

**The White House
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FAX COVER SHEET

Office of Domestic Policy

**Old Executive Office Building
Washington, D.C. 20500
FAX: (202)-456-7028**

To: Bill Galston

FAX No: X 62878

From: Steve Wornath

Phone: _____

Date: 6/21

Pages (Including cover): 6

Comments: Bill FYI re: religious harassment.

Includes Sen. Metzenbaum's letter clarifying

last week's Senate resolution and

House amendment prohibiting use of funds

by EEOC to implement religious harassment

guidelines.

HOWARD M. METZENBAUM
OHIO

COMMITTEE:
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United States Senate
WASHINGTON, DC 20510-3602

June 20, 1994

Mr. Tony Gallegos
Acting Chairman
U.S. Equal Employment Opportunity Commission
1801 L Street, N.W.
Washington, D.C. 20507

Dear Acting Chairman Gallegos:

I am writing with regard to the EEOC's Proposed Guidelines on Harassment Based on Color, Religion, Gender, National Origin, Age and Disability. As you know, the Senate passed a resolution last week that addresses the applicability of these Proposed Guidelines to religious harassment.

As originally introduced, Senator Brown's resolution called on the EEOC to withdraw religion from the Proposed Guidelines and accord such harassment "separate treatment from the other categories of harassment." That language troubled me, for two reasons. First, it is inconsistent with existing case law, which provides no basis for differentiating between religious harassment and other types of workplace harassment in terms of the applicable legal standards. Second, it sends a dangerous signal that religious harassment may be less deserving of protection than other types of harassment.

After some debate on this issue, Senators Brown and Heflin agreed to remove references to "separate treatment" in the findings and body of the resolution. Senators Brown and Heflin also agreed to modify the language providing for the withdrawal of religion from the Proposed Guidelines. As amended, the resolution now requires only a temporary withdrawal, by providing that "the category of religion should be withdrawn from the proposed guidelines at this time" (emphasis added). The phrase "at this time" makes clear that religion need not be excluded from the EEOC's final Guidelines. As modified, the resolution passed by a vote of 94-0 (see attached copy of Congressional Record).

Some press reports about the resolution have been inaccurate, so I am writing to clarify its actual meaning. As passed, the resolution calls on the EEOC to (1) withdraw religion from the Proposed Guidelines at this time, (2) hold additional hearings and receive additional comment, and (3) ensure that the

SENT BY: 06-21-94 10:17 AM FROM HMM SUBCOM 6-21-94 : 2:06PM;

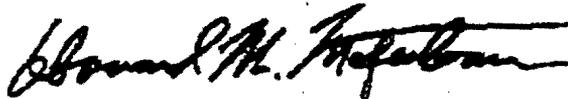
EEOC-

202 456 7028:# 4
P03

final Guidelines make clear that symbols or expressions of religious belief are not to be restricted and do not constitute proof of harassment. Notably, the resolution does not require the EEOC to adopt a separate regulatory process for religious harassment, to issue separate guidelines for religious harassment, or to apply legal standards to such harassment which are different from those applied to other types of workplace harassment.

I hope this clarification has been helpful. Should you have further questions about this resolution, please contact Greg Watchman of my staff at 224-5546.

Sincerely,



Howard M. Metzenbaum
Chairman, Subcommittee on
Labor, Committee on Labor and
Human Resources

SENT BY:
CHARLES H. TAYLOR
15TH DISTRICT, NORTH CAROLINA

6-21-94 : 2:06PM :

EEOC

202 456 7028; # 5

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Congress of the United States
House of Representatives
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COMMITTEE ON
MERCHANT MARINE AND FISHERIES

SUBCOMMITTEE ON
ENVIRONMENT AND NATURAL RESOURCES

TO: Sylvia
WITH: EEOC
PHONE: _____ FAX: 663-4912

FROM:

- Caroline Choi
- Roger France
- Chuck Greene
- Eddie Wright
- Bronwyn Lance
- Shanon Fagan
- Wallace Galloway
- Ed Rogers
- Frances White

NUMBER OF PAGES (INCLUDING COVER): 3
TODAY'S DATE: 6-20-94
TIME: _____

COMMENTS

Note →

the 1st amendment has been interpreted to include
the final regulations, so we've changed the
amendment to apply only to the proposed
October regulations re: religious harassment.

If there are problems receiving this fax, please call 225-6401.

*to be offered this
week*

Revised

**Amendment to Full Committee Print
(Commerce, Justice, State, and Judiciary
Appropriations Bill, 1995)**

Offered by Mr. Taylor

Page 32, line 7, insert before the last period the following:

- 1 : *Provided further,* That none of the funds made available
- 2 in this Act may be used to implement, administer, or en-
- 3 force the guidelines covering harassment based on religion
- 4 published by the Equal Employment Opportunity Com-
- 5 mission on October 1, 1993 (58 Fed. Reg. 51266).

CV BY:OCLA

6-20 94 11:08AM : REP. CHARLES TAYLOR-

EEOC:# 3

06/17/94 12:28

CONG. F. WOLF WASHINGTON, DC → 50519

NO.936 P003

F:\IBF\APPO3M2\TAYLNC.004
(C,J,AS FY95)

H.L.C.

*1st Amendment
Offered: defeated at
Full Committee
Mark
last week*

**Amendment to H.R. _____, as Reported
(Commerce, Justice, State, and Judiciary
Appropriations, 1995)**

Offered by Mr. Taylor of North Carolina

At the end of the bill insert after the last section
(preceding the short title) the following new section:

1 SEC. ____ None of the funds made available in this
2 Act may be used to implement, administer, or enforce any
3 guidelines of the Equal Employment Opportunity Com-
4 mission covering harassment based on religion, when it is
5 made known to the Federal entity or official to which such
6 funds are made available that such guidelines do not differ
7 in any respect from the proposed guidelines published by
8 the Commission on October 1, 1993 (58 Fed. Reg.
9 51266).

DETERMINED TO BE AN ADMINISTRATIVE
MARKING Per E.O. 12958 as amended, Sec. 3
Initials: DMS Date: 8/22/05

CONFIDENTIAL

RELIGIOUS ACCOMMODATION

BACKGROUND

I. The Fundamentals of the Accommodation Requirement

- A. Unlike the other bases covered by Title VII, non-discrimination on the basis of religion does not require just neutrality, but also involves an affirmative obligation to accommodate the sincerely held religious practices and beliefs of employees, if that can be done without undue hardship to the employer.
- B. The extent and nature of the employer's affirmative obligation to accommodate employees' religious beliefs when these are in conflict with work requirements has been the subject of litigation, including two Supreme Court decisions, TWA v. Hardison and Ansonia v. Philbrook. It is now the subject of a bill pending before the Congress, H.R. 5233 (the Nadler bill).
- C. Under the Supreme Court's decision in T.W.A. v. Hardison (1977), Title VII permits the employer to show "undue hardship" by showing that the accommodation would require more than a "de minimis" cost or that it would violate the seniority provisions of a collective bargaining agreement.
- D. In Ansonia v. Philbrook (1988), the Supreme Court held that, under Title VII, an employer has no obligation to offer the accommodation preferred by the employee, so long as the employer offers an accommodation that removes the religious conflict.

II. COMMISSION GUIDELINES ON ACCOMMODATION

- A. Our extant Guideline was issued in 1980 and incorporated the Hardison test for undue hardship.
- B. It provides that "when there is more than one means of accommodation that would not cause undue hardship, the employer . . . must offer the accommodation which least disadvantages the individual with respect to his or her employment opportunities, [such as compensation, terms, conditions or privileges of employment]." 29 C.F.R. § 1605.2 (c)(2)(ii).
 1. In Ansonia, the Supreme Court noted that: "To the extent that the Guideline . . . requires the employer to accept any alternative favored by the employee short of undue hardship . . . the guideline [is] simply inconsistent with the plain meaning of [Title VII]." 479 U.S. at 69-70 n.6.

2. The Commission concluded that Ansonia did not conflict with the Guidelines. This was because the guidelines did not require the employer to give any accommodation that the employee preferred but only the one that did not cause undue hardship and least burdened the employee's employment status. See Policy Statement on Ansonia v. Philbrook, Compliance Manual § 628, Appendix A. It therefore left the Guideline unchanged.
- C. The Commission did not address this issue further until 1993, when the Commission proposed to revise § 1605.2(c)(2) to reflect the Ansonia rule that an employer need not offer the employee his or her preferred accommodation. A copy of the proposed revision is attached.
1. The revision was prompted by Vice President Quayle's regulatory review, under which agencies were virtually required to find some regulations to eliminate or revise.
 2. The proposed revision elicited six comments, five of which were unfavorable. Three religious organizations asked the Commission to delay any final decision pending introduction of a bill by Representative Nadler to amend Title VII's accommodation requirement to conform to the original Guidelines. A fourth, the American Jewish Congress, said that while some revision was needed in light of Ansonia, the proposed guidelines went too far. AJC recommended revisions that would make clear that the accommodation must not adversely affect the employee's job status or opportunities.
 3. No further action was taken regarding the proposed guideline and it was withdrawn with the rest of the regulatory agenda this fall.

III. NADLER BILL

- A. The bill would reverse Hardison by providing that:
1. an employer could not establish an "undue hardship" defense unless it could show that the accommodation would cause "significant" difficulty or expense,
 2. a bona fide seniority system is not a defense to a failure to provide accommodation where the employee's work hours can be adjusted to permit the religious observance or other employees are willing to swap, and

3. employers need not pay premium wages for schedule changes made to accommodate the employee's religious practice.
- B. It addresses Ansonia by providing that:
1. to be reasonable an accommodation must eliminate the conflict between employment requirements and the employee's religious observance and,
 2. as between two or more alternatives that would not cause undue hardship, the employer must offer the accommodation that is least onerous for the employee

IV. ANTICIPATED REACTIONS

- A. For the Commission to proceed with the proposed revisions of the Guidelines at this time would antagonize religious groups, even if the Commission were to adopt the revisions proposed by the AJC. (We would not recommend publishing the proposed Guidelines in their present form under any circumstances since we agree with those commentators who stated that they oversimplify Ansonia and, thus, might be misleading).
- B. Since courts have often interpreted the standard that employers need not incur a "more than *de minimis*" burden to mean that the employer need do almost nothing, the Nadler bill will presumably be welcomed by religious groups, especially by those that practice their Sabbath other than on Sunday and have holy days other than Christmas and Easter. While the bill may be most important to those who practice other than mainstream Christian religions, we expect that all religious groups will enthusiastically support this bill that makes clear that the burden is on the employer to accommodate an employee's religion if it can do so without significantly burdening business.
- C. Employer groups may oppose the bill.
1. They may object to defining "undue hardship" as "significant," rather than "more than *de minimis*," difficulty or expense.
 - a. "Significant difficulty or expense" is the definition of "undue hardship" in the Americans with Disabilities Act. Those groups that oppose the ADA as unduly burdensome on business are likely to have the same reaction to the Nadler bill.

- b. Note, however, that the bill takes care of the most significant potential burden by specifying that employers need not pay premium wages when the employee is working irregular hours for religious reasons.
2. Employers may also be opposed to the provision that where there is more than one accommodation that will not cause significant cost, employers must give the one that is least "onerous" to the employee. As noted above, under the extant Guidelines, employers need only provide the accommodation that least burdens employment opportunities. However, since "onerous" is undefined in the Nadler bill, it could be construed to require employers to give employees their preferred accommodation even where the preference is motivated by something personal rather than by religious need or employment related concerns.
- D. Labor organizations may oppose the bill to the extent that it requires that religious accommodation needs supersede seniority provisions of a collective bargaining agreement that gives employees with the greatest seniority the first entitlement to weekends off or preferred shifts. These issues have been raised with regard to the relationship between the ADA and collective bargaining agreements.
- E. Civil liberties and separation of church and state groups may oppose the bill as an "establishment of religion" in violation of the First Amendment.
1. When Title VII was first enacted, there were challenges to the accommodation requirement as an unlawful establishment of religion. Such challenges have generally been defeated.
 2. Justice Marshall's dissent in Hardison indicates that there is no Establishment Clause violation where the employer need only bear *de minimis* cost but suggests that the answer might differ if the Government required employers to bear significant difficulty or expense. Under the Nadler bill, the employer's burden is just short of significant expense. If the bill passes, expect more First Amendment challenges.

includes the omitted phrase: USCS, requires that the Shipper's Export Document be submitted within four days after shipment. Although DEA cannot require that the USCS document be submitted on or before the day of exportation, it is suggested that an exporter do so to facilitate uninterrupted export of the goods.

The Deputy Assistant Administrator, Office of Diversion Control, hereby certifies that this proposed rule will have no significant impact upon entities whose interests must be considered under the Regulatory Flexibility Act, 5 U.S.C. 601 *et seq.* This proposed rule clarifies an existing regulation, and imposes no burden on the public. This rule is not a major rule for purposes of Executive Order (E.O.) 12291 of February 17, 1981.

Pursuant to section 3(c)(3) and 3(e)(2)(C) of E.O. 12291, this proposed action has been submitted for review to the Office of Management and Budget, and approval of that office has been requested pursuant to the provisions of the Paperwork Reduction Act of 1980, 44 U.S.C. *et seq.*

This action has been analyzed in accordance with the principles and criteria contained in E.O. 12612, and it has been determined that the rule does not have sufficient federalism implications to warrant the preparation of a Federalism Assessment.

List of Subjects in 21 CFR Part 1313

Drug traffic control, Exports, Imports, Reporting requirements.

For reasons set out above, 21 CFR part 1313 is proposed to be amended as follows:

PART 1313—[AMENDED]

1. The authority citation for part 1313 continues to read as follows:

Authority: 21 U.S.C. 802, 830, 871(b), 971.

2. Section 1313.23 is proposed to be amended by revising paragraph (c) to read as follows:

§ 1313.23 Distribution of export declaration.

(c) Copy 3 shall be presented to the U.S. Customs Service at the port of exit for each export of a listed chemical or chemicals on or before the day of exportation, and when possible, along with the Shippers Export Declaration.

Dated: January 27, 1993.

Gene E. Habelip,
Deputy Assistant Administrator, Office of
Diversion Control, Drug Enforcement
Administration.

Editorial note: This document was received at the Office of the Federal Register September 17, 1993.

[FR Doc. 93-23184 Filed 9-22-93; 8:45 am]

BILLING CODE 4410-09-M

DEPARTMENT OF STATE

Bureau of Consular Affairs

22 CFR Part 41

(Public Notice 1872)

Visas: Documentation of Nonimmigrants Under the Immigration and Nationality Act; Temporary Visitors for Business or Pleasure

AGENCY: Bureau of Consular Affairs, DOS.

ACTION: Proposed rule; extension of comment period.

SUMMARY: This document extends the originally scheduled comment period to November 23, 1993. The proposed rulemaking published on July 26, 1993, 58 FR 40024, proposes to amend regulations on visas for temporary visitors for pleasure and temporary visitors for business. The proposed regulations reflect changes in the interpretation of the B visa classification resulting primarily from the enactment of the Immigration Act of 1990 (IMMACT 90).

DATES: Written comments must be received in duplicate on or before November 23, 1993.

ADDRESSES: Interested persons are invited to submit comments in duplicate to Chief, Division of Legislation and Regulations, Visa Office, Department of State, Washington, DC 20522-0113.

FOR FURTHER INFORMATION CONTACT: Stephen K. Fischel, Chief, Legislation and Regulations Division, Visa Office, Washington, DC, 20520, (202) 663-1204.

SUPPLEMENTARY INFORMATION: The Immigration Act of 1990 (Pub. L. 101-649, Nov. 29, 1990) with subsequent modification by the Miscellaneous and Technical Immigration and Naturalization Amendments of 1991 (MATINA) (Pub. L. 102-232, Dec. 12, 1991) amended certain existing nonimmigrant visa classifications in the Immigration and Nationality Act of 1952, ("INA"), and added several new ones. IMMACT 90 and MATINA did not

directly amend the INA's B visa classification (INA 101(a)(15)(B)), but certain changes to the H-1B visa classification (INA 101(a)(15)(H)(i)(b)) and creation of the new O, P, and R classification by IMMACT 90 affect the interpretation of the B visa classification currently set forth in the FAM. Proposed rulemaking 1840 concerns an extremely significant visa classification. In view of the importance of the subject matter, the Department is extending the comment period an additional 60 days for a total of 120 days to provide the public with greater opportunity to submit formal comments.

Dated: September 16, 1993.

David L. Hobbs,
Acting Assistant Secretary for Consular
Affairs.

[FR Doc. 93-23187 Filed 9-22-93; 8:45 am]

BILLING CODE 4710-08-M

EQUAL EMPLOYMENT OPPORTUNITY COMMISSION

29 CFR Part 1605

Discrimination Because of Religion Under Title VII of the Civil Rights Act of 1964, as Amended

AGENCY: Equal Employment Opportunity Commission (EEOC).

ACTION: Notice of proposed rulemaking.

SUMMARY: The Equal Employment Opportunity Commission is proposing a revision to its *Guidelines on Discrimination Because of Religion*. We are revising the guidelines to reflect Supreme Court precedent in *Ansonia Board of Education v. Philbrook*, 479 U.S. 60 (1986) on religious accommodation. If adopted, this revision will clarify an employer's duty of religious accommodation and help avoid unnecessary litigation costs. Also, it will prevent an employee or prospective employee from being discriminated against and unnecessarily penalized because of his/her religious practices.

DATES: Comments must be received by November 22, 1993.

ADDRESSES: Comments should be addressed to the Office of the Executive Secretariat, U.S. Equal Employment Opportunity Commission, 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. This notice is also available in the following alternative formats: large print, braille,

audio tape, and electronic file on a computer disk. Requests for copies of this notice, either in an alternative format or regular format, should be made to the Publications Distribution Center at (202) 663-4264 (voice), or TDD (202) 663-7110.

FOR FURTHER INFORMATION CONTACT: Dianna B. Johnston, Assistant Legal Counsel, or Teresa L. Guerrant, Staff Attorney, Office of Legal Counsel, U.S. Equal Employment Opportunity Commission, 1801 L Street NW., Washington, DC 20507. Telephone (202) 663-4679, FTS 989-4679, or TDD (202) 663-7026.

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

Section 701(j) of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. 2000e-(j), creates an obligation to provide reasonable accommodation for the religious practices of an employee or prospective employee unless to do so would create an undue hardship. In *Ansonia Board of Education v. Philbrook*, 479 U.S. 69 (1986), the Supreme Court held "that an employer has met its obligation under section 701(j) when it demonstrates that it has offered a reasonable accommodation to the employee." The Court stated that "where the employer has already reasonably accommodated the employee's religious needs, the statutory inquiry is at an end. The employer need not further show that each of the employee's alternative accommodations would result in undue hardship." *Id.* at 68. The Commission subsequently issued guidance on this issue. See EEOC Compliance Manual, Section 628, Religious Accommodation, Appendix A, "*Ansonia Board of Education v. Philbrook* and Religious Accommodation."

Currently, § 1605.2(c)(2) provides that when there is more than one method of accommodation available which does not cause undue hardship, the Commission will determine whether the accommodation offered is reasonable by examining: (1) The alternative methods considered by the employer; and (2) the alternatives actually offered to the individual. The employer must offer the accommodation which least disadvantages the individual's employment opportunities. This section is being revised to clarify that pursuant to *Ansonia*, an employer has met its accommodation obligation when it demonstrates that it offered an accommodation that is reasonable. The accommodation need not be the accommodation that the employee prefers.

No changes are proposed to §§ 1605.1 and 1605.3 of the Guidelines of the Regulatory Flexibility Act.

The proposed amended guideline 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 1605

Religious discrimination.

Dated: September 14, 1993.

For the Commission.

Tony E. Gallegos,
Chairman.

For the reasons set forth in the preamble, the EEOC proposes to amend 29 CFR 1605.2(c)(2) as follows:

1. The authority citation for part 1605 is revised to read as follows:

Authority: 42 U.S.C. 2000e-12.

§ 1605.2 [Amended]

2. Section 1605.2(c)(2) is revised to read as follows:

(c) . . .

(2) The employer or labor organization is obligated to offer a reasonable accommodation to the employee or prospective employee. The accommodation offered must be reasonable, but it need not be the accommodation preferred by the employee or prospective employee.

[FR Doc. 93-23074 Filed 9-22-93; 8:45 am]

BILLING CODE 5750-01-M

DEPARTMENT OF THE INTERIOR

Office of Surface Mining Reclamation and Enforcement

30 CFR Parts 701, 773, 774, 778, and 849

RIN 1029-AB62

Definition and Procedures for Transfer, Assignment and Sale of Permit Rights; Definitions of Ownership and Control; Permit Information Requirements and the Applicant/Violator System; Civil Penalties for Owners and Controllers of Violators

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

ACTION: Proposed rule; extension of public comment.

SUMMARY: The Office of Surface Mining, Reclamation and Enforcement (OSM) of the U.S. Department of the Interior (DOI) extends until October 12, 1993,

the public comment period on the proposed rule published in the June 22, 1993 Federal Register (58 FR 34652), and extended on August 24, 1993 (58 FR 45303) concerning the definition and procedures for transfer, assignment and sale of permit rights, definitions of ownership and control; permit information requirements and the Applicant/Violator system; civil penalties for owners and controllers of violators. This will provide additional time in which to comment on the proposed rule.

DATES: Written Comments: OSM will accept written comments on the proposed rule until 5 p.m. Eastern time on October 12, 1993.

ADDRESSES: Written Comments: Hand deliver to the Office of Surface Mining Reclamation and Enforcement, Administrative Record, room 660, 800 North Capitol St., Washington, DC; or mail to the Office of Surface Mining, Reclamation and Enforcement, Administrative Record, room 660 NC, 1951 Constitution Avenue, NW, Washington, DC 20240.

FOR FURTHER INFORMATION CONTACT: Dr. Annette Cheek, Office of Surface Mining Reclamation and Enforcement, 1951 Constitution Avenue, NW, Washington, DC 20240; Telephone: 202-208-6652.

SUPPLEMENTARY INFORMATION: OSM published a proposed rule on June 28, 1993 (58 FR 34652), that would amend its regulations and amend existing provisions to clarify the role of the AVS in the permit application process; reorganize and amend the definitions of ownership and control; amend the definition of and procedures for transfer, assignment, or sale of permit rights; establish procedures for permit revisions regarding changes in operators or other changes in ownership or control; revise requirements for information to be submitted as part of the permit application process; eliminate certain civil penalties for owners and controllers of violators; and establish penalties for knowing submission of false or incomplete ownership or control information during any of the above or several other information collection processes.

The comment period for the proposed rule was scheduled to close on August 27, 1993. An extension was requested and subsequently approved by OSM which extended the comment period until September 27, 1993. A second extension was requested in order to provide additional time in which to comment on the proposed rule. OSM has decided to grant an additional 15 days for the public to comment on the proposed rule. Comments will now be

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: 1/17/95 TIME: _____

TO : Steve Warnath

FAX TELEPHONE NUMBER: 456-7028

SENDER: Clare Gonzales

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(202) 663-4900

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OEO
(202) 663- _____

DOCUMENT: Religious Accommodation Backgrounder

NUMBER OF PAGES TRANSMITTED (INCLUDING COVER): 7

SPECIAL INSTRUCTIONS:

Steve - I spoke to you about this back in November. Rep. Nadley
is expected to (maybe already has) introduce a
bill to address Ansonia. This is a top priority for
the Religious Community that pushed R.F.R.A. Ellen had
mentioned earlier that she would like to coordinate w/ Galston et al

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

Handwritten signature/initials



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

ANALYSIS OF PROPOSAL ON RELIGIOUS EXPRESSION IN THE WORKPLACE

We have reviewed the proposed Executive Order on religious expression in the federal workplace. Portions of the proposal do not appear to fully take account of Title VII of the Civil Rights Act of 1964, as amended, 42 U.S.C. § 2000e et seq., as it applies to religious discrimination and to harassment more generally. Because EEOC's authority extends to Title VII and not the Constitution, we will confine our discussion to Title VII questions.

OVERVIEW

First, portions of the text are likely to mislead or confuse agencies about their obligations under Title VII harassment law. For example, statements that religious expression must be treated like any other controversial or non-religious speech¹ run counter to the very premise of Title VII harassment law: that employees cannot be subjected to hostility or abuse based on their race, color, sex, religion or national origin. Thus, Title VII treats expression on these bases differently from other expression and requires regulation of such expression to the extent that it communicates a quid pro quo or is sufficiently severe and pervasive to create a hostile working environment.

Second, parts of the draft may similarly mislead agencies about their accommodation obligations, including their need to consider whether accommodation of one employee's religion impairs the conditions of employees with different religious beliefs or practices.

Third, the format of the draft is confusing. Principally, this flows from treating "guiding legal principles" separately from and subsequent to the substantive "guidelines for religious expression." If an Order is adopted, at the least, the entire first and second sections should be integrated.

¹ See e.g., p. 2 (supervisors may wear buttons carrying messages about religion to the same extent that they are permitted to wear other controversial buttons of a non-religious nature); pp. 6, 7 (employees should be permitted to engage in religious expression to the same extent that they may engage in comparable nonreligious private expression)

DISCUSSION

I. Harassment

A. Implications of Supervisory Role on Religious Expression

1. Supervisory Speech Need Not Convey a Quid Pro Quo To Be Unlawful

The admonition (p. 2) that supervisors should "assess their religious conduct to ensure that employees do not perceive an unintended quid pro quo . . ." disregards several important facts central to harassment law. First, there is no bright line between quid pro quo and hostile environment harassment. *Carrero v. New York City Housing Authority*, 890 F. 2d 569, 579 (2d Cir. 1989). A given set of facts may be regarded as either -- or both -- quid pro quo or hostile environment harassment. Agencies can be liable if an employee establishes that the conduct created an unlawful hostile working environment even absent an explicit or implicit "quid pro quo."² Although the draft recognizes the distinction in its subsequent discussion of hostile work environment, nothing in this portion of the draft, or in the examples that follow it at p. 3, warns agencies or individuals that conduct can be unlawful even if it passes the "coercion" test.

2. The Possibility of Coercion Is Inherent in the Supervisor/Subordinate Relationship

Second, the draft largely ignores the fact -- recognized in current law -- that the relationship between supervisors and employees is to some extent inherently coercive. For example, the suggestion that supervisory expression is protected when it "does not carry coercive overtones" (p. 2); fails to convey that such overtones may be implicit in the nature of the supervisor/subordinate relationship.³ It is not enough to say that supervisors should be aware of the "possibility" that "some" employees might perceive their religious expression as coercive. Recognizing the inherent coerciveness in the relationship role, courts hold employers strictly liable under Title VII for quid pro harassment. Similarly, while employers are only liable for hostile

² Moreover, it is unrealistic to assume that an alleged harasser is able objectively to evaluate the perceptions of his/her employees. Title VII harassment law has developed in no small part because supervisors have so frequently misunderstood the effect of their conduct on their subordinates.

³ As such, it is insufficient to state that a supervisor may not "insist" that employees participate in religious activities or "insist" that employees refrain from such participation. (p.2, § 2). It is well established that Title VII liability for religious discrimination can attach to supervisory conduct that falls short of "insistence."

environment harassment by co-workers if they knew or should have known of the harassment, they are liable for a greater range of supervisory misconduct. See, e.g., *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 72 (1986) (employer liability for supervisory harassment is determined under agency principles; knowledge is not required); *Karibian v. Columbia University*, 14 F.3d 773, 779 (2d Cir. 1994) ("[i]t will certainly be relevant to the analysis . . . that the alleged harasser is the plaintiff's supervisor rather than her co-worker" (citations omitted)), cert. denied, 114 S. Ct. 2693 (1994)].

3. Even Conduct That Does Not Rise to the Level of Unlawful Harassment May Be Considered Evidence of Unlawful Bias

Finally, the draft ignores the fact that a supervisor's expressions of religious belief can be evidence of bias if employment decisions are later made that penalize those who do not share the supervisor's views. Under Title VII, agencies are liable not only for quid pro quo or hostile environment harassment, but also for any adverse action taken on a protected basis.

Thus, it is misleading to broadly state that a supervisor's comment that "religion is important in one's life" (example (d), p. 2), will be protected so long as it does not "materially disrupt the working environment or cause the employee reasonably to feel intimidated or coerced." If an employee who attends church or temple only sporadically, or not at all, is not promoted, (s)he may well use this comment as evidence that casts doubt on the agency's assertion that the action was taken for lawful reasons.

While a court is unlikely to rely on an isolated comment, a pattern of such comments might be seen as evidence of bias. Similarly, while a court would presumably accord little significance to a lunchtime debate about abortion in which differing views were expressed (example (e), p. 3), it is not necessarily true that such statements have no legal implications "unless [supervisors] take further steps to coerce agreement with their views." Employees who hold opposing views could use the conversation as evidence that any unfavorable treatment of them was due to their differences with their supervisor. Such arguments might succeed, to the extent that the conversation was part of a pattern of related remarks. Accordingly, admonishing agencies to be unconcerned about such statements is ill advised.

B. Hostile Environment Harassment Generally

The Supreme Court has held that "Title VII affords employees the right to work in an environment free from discriminatory intimidation, ridicule and insult," whether based on sex, race, religion or national origin. *Meritor Savings Bank v. Vinson*, 477 U.S. 57, 65 (1986). See also, *Harris v. Forklift Systems*, 114 S.Ct. 367, 373 (1993) (Ginsburg, J. concurring) ("Title VII declares

discriminatory practices based on race, gender, religion, or national origin equally unlawful"). Conduct, including verbal conduct, will violate Title VII if it is "unwelcome" and is sufficiently severe or pervasive that a reasonable person would find the environment to be objectively hostile or abusive. *Id.* at 67-68; *Harris v. Forklift Systems*, 114 S.Ct. at 370. The draft Order fails to account for each of these elements and, thus, again fails to alert agencies to the true scope of their potential Title VII liability.

First, the draft introduces a dichotomy between "derogatory" and "non-derogatory" expression that is not present in Title VII case law. As a related matter, much of the draft fails to account for the fact that allegedly harassing speech is not analyzed in a vacuum but is considered in light of all of the surrounding circumstances. Second, it fails to appreciate that the issue is whether the listener reasonably perceived the comments as hostile or abusive, not whether the speaker intended hostility. Finally, the draft understates the extent of the agencies' potential liability for harassment by supervisors.

1. Whether Expression Violates Title VII Cannot Be Determined Merely By Determining Whether It Can Be Characterized As "Derogatory"

The draft appears to suggest that religious hostile environment theory is limited to explicitly derogatory language and that affirmative expressions of religion such as proselytizing are broadly permitted. See, e.g., p. 3 (religious hostile environment harassment is "pervasive and severe religious ridicule or insult" and "use of derogatory language in an assaultive manner"); ³ p. 4 (examples of "derogatory" comments); p.7 § 3 ("employees are permitted to discuss religious topics with fellow employees and may even attempt to persuade fellow employees of the correctness of their religious views . . . and may urge a colleague to participate or not participate in religious activities to the same extent they may urge their colleagues to engage or refrain from other personal endeavors"); p. 10 ("use of derogatory language directed at an employee can rise to the level of religious harassment if it is severe or invoked repeatedly").

Under Title VII, however, the question of whether verbal conduct is unlawful harassment turns not on any label placed on it, i.e., whether the comments are "derogatory" or "insulting," but on

³ We are puzzled by the formulation that employees should not suffer "a hostile environment or religious harassment" (p3, § 3) (emphasis added) inasmuch as the two are not separate concepts in the law. As discussed, *infra*, the correct inquiry is whether unwelcome harassing conduct is sufficiently severe or pervasive to create a hostile environment.

whether, in light of all of the surrounding circumstances, they are reasonably perceived as "creat[ing] a work environment abusive to employees because of their . . . religion" *Harris v. Forklift Systems*, 114 S.Ct. at 371. The legal analysis in section 2 of the draft acknowledges the importance of looking at the totality of the circumstances (e.g. p. 10), but section 1 conveys a contrary message.

It is not helpful -- and may well be misleading -- to affirmatively urge agencies to consistently overlook or ignore religious expression simply because it might be characterized as "non-derogatory" or as "proselytizing." (See pp.6 - 8). In failing to recognize that a functional test must be applied to determine whether conduct is unlawful, the draft fails to inform agencies that even conduct that the harasser may not intend as derogatory, when unwelcome, can violate Title VII.

The draft's statement that the proselytizer should stop when the listener requests him or her to stop, based on "a principle of civility in the federal workplace," while true as far as it goes, disregards the governing legal framework. The proselytizer should also stop when asked to because failure to do so will constitute unwelcome and potentially unlawful, religious harassment.

Analytically, allegations of religious harassment share certain similarities to other harassment cases. In each, the expression made by the supervisor or colleague may not be hostile in any respect. Indeed, the supervisor or co-worker may sincerely have intended the conduct as completely positive and supportive. In the context of sexual harassment, for example, an unlawful hostile environment can be created by repeated unwelcome requests to go out on a date. Under the governing analytical framework set forth by the Supreme Court (*supra* at 4), repeated unwelcome requests to attend church services, or repeated unwelcome statements about one's religious views, can create an unlawful hostile environment. To counsel that only derogatory statements can lead to liability may thus leave agencies vulnerable to claims that they have taken insufficient action against severe and pervasive -- but arguably non-derogatory -- religious speech and conduct.

2. It Is Critical to Consider Whether a Reasonable Person Would Perceive the Expression As Hostile

Under well established harassment law, the inquiry is whether the "conduct . . . is . . . severe or pervasive enough to create an objectively hostile or abusive work environment -- an environment that a reasonable person would find hostile or abusive -- . . . and [whether] the victim . . . subjectively perceive[d] the environment to be abusive." *Harris v. Forklift Systems*, 114 S.Ct. at 370 (emphasis added). In her concurrence, Justice Ginsberg observed that "[i]t suffices to prove that a reasonable

person subjected to the discriminatory conduct would find . . . that harassment has so altered working conditions as to 'ma[k]e it more difficult to do the job.'" 114 S.Ct. at 372 (citation omitted)(emphasis added). The draft does not discuss the significance of the reasonableness standard but at various points makes generalized assertions of what is or is not reasonable. (See, e.g., p.3, example (e), in the context of a discussion of quid pro quo harassment: "without more neither these of these comments should reasonably be perceived as coercing employees' religious conformity or conduct; p. 4, examples making assumptions about reasonableness without discussion). Although we certainly recognize the difficulties in applying the reasonableness analysis, it cannot be ignored, nor can it be dealt with by simple assertions that certain reactions to religious speech/conduct may or may not be reasonable. Harassment jurisprudence demands more.

3. The Draft Understates the Extent of Employer Liability

The draft states on the top of page 4 that the liability of the Federal Government for hostile environment harassment would depend on such factors as "whether supervisors in the agency knew or should have known of the harassment and the actions the agency takes in response to that harassment." However, it is the position of several courts and the EEOC that an employer is liable for hostile environment harassment by a supervisor regardless of knowledge whenever the supervisor was aided by powers delegated by the employer in carrying out the harassment.

II. Accommodation

The draft correctly states that Title VII requires employers to make exceptions to neutral rules that burden an employee's religious beliefs or practices and must accommodate such employee's practice unless doing so would impose an undue hardship on the conduct of the agency's business. It also accurately notes that the hardship need be no more than *de minimis*. *Trans World Airlines v. Hardison*, 432 U.S. 63, 84 (1977).⁴ The Commission has consistently been a vigorous proponent of accommodation. See, e.g., Guidelines on Discrimination Because of Religion, 29 C.F.R. § 1605.2; *EEOC v. University of Detroit*, 904 F.2d 331 (6th Cir. 1990)(proposal to reduce employees union dues not sufficient

⁴ It is worth noting that in the course of remonstrating with what he perceived as the majority's narrow reading of the employer's accommodation obligation, Justice Marshall observed that "important constitutional questions would be posed by interpreting the law to compel employers (or fellow employees) to incur substantial costs to aid the religious observer." *Trans World Airlines v. Hardison*, 432 U.S. 63, 90 (1977) (Marshall, J. dissenting) (footnote omitted).

accommodation of employee's stated religious objection to having any association with the union).

1. Accommodations Provided for Non-Religious Reasons Are Relevant but not Dispositive of Whether Providing the Accommodation Would Cause Undue Hardship

However, in providing that "[r]eligious accommodation cannot be disfavored vis-a-vis other, nonreligious accommodations [and that] a religious accommodation cannot be denied if the agency regularly permits similar accommodation for nonreligious purposes" (p. 5), the draft misstates the proper standard. The legal inquiry is not whether the agency permits similar accommodation for other purposes, but whether the accommodation can be provided without causing more than *de minimis* hardship to the conduct of the agency's business.

It is true that an employer who routinely provides exceptions to the neutral rule at issue for non-religious reasons will usually be hard-pressed to prove that providing a similar accommodation for religious reasons is a hardship. However, it is not accurate to say that the employer could never prove that the accommodation in a particular instance would be an undue hardship.⁵

3. An Accommodation for One Employee Cannot Create a Hardship for Other Employees

Some of the draft's examples of appropriate accommodation seem to overlook a significant strain in accommodation law; namely the principle that it is an undue hardship for the employer to be required to provide an accommodation for one employee that burdens

⁵ The principle that accommodation for one purpose does not necessarily compel accommodation for religious purposes is exemplified by the requirements of the Rehabilitation Act of 1973, 29 U.S.C. § 791 et seq. That Act compels federal employers to provide reasonable accommodations for qualified individuals with disabilities unless to do so would impose an "undue hardship" on its operations. "Undue hardship," for Rehabilitation Act purposes, is defined as "significant difficulty or expense," and the appropriate regulations and caselaw clearly indicate that this is a substantially higher standard than the "*de minimis*" standard associated with the provision of religious accommodation pursuant to Title VII. Thus, federal employers may have to provide accommodations for individuals with disabilities, even if those accommodations result in more than a *de minimis* cost to the agency. The language of the proposed draft, however, suggests that such compliance with the Rehabilitation Act could be construed as "disfavoring" religious accommodation, thus compelling the agency to violate either the Executive Order on religious expression or the Rehabilitation Act.

another employee. (See, e.g., p.5, example (a) (by substituting the word "adequate" for "voluntary," edits suggest that an agency can adjust work schedules even if another employee must involuntarily take on the accommodated employees duties)).

In *Hardison*, the Supreme Court ruled that to require other employees to suffer an employment detriment in the process of accommodating the first employee would constitute undue hardship. See, e.g., 432 U.S. at 81 (TWA could have granted *Hardison* and others like him days off for religious observance "only at the expense of others who had strong but perhaps nonreligious reasons for not working on weekends . . . TWA would have had to deprive another employee of his shift preference at least in part because he did not adhere to a religion that observed the Saturday Sabbath"); *id.* ("[i]t would be anomalous to conclude that by 'reasonable accommodation' Congress meant that an employer must deny the shift and job preference of some employees, as well as deprive them of their contractual rights, in order to accommodate or prefer the religious needs of others, and we conclude that Title VII does not require an employer to go that far"). See also, *Beadle v. Sheriff's Department*, 29 F.3d 589 (11th Cir. 1994) (an employer can rely on a neutral rotating shift system to accommodate an employee's religious practices; the system need not be part of a seniority system).

Thus, *Hardison* and its progeny signify that it would be problematic to change work schedules because of one employee's religion unless a "voluntary" exchange could be made. Similarly, example (c) on p. 5, while not wrong, does not make clear that the impact on other employees must be part of the calculus.

3. Religious Expression That Rises to the Level of Unlawful Harassment Is an Undue Hardship

Title VII's accommodation provision requires an employer who has a neutral rule banning, for example, all employee expression about arguably controversial topics, to permit religious expression unless the employer proves that such expression would create an undue hardship. As a practical matter, it will be difficult to prove that passive and non-derogatory religious expression constitutes an undue hardship. Thus, employers should ordinarily permit employees to wear a yarmulke, cross or shador. EEOC Dec. No. 71-2620, 4 FEP 23 (June 25, 1971) (ankle length dress); EEOC Dec. No. 71-779, 3 FEP 172 (Dec. 21, 1970) (head covering). See also *Carter v. Bruce Oakley, Inc.*, 849 F. Supp. 673 (E.D. Ark. 1994) (beard); *EEOC v. Electronic Data Systems*, 31 FEP Cases 588 (W.D. Wash. 1983) (beard).⁶ Similarly, it would be difficult to

⁶ *But see, Bhatia v. Chevron*, 734 F.2d 1382 (9th Cir. 1984) (where Sikh employee's beard interfered with wearing of respirator with gas tight face seal and OSHA required use of the respirator,

establish undue hardship if the employee's religious expression is not harassing and is not reasonably perceived by employees as demonstrating bias. See *Brown v. Polk Co.*, 61 F.3d 650, 656 (8th Cir. 1995) (employer could have accommodated voluntary, sporadic and spontaneous prayers during meetings with supervisors where affected employees perceived no bias on part of supervisor), cert. denied, 116 S.Ct. 1042 (1996).

However, the accommodation requirement falls on employers, not on employees. The Court has made clear that religious accommodation of one employee cannot create a hardship for another. To require an employee to tolerate expression that rises to the level of unlawful harassment would be an undue hardship.⁷ Nothing in accommodation law alters the standards for determining when expression is unlawfully harassing.

Examination of harassment allegations requires looking at all of the surrounding facts and at patterns of conduct. Thus, if such expression is unwelcome and is repeated, it will at some point rise to the level of unlawful harassment.⁸

Conclusion

As we have set forth, substantial questions are raised by the draft in connection with Title VII analysis. Please let us know if we can be of further assistance in addressing these important issues.

it would be an undue hardship for employer to excuse wearing it, revamp its duty assignment and expose other employees to Bhatia's share of hazardous work). Cf. *Goldman v. Weinberger*, 475 U.S. 503 (1986) (strict enforcement of military uniform code, prohibiting wearing a yarmulke, did not infringe Goldman's Constitutional right to religious liberty).

⁷ Cf. *Spratt v. County of Kent*, 621 F. Supp. 594 (W.D. Mich. 1985), aff'd, 810 F. 2d 203 (6th Cir. 1986), cert. denied, 480 U.S. 934 (1987) (to allow social worker to use religious counseling of client would be undue hardship because the Establishment Clause requires the limitation). See also *Baz v. Walters*, 782 F.2d 701 (7th Cir. 1986) (Chaplain fired from VA hospital because his form of proselytizing to psychiatric patients was antithetical to VA's philosophy of care and a reassignment would have interfered with job preferences of other employees).

⁸ As noted, a single invitation to embrace another religion, standing alone, would not constitute an unlawful hostile environment under Title VII. Nevertheless, when issued by a supervisor, such invitations can quickly become problematic.

Metzgerbaum -

language supports specific e.g. s i.e. chart

cross
Yarmuth etc

kind of thing that the ER would have to restrict

verbal denigrates

Heflin - religious freedom styled — ^{resolution} to clear up confusion +
uncertainty
Should be guidelines

Problem: EEOC one indefinite + vague broad standards
lumped together w/ 8

look at them separately -- religion occupies a
different position than others because of 1st Amendment

Guidelines re

A least restrictive means of carrying out
harassment by reasonable person you have to
be a student of comparative religion
taken from sexual harassment

ms know sensitivity of friend, associate, relative ^{"denigrates"}

All witnesses at hearing said they were vague, indefinite

EEOC is aware of problems + is looking at, but
religion should be treated separately