordination with one or

more other taxpayers, purposely structures its attempts to influence legislation to achieve results that are unreasonable in light of the purposes of section 162(e) and section 6033(e), the Commissioner can take such steps as are appropriate to achieve reasonable results consistent with the purposes of section 162(e), section 6033(e), and this section.

(f) *Effective date.* This section is effective for amounts paid or incurred on or after May 13, 1994. Taxpayers must adopt a reasonable interpretation of section 162(e)(1)(A) for amounts paid or incurred prior to this date.

Par. 3: In § 1.162-20, paragraph (c)(5) is added to read as follows:

§ 1.162-20 Expenditures attributable to lobbying, political campaigns, attempts to influence legislation, etc., and certain advertising.

* * * * *

(c) * * * * *

(5) *Expenses paid or incurred after December 31, 1993, in connection with influencing legislation other than certain local legislation.* The provisions of paragraphs (c)(1) through (c)(3) of this section are superseded for expenses paid or incurred after December 31, 1993, in connection with influencing legislation (other than certain local legislation) to the extent inconsistent with section 162(e)(1)(A) (as limited by section 162(e)(2)) and §§ 1.162-20T(d) and 1.162-29.

Margaret Milner Richardson,

Commissioner of Internal Revenue.

[FR Doc. 94-11613 Filed 5-10-94; 11:23 am]

BILLING CODE 4830-01-U

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

29 CFR Part 1609

Guidelines on Harassment Based on Race, Color, Religion, Gender, National Origin, Age, or Disability

AGENCY: Equal Employment Opportunity Commission (EEOC).

ACTION: Proposed rule; extension of comment period.

SUMMARY: The period for commenting on the proposed guidelines on harassment based on race, color, religion, national origin, age, or disability (58 FR 51266, October 1, 1993) has been extended to June 13, 1994. After the comment period closed, the Commission received numerous comments and requests by individuals to submit comments. Since the Commission has informally been accepting and reviewing comments and

letters received after the comment period officially closed, it has thus decided to formally extend the comment period in order to give all parties an opportunity to express their views.

DATES: Comments must be received by June 13, 1994.

ADDRESSES: Comments should be addressed to the Office of the Executive Secretariat, EEOC, 10th Floor, 1801 L Street, NW., Washington, DC 20507. Copies of comments submitted by the public will be available for review at the Commission's library, room 6502, 1801 L Street, NW., Washington, DC, between the hours of 9:30 a.m. and 5 p.m. Copies of the notice of proposed rulemaking are available in the following alternative formats: Large print, braille, electronic file on computer disk, and audio tape. Copies may be obtained from the Office of Equal Employment Opportunity by calling (202) 663-4895 (voice) or (202) 663-4399 (TDD).

FOR FURTHER INFORMATION CONTACT: Elizabeth M. Thornton, Acting Legal Counsel, or Dianna B. Johnston, Assistant Legal Counsel, Office of Legal Counsel, EEOC 1801 L Street, NW., Washington, DC 20507; telephone (202) 663-4679 (voice) or (202) 663-7026 (TDD).

Tony E. Gallegos,
Chairman, Equal Employment Opportunity Commission.

[FR Doc. 94-11707 Filed 5-12-94; 8:45 am]

BILLING CODE 6750-01-M

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Part 906

Colorado Permanent Regulatory Program

AGENCY: Office of Surface Mining Reclamation and Enforcement (OSM), Interior.

ACTION: Proposed rule; public comment period and opportunity for public hearing on proposed amendment.

SUMMARY: OSM is announcing the receipt of a proposed amendment to the Colorado permanent regulatory program (hereinafter, the "Colorado program") under the Surface Mining Control and Reclamation Act of 1977 (SMCRA). The proposed amendment consists of revisions to the Colorado rules pertaining to bonding of surface coal mining and reclamation operations and revegetation success criteria for areas to be developed for industrial, commercial, or residential use.



U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
Washington, D.C. 20507

**FACT SHEET ON PROPOSED GUIDELINES ON HARASSMENT BASED ON RACE,
COLOR, RELIGION, SEX, NATIONAL ORIGIN, AGE OR DISABILITY**

1. The Guidelines were issued to help employers understand existing law. Employers are constantly seeking guidance on these issues. There were already Guidelines on sexual harassment and on national origin harassment, but none on race, color or religious harassment or on the other bases covered by federal employment discrimination statutes: age and disability. Because of the recent emphasis on sexual harassment, it was important to clarify the fact that workplace harassment was prohibited on any and all of the bases covered by the laws the Commission enforces. To omit religion from the Guidelines is likely to mislead employers into believing that religious based harassment is permissible.

2. Since Title VII was passed in 1964, it has been illegal to subject employees to different and hostile working conditions because of their race, color, religion, sex or national origin. This is because Title VII prohibits employers from "discriminat[ing] against any individual with respect to his . . . terms, conditions, or privileges of employment."

3. The Guidelines simply explain to employers the existing rules about harassment. They were derived from case law, the Commission's pre-existing Guidelines on National Origin Harassment, the Guidelines on Sexual Harassment and the Policy Guidance on Sexual Harassment. If clarifications are needed, they will be made before any Guidelines are issued.

4. Critical point: Not all offensive conduct violates the law. Harassing conduct rises to the level of unlawful discrimination only when a reasonable person would regard it as hostile or abusive.

5. Because the law is violated only when the complained of conduct is sufficiently severe and pervasive to be found hostile or abusive, Title VII would not be implicated when a supervisor merely tells subordinates that he or she is Jewish, Muslim, Christian, etc. Reasonable people would not deem a statement of one's own affiliation, by itself, to amount to severe or pervasive hostility to those who do not share the same belief. Nor could it reasonably be deemed to be hostile to another's religious beliefs to wear a cross or a yarmulke. It is one thing to express one's own beliefs; another to disparage the religion or beliefs of others. In a diverse workforce, this is a critical distinction and is the heart of non-discrimination law.

6. The Commission has never taken the position that Title VII prohibits the statement of one's own beliefs in the workplace. To the contrary the Commission has repeatedly ruled that employers must permit employees to wear yarmulkes and other religious garb to work unless doing otherwise would cause safety problems or other undue hardship. In addition, Title VII explicitly permits religious organizations to employ individuals of a particular religion to carry out the activities of those entities.

7. As the Guidelines explain, however, the law does protect employees from having to endure severe or pervasive conduct that is hostile or abusive on the basis of religion. This is merely an extension of Title VII's basic protection against discrimination on the basis of religion. Thus, for example, an employee has redress if s/he is subjected to repeated epithets or insults hostile to his/her religion, just as an African-American employee has redress when subjected to repeated racial epithets at work. This affords protection to employees of all persuasions. Thus, a Christian employee would have recourse under Title VII if a "secular humanist" employer engaged in a pattern of ridiculing the employee's religious beliefs.

8. Although the public is most familiar with sexual harassment, the rule that it is unlawful discrimination to make work conditions hostile or abusive because of race, color, religion, national origin and sex, first arose in contexts other than gender. In 1971, in a case called Rogers v. EEOC, 454 F.2d 234 (5th Cir. 1971), cert. denied, 406 U.S. 957 (1972), a court held that segregating Hispanic patients can create hostile and discriminatory work conditions for an Hispanic employee, in violation of Title VII. See also Rodgers v. Western-Southern Life Ins., 792 F.Supp. 628 (E.D. Wisc. 1992) (statements that "you Black guys are too f---ing dumb to be insurance agents" created a hostile working environment), aff'd, -- F.2d --, 63 FEP Cases 694 (7th Cir. 1993).

9. The portion of Title VII quoted above in ¶ 2 makes no distinction between the various bases covered; race, color, religion, sex or national origin. Neither have the courts. Title VII has always prohibited employers from subjecting employees to workplace harassment because of the employee's religion. For example, in Weiss v. United States, 595 F. Supp. 1050, 1056 (E.D. Va. 1984) the court said: "when an employee is repeatedly subjected to demeaning and offensive religious slurs before his fellows by a co-worker and by his supervisor, such activity necessarily has the effect of altering the conditions of his employment within the meaning of Title VII."

10. The principle that employees have a right to "work in an environment free from discriminatory intimidation, ridicule and insult," was recognized by the Supreme Court in 1986 in Meritor Savings Bank v. Vinson, 477 U.S. 57, 65 (1986). Though Meritor was a sexual harassment case, the Court made clear that it was

applying principles applicable to other classes covered by Title VII. The Court specifically accepted the principle that creation of a hostile environment based on discriminatory racial, religious, national origin, or sexual harassment constitutes a violation of Title VII. See id. at 66. Just this year, in Harris v. Forklift Systems, a sexual harassment case, the Supreme Court indicated that all bases covered by Title VII are treated the same. See Harris v. Forklift Sys., Inc., No. 92-1168 slip op. at 4 (Nov. 9, 1993); id. at 2 (Ginsburg, J., concurring) ("Title VII declares discriminatory practices based on race, gender, religion, or national origin equally unlawful").

Draft Questions and Answers on the Guidelines on Harassment Based on Race, Color, Religion, Gender, National Origin, Age or Disability

1. Q. Could it be considered religious harassment if an individual placed a Bible on his/her desk or wore a cross, a turban, a yarmulke, a star of David or any kind of religious talisman to work?

A. The Guidelines provide that harassment is conduct that a reasonable individual would view as severe or pervasive enough to create a hostile or abusive environment based on, among other things, religion. It is inconceivable that a reasonable person would view as creating a hostile or abusive environment an individual's statement that he or she belongs to a particular church, placement of a religious tome like the Bible on a bookshelf or desk, or another's decision to wear a religious symbol to work. Indeed, according to cases involving "reasonable accommodation," employers are required to accommodate their employees' expressed religious need to wear religious garb, provided that doing so would not create an undue hardship.

2. Q. Is it permissible under the Guidelines for an employer to conduct Bible study or prayer meetings in the workplace, even though all of the individuals in the workplace do not belong to the same religion?

A. An employer would have the right to conduct such meetings, provided that individuals who do not wish to attend or take part are not forced to and are not penalized in any way by their decision not to attend. See, e.g., EEOC v. Townley Engineering & Mfg., Co., 859 F.2d 610 (9th Cir. 1988).

3. Q. Do the Proposed Guidelines affect an employer's freedom to share his/her faith with an employee?

A. The Proposed Guidelines are not intended to create any new obligations on employers. They were derived from case law, the Commission's pre-existing Guidelines on National Origin Harassment, the Guidelines on Sexual Harassment and the Policy Guidance on Sexual Harassment and they merely explain to employers the existing rules about harassment. Accordingly, the Proposed Guidelines do not alter an employer's existing right to express religion in the workplace.

4. Q. If a supervisor who constantly preaches the benefits of his/her religion repeatedly asks subordinates to accompany him/her to religious services and the supervisor is constantly rebuffed, could a charge of harassment ultimately be asserted?

A. This is a fact dependent question. As the Proposed Guidelines note, the totality of the circumstances will be considered in making such a determination. But, if employees make

clear that such invitations are unwelcome and the supervisor persists in pressing his/her religion on his/her subordinates, existing principles of harassment law suggests that a cause of action for harassment could be asserted.

5. Q. Could one incident, such as placing a mug with an offensive symbol such as a swastika on one's desk, constitute harassment?

A. It is extremely unusual for one instance of hostile conduct to violate the law, but when the conduct is especially hostile it may do so. Some symbols are so patently offensive or abusive that any reasonable individual would conclude that they polluted the workplace environment. See Yudovich v. P.W. Stone, 839 F. Supp. 382 (E.D. Va. 1993) (supervisor's expression of anti-Jewish hostility such as keeping a coffee mug with a swastika on his desk prominently displayed and in public view may by itself violate Title VII).

6. Q. May an individual discuss his/her religious beliefs in the office?

A. Discussions of religious beliefs with those who welcome such conversations would not violate the law. General statements of belief that do not denigrate or show hostility to those of other beliefs would generally not violate the law, unless the speaker consistently persisted in lecturing or discussing religion after the listener has asked not to be subjected to such discussions.

TALKING POINTS

* * *

Proposed Consolidated Guidelines on Workplace Harassment

- * **Definition:** The proposed guidelines provide that conduct towards an employee constitutes unlawful harassment on the basis of religion only when it is unwelcome and when it is severely or pervasively denigrating or shows hostility.
- * The guidelines were never intended to abridge the free exercise of religion in the workplace. In fact, a prohibition of religious expression in the workplace would violate Title VII of the Civil Rights Act of 1964, which is the law upon which the guidelines are based.
- * The guidelines are meant to protect the rights of all workers to practice their faiths as they choose.
- * The guidelines do not bar:
 - religious expression in the workplace
 - wearing a cross or a yarmulke at work
 - having a Bible on one's desk
 - inviting a colleague to church
- * The guidelines do prohibit:
 - using repeated and offensive religious epithets in the workplace
 - forcing employees to comply with someone else's religious beliefs
- * The proposed guidelines are fully consistent with the principles embodied in the Religious Restoration Act signed by the President last fall.
- * Charges of religious harassment filed with EEOC in FY 1992 totaled 524, 3.2 percent of all harassment charges and .4 percent of total charge receipts. In FY 1993, EEOC received 587 religious harassment charges, 3.1 percent of all harassment charges and .4 percent of total charge receipts.
- * By the close of the original public comment period (Nov. 30, 1993) EEOC had received approximately 85 written comments. From that time until the present, approximately 33,133 written comments have been received. Since March 7, about 7,325 calls have been received in EEOC's Communications office.
- * The public comment period for the proposed guidelines will continue until June 13, 1994. Written comments may be post marked by June 13.

Withdrawal/Redaction Marker

Clinton Library

DOCUMENT NO. AND TYPE	SUBJECT/TITLE	DATE	RESTRICTION
005. memo	Donsia Strong to Katherine Darwin re: EEOC (1 page)	6/7/1994	P5

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FOLDER TITLE:

[Harassment - Religious and Consolidated Guidelines] [1]

ds60.

RESTRICTION CODES

Presidential Records Act - [44 U.S.C. 2204(a)]

Freedom of Information Act - [5 U.S.C. 552(b)]

- P1 National Security Classified Information [(a)(1) of the PRA]
- P2 Relating to the appointment to Federal office [(a)(2) of the PRA]
- P3 Release would violate a Federal statute [(a)(3) of the PRA]
- P4 Release would disclose trade secrets or confidential commercial or financial information [(a)(4) of the PRA]
- P5 Release would disclose confidential advise between the President and his advisors, or between such advisors [a)(5) of the PRA]
- P6 Release would constitute a clearly unwarranted invasion of personal privacy [(a)(6) of the PRA]

C. Closed in accordance with restrictions contained in donor's deed of gift.

PRM. Personal record misfile defined in accordance with 44 U.S.C. 2201(3).

RR. Document will be reviewed upon request.

- b(1) National security classified information [(b)(1) of the FOIA]
- b(2) Release would disclose internal personnel rules and practices of an agency [(b)(2) of the FOIA]
- b(3) Release would violate a Federal statute [(b)(3) of the FOIA]
- b(4) Release would disclose trade secrets or confidential or financial information [(b)(4) of the FOIA]
- b(6) Release would constitute a clearly unwarranted invasion of personal privacy [(b)(6) of the FOIA]
- b(7) Release would disclose information compiled for law enforcement purposes [(b)(7) of the FOIA]
- b(8) Release would disclose information concerning the regulation of financial institutions [(b)(8) of the FOIA]
- b(9) Release would disclose geological or geophysical information concerning wells [(b)(9) of the FOIA]

TO:

I have attached material that Donsia and I received from Claire Gonzales, Director of Communications and Legislative Affairs at the EEOC, concerning its proposed religious harassment and discrimination guidelines. The Senate Committee has scheduled a hearing on these guidelines for June 9th.

As this material explains, the issue has exploded because opponents of the guidelines argue that they may potentially provide the basis for banning legally-protected forms of religious expression in the workplace. The EEOC counters that its intent is only to restate the law, not to make new law or policy. According to the EEOC, no behavior that is now permitted will be threatened, but it acknowledges that in several instances the language is somewhat broad and vague.

In order to consider the views EEOC reopened the comment period and my understanding is that the EEOC is trying to determine what is the proper course to take with the guidelines (revise or drop).

At a minimum it appears that the EEOC will have to explain/defend its use of the reasonable person standard which has been utilized by some, but not all, courts. In that respect, the EEOC will be challenged to explain how its choice of this standard is consistent with its claim that the guidelines merely state the law.

In speaking with Claire Gonzales, Director of She has requested input from us, Leg. Affairs (Eric Senunus), and other W.H. offices as to who might be appropriate to testify and any thoughts we may have about the content of the testimony. I think that it is EEOC's

**U.S. Equal Employment Opportunity Commission
Office of Communications and Legislative Affairs
1801 L Street, NW, Room 9024
Washington, DC 20507
FAX # (202) 663-4912**

FAX TRANSMITTAL FORM

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United States Senate

COMMITTEE ON THE JUDICIARY
WASHINGTON, DC 20510-6275

June 1, 1994

Ms. Claire Gonzales
Office of Communications and Legislative Affairs
EEOC
1801 L Street, N.W.
Room 9024
Washington, D.C. 20507

Dear Ms. Gonzales:

On Thursday, June 9, 1994, the Subcommittee on Courts and Administrative Practice will hold a hearing on EEOC's Proposed Guidelines for Religious Harrassment. The hearing is scheduled to begin at 2:00 p.m. in Room 226 of the Senate Dirksen Office Building.

Given your expertise and interest in this issue, I would like to invite you to testify at this hearing. In the event that you are able to testify, please provide my Subcommittee staff with a 100 copies of your written statement by 5:00 p.m., Monday, June 6, 1994. In addition, *each copy of your testimony should include a summary (following the title page) of not more than one page.* This testimony should be sent to the following address:
Subcommittee on Courts and Administrative Practice, 223 Hart Senate Office Building, Washington, D.C., 20510-6275.

I would also like to request that you limit your oral presentation to five minutes to allow ample time for questions. Your written statement will be printed in its entirety in the hearing record.

If you have any questions, please call Jim Whiddon, Majority Counsel, of my staff at (202) 224-4022. I look forward to your testimony.

Sincerely,



Howell Hefflin
Chairman
Subcommittee on Courts and
Administrative Practice

HH/cc

WASHINGTON UPDATE

Policy and Politics in Brief

POSSIBLY ONE 'THOU SHALT NOT' TOO MANY

BY W. JOHN MOORE

Mutter a few lewd comments to a co-worker or hurl racial insults at a fellow employee and the result could be charges of sexual or racial harassment at the Equal Employment Opportunity Commission (EEOC). But if a manager begins weekly sales meetings by thanking "Our Lord Jesus Christ," is the executive guilty of the sin of religious harassment if somebody at the session is a devout atheist?

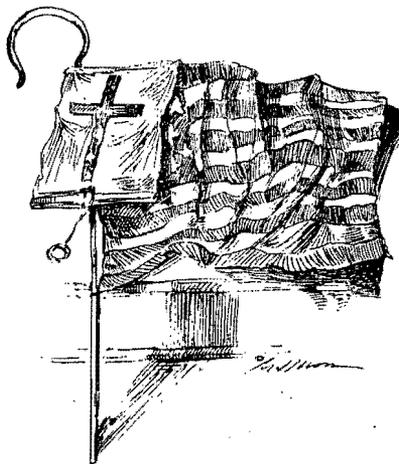
The answer to that question has embroiled the EEOC—which last October unveiled proposed guidelines that attempt to define the proper and improper roles of religion in the workplace—in perhaps its messiest debate in years. Conservative religious groups have called for a crusade against the guidelines, asserting that they are so broad that cases of religious speech could be ruled illegally offensive. Outraged religious leaders assert that the guidelines would muzzle religious discussions in the workplace.

Fearing their liability under the guidelines, Christian critics say, employers will increasingly create a religion-free workplace. "These rules will have a chilling effect on religious expression," warned Forest D. Montgomery, the Washington public affairs counsel for the Wheaton (Ill.)-based National Association of Evangelicals. He and a host of other religious leaders say the guidelines violate the Free Exercise Clause of the 1st Amendment, as well as free-speech protections.

The guidelines are an agency effort to give employers more guidance about their responsibilities under Title VII of the 1964 Civil Rights Act, which bars discrimination on the basis of age, color, disability, gender, national origin, race and religion. The proposal has created a firestorm of protest on Capitol Hill. Subcommittees of both the Senate Judiciary Committee and the House Education and Labor Committee are expected to hold

hearings on the guidelines this summer. More than 40 Members of Congress have already signed a resolution sponsored by Rep. Howard P. (Buck) McKeon, R-Calif., urging the agency to drop religion from its final rules on workplace harassment.

The EEOC has received so many negative comments that the agency announced on May 10 that the comment period on the guidelines, which closed on Nov. 30, has been reopened. Christian groups have



flooded the EEOC with comments denouncing the guidelines, according to a commission spokesman. Opponents say they resent the commission's efforts to treat religious harassment the same way as racial or sexual harassment. Particularly worrisome, they say, is the agency's decision that employers are legally required to protect their employees from a hostile environment. That means companies that ban *Penthouse* pinups may also seek to avoid liability by barring employees from putting a crucifix above their desks or wearing a yarmulke to work, religious leaders said.

When the government even suggests that religious displays could create a hostile environment, "you have drawn fire, big-time fire, five-alarm fire," warned the Rev. Louis P. Sheldon, chairman of the Anaheim (Calif.)-based Traditional Values Coalition, a grass-roots lobbying group that represents 31,000 churches.

Comments filed at the EEOC revealed wide-ranging concerns. "If an employer wants to state his personal religious beliefs or run his company on Christian biblical principles and so state the fact

publicly, he should be able to. Obviously an employer cannot hire, promote or fire based on religious beliefs. But to place this prohibition under the sexual harassment 'hostile environment' category would leave wide open the opportunity for employer abuse," wrote C.W. Randell, president of the Washington-based Federal News Service.

"Or, for example, the office of a feminist organization . . . might 'pervasively' display materials opposing Catholic and other fundamentalist Christian anti-abortion activities, creating what a 'reasonable fundamentalist' might perceive as a hostile environment on religious grounds," said comments filed by Feminists for Free Expression, a New York City-based advocacy group.

The American Civil Liberties Union (ACLU) has also criticized the guidelines. But unlike some religious groups, the ACLU opposes eliminating religious harassment from the rules. "That would send the wrong message to employers that religious harassment is not a problem," ACLU legislative counsel Robert S. Peck said. The ACLU wants the EEOC to draft more-specific guidelines, he said.

"Getting rid of the regs entirely is a bit of an overreaction," added Steven Green, legal director of the Silver Spring (Md.)-based Americans United for Separation of Church and State. "EEOC guidelines can cover certain actions without infringing on freedom of religion. People on the extremes are raising undue concerns."

From 1989-93, the number of religious harassment complaints filed with the commission jumped from 196 to 319. Still, those represent approximately 2 per cent of the total number of complaints at the commission.

Most religious harassment complaints are filed by people who say that they were mistreated and harassed because of their religious beliefs. The proposed guidelines were issued, EEOC officials say, to let people express their religious beliefs without fear of reprisals in the workplace.

Some religious groups, such as the American Jewish Congress, support the EEOC's effort to address religious harassment.

Elliot M. Minberg, legal counsel for People for the American Way, a Washington-based liberal-advocacy group, chided conservative religious organizations for their efforts to eliminate guide-

lines that, he maintains, actually protect religion. "Their concern is to preserve room on the job for proselytizing fellow employees," he said.

Traditional Values Coalition leader Sheldon acknowledged the importance of the right to express one's religious views in the workplace. "In conservative Christian circles, it is part of the normative experience to be evangelical about Christ and your relationship with him," he said.

But employers must be careful of erring too far on the side of employees

with strong religious beliefs. In late January, for example, a federal judge in Michigan ruled that a Holiday Inn may have violated the law by firing a pregnant restaurant worker after Christian staff members were upset by the woman's talk about having an abortion. "The employee who believed that abortion was morally permissible was identified as the 'cause' of the problem, as opposed to the Christian employees who objected to it," ruled Judge Richard A. Enslin of the U.S. District Court for the Western District of Michigan. ■

who warned that President Clinton's reform proposal would create a giant bureaucracy that would limit individuals' discretion in choosing a health care plan.

Rostenkowski and Gradison, a former Republican Ways and Means member, began talking about a possible deal in late January, said Lawrence F. O'Brien III, a partner in the Washington law firm of O'Brien•Calio who is an outside lobbyist for the HIAA. After that, HIAA and Ways and Means staff members met at least weekly to hammer out details of the agreement, O'Brien said. "It's been a very prolonged and intense dialogue."

Among the HIAA's chief objections to the pending legislation are provisions that would establish budget caps on national health care expenditures and expand the medicare program to provide coverage for people who can't afford to buy it.

In return for the HIAA's silence on those issues, Rostenkowski said that he was willing to support several amendments to the bill that would give insurers more flexibility in offering health coverage under a reformed system.

For instance, the bill as approved by the Ways and Means Health Subcommittee would not allow an insurer to deny anyone coverage because of a preexisting condition. But Rostenkowski's proposal says that during a three-year phase-in of the reform package, insurers could deny coverage for as many as six months to anyone who had turned down a chance to buy insurance during the past 90 days. That is intended to prevent people from seeking insurance only when they get sick.

Rostenkowski also reportedly signed off on proposals to let insurers choose what kind of groups they would write policies for, rather than requiring them to provide insurance for all segments of the market, and to let them assess different rates for individuals based on their age, instead of an across-the-board rate.

Rostenkowski is renowned for assembling a majority on his panel by lining up support from interest groups. But his normal style is to unveil his deals as a package, which make them less likely to be picked apart.

"I'm sure he doesn't like for this to come out in dribs and drabs," said lobbyist Bromberg, the executive director of the Federation of American Health Systems, a group of for-profit hospitals.

There's already some apprehension among liberal House Democrats about

WILL A SWEET DEAL GO SOUR?

BY JAMES A. BARNES

"This is vintage," hospital lobbyist Michael D. Bromberg said, describing a deal cut by House Ways and Means Committee chairman Dan Rostenkowski, D-Ill., with the Health Insurance Association of America (HIAA) to buy a truce on health care reform.

Rostenkowski, according to an HIAA memorandum, offered to back some items on the group's wish list if the HIAA agreed not to gear up its public relations

machinery against other provisions in the bill—at least not while Ways and Means is marking up the legislation. The HIAA hasn't formally accepted the tradeoff, but its president, Willis D. Gradison Jr., has said that he is "optimistic" that the group's executive committee will approve it.

Vintage it may be. But like the old advertising promise to "serve no wine before its time," the premature disclosure of the deal, first reported in *The Wall Street Journal* on May 17, may complicate Rostenkowski's efforts to round up similar agreements with other key players in the debate.

"This is not his way, to deal with an interest group and put it in the newspaper," Ways and Means member Michael A. Andrews, D-Texas, said in an interview. Now that the deal is out in the open, rival lobbyists and Members of Congress may start to criticize it, which could cramp Rostenkowski's negotiating room.

And it's far from clear that Rostenkowski has bought peace with the insurance industry. The nation's five biggest health insurers have quit the HIAA; they now have a rival lobby group, the Alliance for Managed Competition, that differs with the HIAA on a number of key issues. Smaller insurers have set up another group, the Council for Affordable Health Insurance. (See *NJ*, 1/15/94, p. 106.)

Still, quieting the HIAA could give Rostenkowski some breathing room. Last fall, the association launched an effective television advertising campaign featuring a fictional couple, "Harry and Louise,"



John Eisack

Insurers' leader Willis D. Gradison Jr. They may hold their fire on health reform.

ORAL STATEMENT
OF
DOUGLAS GALLEGOS, EXECUTIVE DIRECTOR
U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
BEFORE THE
SUBCOMMITTEE ON COURTS AND ADMINISTRATIVE PRACTICE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
JUNE 9, 1994

Oral Statement

Good Afternoon, I am Douglas Gallegos, Executive Director of the Equal Employment Opportunity Commission. I would like to introduce Elizabeth Thornton, EEOC's Acting Legal Counsel, and Dianna Johnston, Assistant Legal Counsel for Title VII policy.

We are here today to testify before the Subcommittee regarding the Equal Employment Opportunity Commission's Proposed Consolidated Guidelines on Harassment, particularly focusing our comments on the religious harassment provisions. These guidelines would protect from unlawful harassment those wishing to express their faith at work, just as the guidelines would protect workers from being forced to comply with someone else's religious beliefs.

Let us be clear that the guidelines are intended to explain existing law, consolidating existing judicial and Commission precedent, not to create any new legal theories or in any way abridge the free exercise of religion in the workplace. The guidelines provide that conduct towards an employee constitutes unlawful harassment only when it is unwelcome and when it severely or pervasively denigrates or shows hostility on the basis of religion.

Contrary to some erroneous commentary, the guidelines do not prohibit religious expression in the workplace. Such a prohibition would itself violate Title VII of the Civil Rights Act of 1964. Thus, while the proposed guidelines would prohibit

using repeated and offensive religious epithets in the workplace, the guidelines would not forbid wearing a cross or a yarmulke at work, having a Bible on one's desk, or inviting a colleague to church. As you know, the Commission has vigorously defended the right of employees in the workplace to exercise their religious faiths.

The public comment period for the proposed guidelines will continue until June 13, 1994. Any final guidelines would make clear not only that an employer is not required to prohibit non-intrusive religious expression, but that employers could not lawfully ban such expression.

In reiterating existing law, the proposed guidelines are fully consistent with the principles embodied in the Religious Freedom Restoration Act, signed by the President this past fall.

We would be glad to answer any questions you may have. However, because we are still in the comment period and because any action on these proposed guidelines requires approval by the full Commission, it would be inappropriate to commit at this time to any conclusions concerning or suggested changes to the guidelines.

STATEMENT OF
ELIZABETH M. THORNTON, ACTING LEGAL COUNSEL
U.S. EQUAL EMPLOYMENT OPPORTUNITY COMMISSION
BEFORE THE
SUBCOMMITTEE ON COURTS AND ADMINISTRATIVE PRACTICE
COMMITTEE ON THE JUDICIARY
UNITED STATES SENATE
JUNE 9, 1994

**Summary of Testimony on
Proposed Consolidated Harassment Guidelines**

On October 1, 1993, the EEOC published its Proposed Guidelines on Harassment Based on Race, Color, Religion, Gender, National Origin, Age or Disability. The original comment period was extended due to unexpected interest in the Proposed Guidelines, and will close on June 13, 1994.

Thousands of Americans have expressed concern that the Proposed Guidelines were designed to suppress religious expression by employees in the workplace. This is simply wrong. The Proposed Guidelines were intended merely to explain and interpret existing law rather than create new legal theories. Existing law makes clear that harassing conduct is unlawful when it is unwelcome and when it severely or pervasively denigrates or shows hostility on the basis of race, religion, gender, national origin, age or disability. Thus, contrary to suggestions by critics, the Proposed Guidelines do not provide that it would be unlawful to wear a cross or yarmulke, have a Bible on one's desk or invite a colleague to church, since such actions would not be hostile, severe or pervasive.

Some valid concerns have been raised with regard to certain of the provisions of the Proposed Guidelines such as the provision articulating the standard for evaluating hostile environment harassment and the provision defining harassment as including hostile conduct toward an individual because of the protected class status of his or her relatives or associates. In addition, concern has been expressed regarding the interaction of the Proposed Guidelines and the First Amendment right of free exercise of religion, and with the recently enacted Religious Freedom Restoration Act. In order to understand and respond to these and other concerns, Commission staff have met with representatives of several interest groups.

Although deletion of religion from the Proposed Guidelines may seem like a simple solution, Commission staff remain extremely cautious about treating one protected class differently from all others. Religious harassment is an unfortunate reality in many workplaces, and any action that would weaken the prohibition against such conduct should be very closely examined. The Commission continues to receive, analyze and evaluate comments, and its reconsideration of the Guidelines will be informed by these comments.

Proposed Consolidated Harassment Guidelines

Thank you for providing the opportunity to discuss the Equal Employment Opportunity Commission's Proposed Consolidated Guidelines on Harassment. My comments today will be necessarily limited because the comment period on these Guidelines is still open and the comments will have to be evaluated before any final decisions can be made. As you know, on October 1, 1993, the Commission published a Notice of Proposed Rulemaking in the Federal Register promulgating Proposed Guidelines on Harassment Based on Race, Color, Religion, Gender, National Origin, Age or Disability and invited public comment. The original comment period ran for sixty days and, due to an unexpected interest in the Guidelines after the comment period closed, the Commission extended the comment period to June 13, 1994.

There has been a lot of confusion about the purpose and effect of the Proposed Guidelines, as well as the law on which they are based, with regard to religious harassment. This has prompted an outpouring of concern by thousands of Americans who care deeply about religious freedom, and we are grateful for the opportunity to set the record straight.

The gist of the criticism leveled at the inclusion of religion in the Proposed Guidelines is that it represents an attempt by the Commission to articulate a new rule designed to suppress religious

expression by employees in the workplace. This is simply wrong. As you know, for thirty years Title VII has protected this country's workers from discrimination in employment on the basis of their religious beliefs. The Commission has strongly defended the right of employees to exercise their religion in the workplace, even when employers have found it inconvenient to accommodate those beliefs.

As originally enacted by Congress, Title VII of the Civil Rights Act of 1964 prohibits employment discrimination on the bases of race, color, religion, sex and national origin. Congress has also afforded employees protection against discrimination on the bases of age and, more recently, disability. From its inception, Title VII has prohibited discrimination that affects hiring, firing or other tangible job benefits. In construing Title VII, courts have consistently held that it also protects employees who are subjected to ~~severe or pervasive hostility because of their race, religion, or other covered bases.~~ That is the definition of harassment. The Supreme Court in Meritor Savings v. Vinson, 477 U.S. 57, 66 (1986) and in Harris v. Forklift Systems, 62 U.S. L.W. 4004, 4005 (November 9, 1993) has held that harassment violates Title VII, and that Title VII applies to all of the statutorily covered bases.

To clear up the misunderstandings surrounding the Proposed Guidelines, it may be helpful to provide some historical context.

The primary force behind the initiation of the Guidelines was former Commissioner Joy Cheria who was concerned about the lack of guidance on the subject of racial harassment. Prior to the development of the Proposed Guidelines, the Commission had issued separate Guidelines for only sexual and national origin harassment. Instead of continuing to address harassment on a piecemeal basis, the Commission determined that guidelines addressing all protected bases of prohibited harassment in the workplace should be developed.

In drafting the Proposed Consolidated Guidelines, EEOC's Office of Legal Counsel sought to consolidate twenty years of judicial and Commission precedent. The Proposed Guidelines were intended to explain and interpret ~~existing law~~ rather than to create new legal theories. The Commission simply combined information and interpretations that courts and the Commission had articulated for many years.

Conduct that ~~denigrates~~ personal characteristics such as race, religion, or gender is never nice or pleasant to experience, but it is ~~not always unlawful~~. The established body of law does not protect employees from every insult or offense that comes their way and it does not cover the hypersensitive employee's every complaint. The Supreme Court has made clear that harassing conduct is unlawful only when it is unwelcome and when it severely or pervasively denigrates or shows hostility on the basis of race,

religion, gender, national origin, age or disability. The law of workplace harassment recognizes that when conduct is severely or pervasively abusive because of one of those protected bases, it "offends Title VII's broad rule of workplace equality". Harris v. Forklift Systems, 62 U.S. L.W. at 4005. Thus, contrary to suggestions by their critics, the Proposed Guidelines do not provide that it would be unlawful to wear a cross or a yarmulke, have a Bible on your desk or invite a colleague to church. Such actions would be neither hostile nor severe nor pervasive. The Commission appreciates the concern that overly cautious employers may misconstrue the Proposed Guidelines and resort to ~~blanket prohibitions of religious expression to avoid any possible liability~~. Not only are the Proposed Guidelines not intended to create such result, such a broad policy would likely ~~run afoul of~~ Title VII's requirement that employers reasonably accommodate an employee's religious exercise unless doing so would be an undue hardship. Any final Guidelines could make clear that such blanket prohibitions are neither required nor permissible.

Commission staff acknowledge that commentors have raised some valid concerns. For example:

- The Proposed Guidelines definition of harassment includes, as one of three definitions, conduct that "otherwise adversely affects employment opportunities." [§1609.1(b)(1)(iii)]. This language was taken directly

from the Guidelines on National Origin harassment that have been in effect since 1980. Critics are correct, however, in stating that courts have not used this language. Hence, the concern that the language might be misconstrued as an attempt to create a new category of harassment is well taken.

- Much of the criticism focuses on the Proposed Guidelines' articulation of the "reasonable person" standard used in determining whether a hostile work environment exists. [§ 1609.1(c)]. This standard for "reasonable person" allows "consideration of the perspective of persons of the alleged victim's race, ... religion, etc."

Critics argue that this may be interpreted to mean that alleged harassing conduct will be judged solely from the subjective, and ever changing, standpoint of the complaining party. They further contend that the standard is so subjective and vague that wary employers will feel forced to prohibit any religious expression in the workplace rather than risk offending anyone.

In articulating the standard, the Commission's intent was to retain an objective rather than a subjective perspective while taking account of historical discrimination aimed at various groups. It was not

intended to provide special protection for the hypersensitive employee. Given the amount of controversy generated by this provision, however, it is clear that the language should be revised to more accurately reflect the intended meaning.

- There has also been a substantial amount of comment on that portion of the definition of harassment that includes hostility toward an individual because of a covered characteristic of their relatives or associates. Some commentators have misconstrued this language to mean that an employee's associates can bring suit against an employer. Its intent was simply that an employee has a claim under anti-discrimination laws if s/he is subjected to severe or pervasive hostility because, for example, he/she is married to a person of another race or religion.

- The final and overarching concern expressed in the comments is the interaction of the Proposed Guidelines and the First Amendment right of free exercise of religion. The Commission is sensitive to the First Amendment concerns that have been raised by the Guidelines' critics. During the original comment period in the fall, some of the eighty-six comments received focused on whether the inclusion of religion in the

Proposed Guidelines violated the First Amendment's guarantee of free exercise. Legal Counsel staff immediately began and is continuing to explore the First Amendment issue.

Many critics are particularly concerned that the Guidelines conflict with the recently enacted Religious Freedom Restoration Act (RFRA). RFRA generally provides that the government may not substantially burden free exercise, even by a neutral rule, unless the government has a compelling interest and does so using the least restrictive means. RFRA had not been enacted when the Guidelines were originally published for comment. RFRA's potential impact on the Proposed Guidelines is being analyzed by Legal Counsel and will certainly be addressed by the Commission during its reconsideration of the Proposed Guidelines.

In order to understand and respond to these and other concerns involving the inclusion of religion in the Proposed Guidelines, Commission staff have met with representatives of several interest groups, including an "Ad Hoc Coalition" composed of the Traditional Values Coalition, the Family Research Council, the National Association of Evangelicals, the Center for Law & Religious Freedom, the Christian Legal Society, the American Civil Liberties Union. The representatives at that February 24th meeting expressed

concern that the Proposed Guidelines were overly broad and ultimately would force employers wishing to avoid liability to ban religion from the workplace entirely. Several representatives suggested that religion should be removed from the Guidelines.

On March 18, 1994, Commission staff met with another group of religious and civil liberties organizations that argued that removing religion from the Proposed Guidelines would send the wrong signal to employers by undermining Title VII's protection of religious expression in the workplace. Among the groups represented in that meeting were the Baptist Joint Committee, the American Jewish Congress, the General Conference of Seventh-day Adventists, the American Jewish Committee, the Anti-Defamation League of B'nai B'rith and People for the American Way. It should be noted that those representatives also expressed concern that, as proposed, portions of the Guidelines were subject to misinterpretation. They suggested that any problems with vagueness could best be solved by including specific examples of what does and does not constitute prohibited religious harassment.

Through the comments received, the Commission better understands the Proposed Guidelines' strengths and weaknesses, particularly in terms of how the public might construe them. The comments have made the point well that some parts of the Proposed Guidelines might be interpreted far differently than the Commission intended. We are continuing to receive, analyze and evaluate the

comments. One effective response to these concerns might be to revise the language in any final Guidelines to clarify the intended meaning and to include easy to understand examples of both permissible and prohibited conduct.

Although deletion of religion from the Proposed Guidelines seems like a simple solution, Commission staff remains extremely cautious about treating one protected basis differently than all others. Religious discrimination, including harassment, is an unfortunate reality in today's workplace. Any action that would weaken the protections afforded by Title VII from religious discrimination should be very closely examined.

One of the most critical elements of the Commission's mandate is the education of employers and employees about applicable law in the area of employment discrimination. The Proposed Guidelines were intended to explain existing law in the complex area of harassment, and the principles set forth are neither new nor solely the creation of the Commission. The EEOC is deeply committed to promoting equal employment opportunities for all people in this society. Properly understood and applied, anti-harassment law can be a tool that helps employers provide working conditions in which people of diverse beliefs and backgrounds can work together productively.

I would be glad to answer any questions you may have. However, because we are still in the comment period and because any action on these Proposed Guidelines requires approval by the full Commission, it would be inappropriate to commit at this time to any conclusions concerning or suggested changes to the Guidelines.

**Q & A's on Proposed Consolidated
Harassment Guidelines**

Q: Why did the EEOC issue the Proposed Guidelines?

A: Because of all the recent media attention, the public now knows a lot about sexual harassment. The Commission recognized a need for public education about all forms of unlawful harassment, including race, national origin, religion, age, and disability.

The EEOC thought it would be especially helpful to both employers and employees to have uniform guidance on the various kinds of workplace harassment prohibited by federal law.

The purpose of the proposed guidelines was not to create new legal standards, but rather to educate employers, employees, and the general public about existing legal standards in the area of harassment law.

Q: Is there sufficient EEOC guidance on harassment issues in the absence of the Proposed Guidelines?

A: No. The Commission previously issued guidance on sexual harassment and national origin harassment, but there are no guidelines on any of the other forms of unlawful harassment.

The Proposed Guidelines would provide consolidated, detailed standards for determining whether conduct in the workplace constitutes unlawful harassment based on race, color, religion, gender, national origin, age or disability.

Q: Do the Proposed Guidelines require that employers have religion-free workplaces?

A: No. Nothing in the Proposed Guidelines requires employers to ban positive expressions of religious beliefs by their employees. Employees must understand, however, that they may not engage in severe or pervasive conduct that denigrates others because of their religious beliefs.

Q: Please explain the standard of "the reasonable person in the same or similar circumstances."

A: The Proposed Guidelines "reasonable person" standard is meant to show the way in which the Commission will determine the severity or pervasiveness of alleged harassment. The Commission will evaluate the conduct by considering whether a reasonable person in the same or similar circumstances would find the conduct intimidating, hostile or abusive.

In applying this standard, the Commission considers the perspective of individuals with the same characteristics of the claimant, in order to take into account historical discrimination against people in that community.

For example, African-American employee would probably be much more offended to find a noose on his/her desk than would a White employee, due to historical discrimination against African-Americans.

Q: Can extremely sensitive individuals claim unlawful harassment if they genuinely feel that certain conduct creates a hostile or abusive work environment, even though hardly anyone else would react in the same way?

A: No. The Commission will only conclude that harassment has occurred if a reasonable person in the same or similar circumstances would have found that the conduct created an intimidating, hostile or offensive work environment.

Q: Don't the Proposed Guidelines infringe on the constitutionally protected right of freedom of religion?

A: No. The Proposed Guidelines are intended to help accommodate everyone's free exercise of religion in the workplace. In protecting religious freedom, the EEOC is bound by the Constitution and has a statutory duty to protect and enforce the rights of not only those in the majority, but also those who may be in the minority.

Q: Do the Proposed Guidelines violate the Religious Freedom Restoration Act?

A: No. The Religious Freedom Restoration Act generally provides that the government cannot burden free exercise of religion unless it has a compelling interest to do so. The Proposed Guidelines are completely consistent with this new law.

Q: Why doesn't the Commission just take religion out of the Proposed Guidelines?

A: In considering what to do about the guidelines, the Commission has broad range of options. Deleting religion from the guidelines, however, may be dangerous because it would send a signal that religious discrimination in the workplace is not as important as the other kinds of illegal discrimination.

The EEOC believes that religious discrimination merits the same kind of vigilant enforcement as discrimination based on race, national origin, gender, age, or disability.

Q: Is it appropriate to apply the law of sexual harassment to religious harassment?

Yes. The Supreme Court has held that the same legal principles apply to all forms of discrimination covered by Title VII.

The Supreme Court has specifically endorsed the principle that creation of a hostile environment based on discriminatory racial, religious, national origin, or sexual harassment violates Title VII.

QUESTIONS AND ANSWERS ON
PROPOSED CONSOLIDATED HARASSMENT GUIDELINES

Protected and Prohibited Religious Practices

- 1. Can supervisors wear religious symbols such as crosses, yarmulkes, or turbans?

Answer: Yes. The wearing of religious symbols does not denigrate another's religion and is not harassment.

- 2. Can a coworker ask an individual to attend a church service or function with him?

Answer: Generally yes. Repeated requests might, however, amount to harassment if the individual has told the employer that he finds the requests objectionable.

- 3. May a supervisor ask an employee to attend a church service with him?

Answer: As with a coworker, a supervisor may ask an employee to attend a church service unless the employee indicates that he is offended by such requests or repeatedly refuses to go.

A supervisor may not, however, force an employee to attend a church service or take employment action against the employee for failure to attend.

- 4. May a supervisor keep religious posters or artifacts in her office?

Answer: Yes. In limited circumstances, a supervisor might be obliged to hold meetings outside of her office with any employee who objected on religious grounds to meeting in her office.

- 5. May an employer sponsor a Christmas party with religious holiday decorations?

Answer: Yes. An employer could not, however, require employees to attend the party.

- 6. May an employer conduct a weekly prayer breakfast?

Answer: Yes, although employees may not be forced to attend and may not be sanctioned for failing to attend.

7. May an employer force employees to participate in new age training programs?

Answer: No. Employees who object to doing so may not be forced to participate in religious training programs.

8. May an employer encourage employees to attend new age training programs or prayer breakfasts?

Answer: Generally, an employer may invite employees to attend religious events. An employer may not, however, take or threaten to take action against employees who do not attend. An employer may also may have to stop repeatedly inviting particular employees who indicate that they find such invitations unwelcome on religious grounds.

9. May an employer broadcast a prayer over the loudspeaker system each morning?

Answer: Generally yes. However, if an employee protests that the message conflicts with her/his religious beliefs, the employer may have to try to reasonably accommodate him/her.

10. May an employer hire a chaplain?

Answer: An employer may hire a chaplain, for example, to conduct the prayer breakfasts or other religious observances the employer is permitted to sponsor in the workplace.

11. May an employer use stationery that states that the company is "Christ centered" or place a religious poster in a common area?

Answer: The **Townley** case suggests that the answer is, generally, yes. However, we know of no case that has addressed this issue directly. However, principles of accommodation law -- not harassment law -- would seem to suggest that if an employee explains that such practices conflict with his/her religious beliefs, the employer may be required to attempt to reasonably accommodate the employee.

12. May an employer say grace before a company sponsored social event?

Answer: Yes, although any employee who objected on religious grounds to hearing or saying grace would have to be excused from participating in that portion of the company sponsored event.

13. May a supervisor speak to employees about his religious faith?

Answer: Generally, yes. It would not be harassment for a supervisor to make positive statements to employees about the existence or content of his religious faith. It would be unlawful for a supervisor to make severely or pervasively hostile, denigrating or abusive statements about the religious faith of an employee, however.