

**ORAL STATEMENT**  
**OF**  
**DOUGLAS CALLEGOS, 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.

# NEWS

FOR IMMEDIATE RELEASE  
Thursday, June 9, 1994

CONTACT: Claire Gonzales  
Reginald Welch  
(202) 663-4900  
TDD (202) 663-4494

## EEOC DEFENDS INCLUSION OF RELIGION IN PROPOSED CONSOLIDATED GUIDELINES ON WORKPLACE HARASSMENT

WASHINGTON -- The staff of the U.S. Equal Employment Opportunity Commission (EEOC) testified before a Senate subcommittee today about the Commission's Proposed Consolidated Guidelines on Harassment, particularly focusing those 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.

The Commission staff made 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.

The Commission staff also made clear that, 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. 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 yarmulke at work, having a Bible on one's desk, or inviting a colleague to church. The staff noted that 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.

# # #



DEPARTMENT OF THE AIR FORCE  
WASHINGTON DC



September 27, 1994

OFFICE OF THE GENERAL COUNSEL

Gilbert F. Casellas  
1740 Air Force Pentagon  
Washington, DC 20330-1740

The Honorable Hank Brown  
United States Senate  
Washington, DC 20510-0604

Dear Senator Brown:

This is in response to your letter of September 23, 1994, which raises a series of questions regarding the EEOC's proposed Guidelines on Harassment, as well as Title VII's prohibition of discrimination on the basis of religion. As your letter acknowledges, the EEOC withdrew these proposed guidelines on September 19, 1994. This subject was addressed during my confirmation hearing in July before the Senate Committee on Labor and Human Resources.

Before I turn to your specific questions, I will reiterate my view that any future EEOC action on this subject must be completely consistent with the Constitution's guarantee of the free exercise of religion, as well as its prohibition of the establishment of religion; applicable statutory law, including Title VII and the Religious Freedom Restoration Act; and the Supreme Court's holdings addressing both the First Amendment's protection of the freedom of religion and the nature of prohibited harassment under Title VII.

I would also note that the EEOC operates as a five-member deliberative body. Accordingly, it is not within the power of any single Commissioner to guarantee that the EEOC will or will not take a particular course of action. Moreover, because of the deliberative nature of the decision-making process, it would be inappropriate for me to make any binding commitment on this or any question before I have had the opportunity to review the vast public record that has been made, (including the over one hundred thousand comments that have been received by the agency) and to be thoroughly advised on the full range of legal issues. Moreover, I am not an expert on the complex questions which arise in connection with the First Amendment's guarantee of the freedom of religion.

The Honorable Hank Brown

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I recognize, however, that the proposed guidelines recently withdrawn by the EEOC created confusion, at the very least, about whether the Commission was seeking to move beyond existing law in the area of religious harassment. If the EEOC were to promulgate new guidelines in this area, it would be critical for such guidelines to be fully consistent with existing law, including the Religious Freedom Restoration Act, and carefully avoid any such confusion.

Finally, any course of action by the Commission on any issue must be fully informed by a thorough assessment of all of the EEOC's needs and the myriad of issues -- both operational and policy -- facing the agency. Only after such an assessment and consultation with the other Commissioners, can we determine the priorities for allocation of the severely limited resources of the Commission.

Let me now proceed to your specific questions, which I will answer to the best of my ability, within these necessary constraints.

1. While there is no statutory mandate, I understand that Title VII does authorize the EEOC to provide technical assistance on these and all other issues arising under that statute. As discussed above, the question of whether, in my view, the EEOC should promulgate such guidelines and/or rules is one which I should not prejudge. However, any guidelines in this area must reflect existing law, including the Religious Freedom Restoration Act. As noted above, I recognize that the proposed guidelines recently withdrawn by the Commission created confusion about whether the EEOC was seeking to move beyond existing law in ways that would inappropriately constrain religious expression. Any such action should take into account the many thousands of comments which have been submitted in connection with the proposed guidelines (now withdrawn), a careful review of all applicable law, and a consideration of the many diverse points of view on this subject.

2. At this time, in the absence of agency guidance on the subject, employers and employees must base their understanding of what does and does not violate Title VII with regard to discrimination on the basis of religion on an examination of the relevant constitutional and statutory provisions and the operative case law.

3. A. The reasons enunciated in the Supplementary Information address a variety of issues, some of which clearly do not relate to the question of whether or not there should be guidance regarding religious harassment and others of which may or may not. For example, the reasons citing the need to address harassment in connection with the recently enacted Americans With Disabilities Act and the need to clarify that gender-based harassment, in addition to sexual harassment, is in violation of the Act, obviously do not address the need for guidance on the subject of religious harassment. The other proffered reasons cite the need for a consistent and consolidated approach to harassment, the need to reiterate that harassment is unlawful, and the need to offer more detailed information regarding the nature of prohibited harassment. Clearly, should the Commission decide to

The Honorable Hank Brown

Page 3

revisit the question of whether or not to pursue guidance on the subject of religious harassment, these reasons must be carefully re-examined in light of the 110,000 comments received, the Supreme Court's intervening decision in *Harris v. Forklift Systems, Inc.*, and the implications of the Religious Freedom Restoration Act as well as all other applicable law. Moreover, such process must take into account the requirements of the recently enacted legislation regarding the proposed guidelines.

B. As stated in connection with my answer to subsection A of this question, such a determination would have to be based on a rigorous review of the comments and all governing law.

C. At this time, I am not aware of additional reasons.

4. This question, of course, goes to the heart of the issue: whether such guidance will serve a useful purpose in helping employers and employees better understand their existing rights and responsibilities in connection with Title VII's prohibition of discrimination on the basis of religion. If the guidance will not be useful, in my judgment, there is no purpose in pursuing it.

5. While as I stated above I am not an expert on the First Amendment's protection of religious freedom or on the Religious Freedom Restoration Act of 1993, it is my view that the Commission is obligated to take full account of the guarantees of religious freedom in our Constitution and laws, including Title VII's mandate of religious accommodation. Moreover, I am aware of the strictures of the Religious Freedom Restoration Act which provides that the "Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person - (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." However, because the Commissioners play an adjudicative role in certain cases and make decisions as to whether to litigate many others, it would be most inappropriate for me to express any view regarding whether a specific fact pattern may or may not violate the law.

6. As you properly note, the language you cite (which forms only part of the definition in the now-withdrawn guidance) has been withdrawn and is not before the Commission. Of course, should the Commission take any action with regard to harassment, it should be fully consistent with the First Amendment and all other applicable constitutional provisions.

7. The question you present is whether the definition of the reasonable person standard in the proposed (now withdrawn) guidance is appropriate. The Supreme Court has unanimously ruled that a reasonableness inquiry is part of the analysis of whether particular conduct is prohibited harassment. The proper formulation of the "reasonable person" test, including its particular applicability to questions of religious harassment, will have to be carefully addressed, keeping in mind the Supreme Court's analysis in *Harris*,

The Honorable Hank Brown

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along with the implications of additional laws such as the Religious Freedom Restoration Act not considered in *Harris*, should the Commission revisit the question of guidance on religious harassment.

In closing, I would like to reiterate my personal commitment to ensuring that all federal job discrimination laws within the EEOC's jurisdiction must be construed and enforced in a manner that protects the basic rights of all Americans, including the fundamental constitutional rights to freedom of religious expression. I assure you that, if confirmed, I will take all steps within my power to assure that the EEOC does not violate the constitutional right of all Americans to exercise and express their religious beliefs.

Thank you for the opportunity to discuss these important matters in greater detail with you. If you have any further questions, please do not hesitate to contact me at (703) 697-0941.

Respectfully,

A handwritten signature in black ink, appearing to read "Gilbert F. Casellas", written in a cursive style. The signature is positioned above the printed name.

Gilbert F. Casellas

**Paul M. Igasaki**  
c/o Asian Law Caucus, Inc.  
468 Bush Street, 3rd Floor  
San Francisco, CA 94706  
Telephone: (415) 391-1655, Fax: (415) 391-0366

September 27, 1994

Honorable Hank Brown  
United States Senate  
Washington, D.C. 20510

Dear Senator Brown:

Thank you for your correspondence of September 23, 1994, asking for responses to a series of questions relating to the recently-withdrawn EEOC guidelines on race, color, religion, gender, national origin, age or disability. As you know, I have been nominated to a Commissioner position and will be designated as Vice Chair of the Commission. I responded to questions on this subject raised at the hearing on my nomination before the Labor and Human Resources Committee.

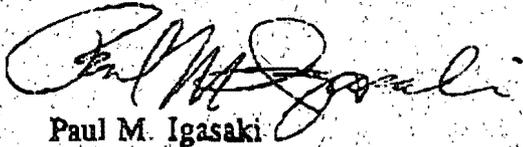
I have reviewed the answers to your questions prepared by the Chair-designate, Mr. Gilbert Casellas, and am in full and complete agreement with his answers. For this reason, I am not reiterating in full our shared views on the questions raised in your letter. I do not want to be unresponsive, however, and remain available, as I suggested to your staff, to discuss any of these issues that you may wish clarification on by telephone or by other available means.

Please be assured that I understand and share your concern that the constitutional right of employees to express their religious beliefs be fully protected. While I am not a constitutional scholar on the right to religious freedom, I am committed to this important principle as I am to the guarantee of equal protection under the law. I am aware of the Religious Freedom Restoration Act as well as other protections of constitutional religious expression and can assure you that I will abide by their mandates.

Freedom of religion is a fundamental part of our American heritage. I believe strongly in its protection. While I was raised in and my family belongs to the United Church of Christ, my wife and her family belong to the Buddhist Churches of America. And I was raised in a largely Jewish community. I learned a great deal from my colleagues, relatives, friends and neighbors, in school and in the workplace, whose spiritual paths were different than my own. This religious diversity and the protection of all beliefs is a valuable part of our nation's constitutional protections and I am firmly committed to all of these protections. My family's experiences during World War II, when they were incarcerated in relocation camps in Colorado

and Arizona due only to their ethnicity, has led to my commitment to protect against intolerance of any kind. Our country is stronger for its commitment to these protections.

Respectfully,



Paul M. Igasaki

Paul Steven Miller  
750 17th Street, 6th Floor  
Washington, D.C. 20006  
(202) 395-7919

September 27, 1994

The Honorable Hank Brown  
United States Senate  
716 Hart Senate Office Building  
Washington, D.C. 20510

Dear Senator Brown:

I have received your letter, dated September 23, 1994, in which you asked a series of questions concerning the recently withdrawn EEOC Proposed Guidelines on Harassment Based on Race, Color, Religion, Gender, National Origin, Age or Disability. The subject of the Proposed Guidelines on Harassment was raised during my confirmation hearing before the Senate Committee on Labor and Human Resources on July 21, 1994. As I stated at the hearing, I believe that harassment in any form, including religious harassment, should not, and can not be tolerated. I firmly believe that people should be judged on their ability to perform in the job, rather than on other characteristics, including their personal choice of religious practice and guidance.

I have had the opportunity to review thoroughly and carefully Chairperson-designate Gilbert Casellas' responses to the questions set forth in your September 23, 1994 letter. I fully and completely agree with the views that he expresses. For this reason, I am not restating our shared views on the issues raised in your letter. However, I am willing and available to discuss with you any of the issues raised in those responses, or any other issue concerning my nomination to be a Commissioner at the EEOC.

As you are aware, the EEOC has withdrawn the Proposed Guidelines on Harassment. I am also aware that the Commission has received thousands of comments from many different individuals and groups concerning these Proposed Guidelines. If confirmed by the United States Senate to be a Commissioner at the EEOC, I will very carefully consider these comments, in addition to the Constitutional protections which guarantee the freedom of religion, as well as all Congressional mandates in this area, including the Religious Freedom Restoration Act of 1993 and Title VII's mandate of religious accommodation.

As a Jew, both the Constitution's guarantee of a person's right to practice one's own religion freely and Title VII's right to be free of harassment in the workplace are of particular importance to me. I have experienced anti-Semitism in several different contexts, and therefore, I know from personal experience the importance of religious freedom

The Honorable Hank Brown

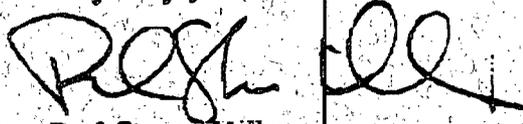
September 27, 1994

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and protection from harassment. You have my assurance that I am absolutely committed to preserving the freedom and dignity of an individual's religious convictions.

Please do not hesitate to contact me to discuss further any of these issues concerning the withdrawn Proposed Harassment Guidelines or any other issue pertaining to my confirmation to the EEOC.

Very truly yours,

A handwritten signature in black ink, appearing to read "Paul Steven Miller", written in a cursive style.

Paul Steven Miller

MARK BROWN  
TELETYPESUBJECT  
FOREIGN RELATIONS  
JUDICIARY**United States Senate**

WASHINGTON, DC 20510-0606

September 23, 1994

Mr. Gilbert F. Casellas, Designated Chairman  
Equal Employment Opportunity Commission  
1801 L Street N.W.  
Washington, D.C. 20507

Dear Mr. Casellas:

Consistent with the advise and consent role of the United States Senate, and discussions my staff have had with White House officials assisting you with your nomination to serve as Chairman of the Equal Employment Opportunity Commission ("EEOC"), I am submitting the following written questions to you for your written response. Please answer each question fully and in sufficient detail to entirely explain your position.

1. Is it your view that in order for the purposes, intent and effect of section 703 of title VII of the Civil Rights Act of 1964 to be carried out that the EEOC must and/or should set forth specific guidelines and/or rules to employers and employees concerning workplace discrimination and harassment based on religion?
  
2. How should employers and employees properly define what does and does not constitute a violation of section 703 of title VII of the Civil Rights Act of 1964, based on religion?
  
3. In the EEOC's Guidelines on Harassment Based on Race, Color, Religion, Gender, National Origin, Age, or Disability, 29 CFR Part 1609, in the "Supplementary Information" section (withdrawn September 19, 1994), the EEOC lists five specific reasons why "the Commission determined that there is a need for new guidelines that emphasize that harassment based on ... religion ... is egregious and prohibited by title VII."
  - A. Do you agree with the reasons articulated (in part, or in whole) as they relate to the category of religion? If yes, no, or combination, please explain in detail.

Mr. Gilbert F. Casella  
September 23, 1994  
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- B. Although the guidelines have been withdrawn in compliance with Federal law, do the reasons (in part, or in whole) reflect sufficient bases for the promulgation of like EEOC guidelines and/or rules related to the category of religion in the foreseeable future?
- C. Are there any other reasons you would invoke for the support of the guidelines based on the category of religion?
4. Are EEOC guidelines and/or rules of the form (not substance) contemplated by the EEOC's Guidelines on Harassment Based on Race, Color, Religion, Gender, National Origin, Age, or Disability, 29 CFR Part 1609 (withdrawn September 19, 1994), necessary and/or appropriate to apprise employers and employees of their rights and responsibilities consistent with section 703 of title VII of the Civil Rights Act of 1964 based on religion?
5. Under what circumstances may an individual or entity be restricted in the expression of their religious beliefs and practices in the workplace, consistent with the First Amendment rights of religious freedom and expression and the Religious Freedom Restoration Act of 1994? (Please give specific examples and detailed explanations)
6. The EEOC's Guidelines on Harassment Based on Race, Color, Religion, Gender, National Origin, Age, or Disability, 29 CFR Part 1609 (withdrawn September 19, 1994) specifically include a standard for defining unlawful "harassing" behavior identified as:
- verbal or physical conduct that "denigrates or shows hostility or aversion toward a individual because of his/her ... religion ... or that of his relatives, friends or associates."
- Is there a constitutionally permissible basis for applying this standard (in part or in whole) to the area of religion consistent with section 703 of title VII of the Civil Rights Act of 1964 based on religion? (Please explain in detail and provide legal authority where appropriate).

Mr. Gilbert F. Casellas  
September 23, 1994  
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7. Is it appropriate to apply the "reasonable person" standard articulated in the EEOC's Guidelines on Harassment Based on Race, Color, Religion, Gender, National Origin, Age, or Disability, 29 CFR Part 1609 (withdrawn September 19, 1994), to the area of religion consistent with section 703 of title VII of the Civil Rights Act of 1964 based on religion?

Thank you in advance for your responses. If you have any questions, please call Joe Rogers of my staff at (202) 224-5941.

Sincerely,



Hank Brown  
United States Senator

**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 : 9/24/94

TIME : 1:25

TO : Steve Warnath

FAX TELEPHONE NUMBER: 456-7028

SENDER: Clare Gonzales

**CHECK ONE:**

**OCLA**  
 (202) 663-4900

**SURVEYS**  
 (202) 663 - \_\_\_\_\_

**OFO**  
 (202) 663- \_\_\_\_\_

**OK**  
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 (202) 663 - \_\_\_\_\_

**OLC**  
 (202) 663- \_\_\_\_\_

**OCEO**  
 (202) 663- \_\_\_\_\_

DOCUMENT: Ellen's draft response (In case you dont have enough to read)

NUMBER OF PAGES TRANSMITTED (INCLUDING COVERSHEET): 7

SPECIAL INSTRUCTIONS: Thanks for your help and perspective  
CEB

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

9/24/94 Draft

respond.brn

Dear Senator Brown:

This is in response to your letter of September 23, 1994 which raises a series of questions regarding the EEOC's proposed Guidelines on Harassment, now withdrawn pursuant to Congressional mandate, as well as Title VII's prohibition of discrimination on the basis of religion. This subject, of course, was addressed during my confirmation hearings which took place over two months ago, before the Senate Committee on Labor and Human Resources. Before I turn to your specific questions, I will reiterate my view that any EEOC action on this subject -- must take into full account the Constitution's guarantee of the free exercise of religion as well as its prohibition of the establishment of religion, the implications of applicable statutory law, including the Religious Freedom Restoration Act, and the Supreme Court's holdings addressing both the the First Amendment's protection of the freedom of religion and the nature of prohibited harassment under Title VII. I would also note that the EEOC operates as a five-member deliberative body. Accordingly, it is not within my power, and it would be most inappropriate, to guarantee that the EEOC will or will not take a particular course of action. Moreover, because of the deliberative nature of the decision-making process, it would be also be exceedingly inappropriate for me to express any final views on, or otherwise prejudge, this question (or any other) before I have had the opportunity to review the vast public record which has been made, including the over one hundred thousand comments which have been received by the agency, and to be thoroughly advised on

the full range of legal issues. Let me now proceed to your specific questions, which I will answer to the best of my ability, within these necessary constraints.

1. Clearly there is no requirement that the EEOC must set forth specific guidelines and/or rules concerning workplace discrimination and harassment based on religion. As discussed above, the question of whether, in my view, the EEOC should promulgate such guidelines and/or rules is one which I cannot prejudge and will only address after reviewing the many thousands of comments which have been submitted in connection with the proposed guidelines (now withdrawn) as well as conducting a careful review of all applicable law.

2. At this time, in the absence of agency guidance on the subject, employers and employees must base their understanding of what does and does not violate Title VII with regard to discrimination on the basis of religion on an examination of the relevant statutory provisions and case law.

3. A. The reasons enunciated in the Supplementary Information address a variety of issues, some of which clearly do not relate to the question of whether or not there should be guidance regarding religious harassment and others of which may or may not. For example, the reasons citing the need to address harassment in

connection with the recently enacted Americans With Disabilities Act, and the need to clarify that gender-based harassment, in addition to sexual harassment, is in violation of the Act, obviously do not address the need for guidance on the subject of religious harassment. The other proffered reasons cite the need for a consistent and consolidated approach to harassment, the need to reiterate that harassment is unlawful and the need to offer more detailed information regarding the nature of prohibited harassment. Clearly, before the Commission revisits the question of whether or not to pursue guidance on the subject of religious harassment, these reasons must be carefully re-examined in light of the 110,000 comments received, the Supreme Court's intervening decision in Harris v. Forklift Systems, Inc., and the implications of the Religious Freedom Restoration Act as well as all other applicable law. Moreover, such process must be undertaken into account the requirements of Pub. L. [ ] .

B. As stated in connection with my answer to subsection A of this question, such a determination will have to be based on a rigorous review of the comments and all governing law.

C. At this time, I am not aware of additional reasons.

4. This question, of course, goes to the heart of the issue: whether such guidance will serve a useful purpose in helping employers and employees better understand their rights and responsibilities in connection with Title VII's prohibition of discrimination on the basis of religion. If the guidance will not

be useful, in my judgment, there is no purpose in pursuing it. I do not, at this point in time, have definitive views on this question but will make a judgment only after a careful review of the comments, the case law and all other relevant materials and information.

5. While I am not an expert on the First Amendment's protection of religious freedom or on the Religious Freedom Restoration Act of 1994, I fully understand and respect the great importance of the guarantees of religious freedom in our Constitution and laws. Moreover, I am aware the strictures of the Religious Freedom Restoration Act which provides that the "Government may substantially burden a person's exercise of religion only if it demonstrates that application of the burden to the person - (1) is in furtherance of a compelling governmental interest; and (2) is the least restrictive means of furthering that compelling governmental interest." I assure you that all relevant constitutional and statutory provisions will be carefully and rigorously considered before the EEOC proposes any new guidance on the subject of religious harassment, and any action we propose will be informed by a full understanding and appreciation of the law's protection of the right of individuals to practice their religion.

6. As you properly note, the language you cite has been withdrawn and is not before the Commission. Moreover, since the

time that this language was published, the Supreme Court addressed the question of the definition of prohibited harassment under Title VII in a unanimous, decision in Harris v. Forklift Systems, Inc. In Harris, the Supreme Court set forth a different approach to the analysis of prohibited harassment than the EEOC had incorporated in its proposed guidance. Of course, any further action by the Commission with regard to harassment would have to be predicated on a careful review of, and be fully consistent with, the Supreme Court's analysis. Because the language you cite (which, in any event, only forms part of the definition in the now-withdrawn guidance) is highly unlikely to be the operative language, even if the EEOC is to return to the issue, the question of its constitutionality is moot.

7. The question you present is whether the definition of the reasonable person standard in the proposed guidance is appropriate. While the Supreme Court has ruled that a reasonableness inquiry is part of the analysis of whether particular conduct is prohibited harassment, see Harris at [ ] ("[c]onduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment - an environment that a reasonable person would find hostile or abusive - is beyond Title VII's purview.") accord (Scalia J. concurring at [ ]) (noting with approval that part of the test that asks whether the "conduct [at issue] unreasonably interferes with an employee's work performance."), the Court did not adopt the test as set forth by the Commission in the proposed

guidelines. The proper formulation of the "reasonable person" test, including its particular applicability to questions of religious harassment, will have to be carefully addressed, keeping in mind the Supreme Court's analysis in Harris, along with the implications of additional laws not considered in Harris, if and when the Commission revisits the question of guidance on religious harassment.

**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 : 8/25/94

TIME: \_\_\_\_\_

TO : Steve Warnath

FAX TELEPHONE NUMBER: 456-7028

SENDER: Claire Gonzales

**CHECK ONE:**

**OCLA**  
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**SURVEYS**  
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**OLC**  
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**OEEO**  
(202) 663- \_\_\_\_\_

DOCUMENT: FYI - EEOC's Response to Senator Brown's  
8/9/94 Letter Re: Lobbying & Religious Harassment Guidelines

NUMBER OF PAGES TRANSMITTED (INCLUDING COVERSHEET): 4

SPECIAL INSTRUCTIONS: \_\_\_\_\_  
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Please telephone the appropriate office above if you do not receive all documents.



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

**August 25, 1994**

**The Honorable Hank Brown**  
**United States Senate**  
**Washington, DC 20510**

**Dear Senator Brown:**

**This is in response to your letter dated August 9, 1994, in which you assert that certain employees of the Equal Employment Opportunity Commission (EEOC) have engaged in lobbying efforts against recent legislation that you have sponsored. Specifically, you allege that certain Commission employees, through communications with Senate and House staff, have sought to discourage members of Congress from supporting amendments relating to the Commission's Proposed Guidelines on Harassment Based on Race, Color, Religion, Gender, National Origin, Age or Disability (the Proposed Guidelines).**

**Please be advised that I have personally looked into this matter and I have found no evidence of any lobbying activities with regard to any legislation related to the Proposed Guidelines. As you are certainly aware, the Commission did not and has not taken a position on any of the issues raised in these legislative proposals. To do so, the Commission would have to consider and formally vote on each. (The process I discussed in my recent response to your letter of July 15, 1994, a copy of which is enclosed for your reference.)**

**In discussing this matter with all EEOC staff who are in any way associated with this issue, I was dismayed to learn that, in most cases, the EEOC was not even informed about or aware of the legislation until either it was being debated or after it had been passed. The only affirmative communications that were made by any EEOC staff about the amendments were made to obtain information about the amendments, and those were quite limited. Given the implications of these amendments on the Commission, I hope you would agree that it is entirely appropriate for EEOC staff to try to monitor such legislation in this way.**

**In connection with the ongoing controversy surrounding the inclusion of religion in the Proposed Guidelines, EEOC staff has received and responded to numerous written and oral inquiries from congressional staff about the Proposed Guidelines, Commission procedures, and other related issues. The June 9, 1994, hearing before the Senate Judiciary Subcommittee on Courts and Administrative Practice, in particular, generated a number of calls from congressional staff. As far as I can discern, the responses of the Commission's staff to these inquiries were completely consistent with the agency's position, responsibilities, and applicable law. Further, I believe it is entirely proper, and indeed our duty, to respond to such inquiries with whatever public information we have available on the subject.**

The Honorable Hank Brown  
Page Two

Should you have further questions or if I can be of any further assistance, please do not hesitate to contact my office if I can be of further assistance.

Sincerely,

A handwritten signature in black ink, appearing to read "Tony Gallegos", with a long horizontal flourish extending to the right.

Tony Gallegos  
Chairman

Enclosure

**United States Senate**

WASHINGTON, DC 20510-0804

August 9, 1994

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

Dear Acting Chairman Gallegos:

It has come to my attention that certain employees of the Equal Employment Opportunity Commission (EEOC) may have been actively engaged in lobbying efforts related to legislation relating to the Commission's proposed guidelines on harassment based on race, color, religion, gender, national origin, age or disability (29 CFR Part 1609). These amendments are currently pending on S. 1491, the Airport and Airways Improvement Act of 1994, and H.R. 4603, the Commerce, Justice, State, and the Judiciary Appropriations bill.

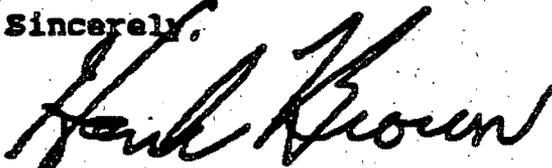
Specifically, I understand that certain Commission employees have been and continue to be involved in communications with Senate and House staff, seeking to discourage members from supporting the amendments.

I am concerned about the use of taxpayers dollars being used for lobbying purposes and would appreciate hearing back from you regarding the nature and scope of any and all communications between EEOC employees and Senate and/or House staff related to these amendments.

Additionally, I also understand that we have still not received a response to the letter sent to you on July 15, 1994, from me, Senator Howell Heflin, and Representatives Charles Taylor, Frank Wolf and Martin Lancaster. We await your response.

If you have any questions, please feel free to contact Joe Rogers of my staff or myself at 224-5941.

Sincerely,



Hank Brown  
United States Senator

cc: Mr. Gilbert Casellas  
Designated Chairman of EEOC