EEOC Proposed Harassment Guidance Comments

Introduction

The following commentary on the Equal Employment Opportunity Commission's *Proposed Enforcement Guidance on Unlawful Harassment* ("Guidance") is being submitted on behalf of the Employment Law Alliance ("ELA"). The ELA is an integrated, global practice network with more than 3,000 lawyers across more than 120 countries, all 50 U.S. states and every Canadian province. As the world's largest practice network, the ELA provides multi-state and multi-national companies labor, employment and immigration services. The ELA has more Chambers-ranked firms than any other law firm alliance in the world. Law firms are invited to become ELA members only after a rigorous due-diligence process, including consultation with experienced in-house counsel, judges, current members, and industry leaders. Our members have significant expertise in employment-related matters. Rather than address a myriad of minor points, our organization has decided to provide input on a few select areas of importance.

At the outset, it is worth noting that the Guidance is not binding law. Rather, the Guidance is entitled only to *Skidmore* deference. *Skidmore v. Swift & Co.*, 323 U.S. 134, 140 (1944). As such, the Guidance receives "deference in accordance with the thoroughness of [its] research and the persuasiveness of [its] reasoning." *Stagi v. Natl. R.R. Passenger Corp.*, 391 Fed. Appx. 133, 138 (3d Cir. 2010) (citation and internal quotation marks omitted)*; see Nat. R.R. Passenger Corp. v. Morgan*, 536 U.S. 101, 111 n.6 (2002) ("[W]e have held that the EEOC's interpretive guidelines do not receive *Chevron* deference") (citations omitted); *see Christensen v. Harris County*, 529 U.S. 576, 587 (2000) (stating that interpretations contained in enforcement guidance lack the force of law and . . . "are entitled to respect . . . only to the extent that those interpretations have the 'power to persuade'") (quotations omitted); *see also Ferguson v. E.I. duPont de Nemours & Co.*, 560 F. Supp. 1172, 1198 (D. Del. 1983) (declining to follow the EEOC's guidelines in hostile work environment case because "[t]he EEOC guidelines, while entitled to deference, do not have the force and effect of law").

Comment Regarding the Expansion of the Definition of "Sex"

The Guidance seeks to include "gender identity," "transgender status," an "individual's intent to transition," and "sexual orientation" all within the prohibition of sex-based harassment under Title VII. This interpretation goes beyond the plain language and legislative intent of Title VII, and instead reflects the Commission's impermissible trespassing into legislative rulemaking.

Considering Conduct that Occurs Outside the Workplace as Evidence of a Hostile Work Environment

The Guidance broadly states that incidents occurring in a non-work related context may have consequences in the workplace and may therefore contribute to a hostile work environment. The EEOC provides an example of an African American employee who is racially attacked by co-workers on a city street, and states that the mere presence of these harassers at the same workplace would be sufficient to establish a hostile work environment for the African American employee.

However, not one of the cases cited by the EEOC supports this broad proposition and the Guidance entirely ignores significant adverse judicial authority. *See, e.g., Sprague v. Thorn Americas, Inc.*, 129 F.3d 1355, 1366 (10th Cir. 1997) (refusing to consider incident of harassment which occurred outside of work); *Gowesky v. Singing River Hosp. Sys.*, 321 F.3d 503, 510 (5th Cir. 2003) ("[A] harassment claim, to be cognizable, must affect a person's working environment."); *Fontenot v. Buus*, 370 F. Supp. 2d 512, 518 (W.D. La. 2004) (where only harassment in work was "leering," defendant's conduct which occurred outside the workplace, away from any witnesses, would not be considered); *Diepenhorst v. City of Battle Creek*, No. 1:05-CV-734, 2007 WL 1141492, at *12 (W.D. Mich. Apr. 17, 2007) (holding off-premises conduct should not be considered).

ELA's position is that hostile work environment claims should be confined to incidents occurring inside the physical workplace and/or at work-related events. Employers have little to no control over employee behavior outside of these contexts and should not be liable for such behavior. The Guidance should be revised to be consistent with the cases it purports to rely upon, which set forth very narrow circumstances for when conduct occurring outside the workplace may be considered.

The cases cited by the EEOC provide that outside-of-work conduct may only be considered when it: (1) is carried out by an employee in a direct supervisory role over the harassment victim; (2) occurs at a work-related event; or (3) occurs between co-workers who constantly work with and see each other inside the workplace.

In, *Duggins v. Steak 'N Shake, Inc.* (cited by the EEOC), the court recognized that "other courts have generally held an employer is not liable for the harassment or other unlawful conduct perpetrated by a non-supervisory employee after work hours and away from the workplace setting." 3 F. App'x 302 at 311 (6th Cir. 2001). Thus, consistent with the decision in *Duggins*, if outside-of-work conduct is to be considered at all, it should be limited to conduct by those with direct supervisory authority over the alleged harassment victim.

Next, *Lapka v. Chertoff* is incorrectly cited for the broad proposition that conduct taking place outside the workplace may be considered as evidence of a hostile work environment. Instead, the court's finding in *Lapka* was based on the fact that the incident occurred in a work-related environment. The alleged conduct occurred after hours at a mandatory training center where employees were forced to attend and live for the month. The court found:

> The FLETC [Federal Law Enforcement Training Center] bar was a part of the FLETC facility, and Lapka first encountered Garcia on the FLETC campus, so the event could be said to have grown out of the workplace environment. *Id*. We further note that Lapka and Garcia were required by their employer to attend these training sessions; they were on "official duty" while they were there. The FLETC facility is different from a typical workplace where "employees go home at the close of their normal workday." *Ferris v. Delta Air Lines, Inc.*, 277 F.3d 128, 135 (2d Cir. 2001). Trainees at this facility attend employment-related training sessions, eat in the FLETC cafeteria, drink at the FLETC bar and return to dormitories and

> hotel rooms provided by the DHS. Employees in these situations can be expected to "band together for society and socialize as a matter of course." Id. Lapka has established that she was subject to sexual harassment because of her sex, at least for the purposes of summary judgment.

Lapka v. Chertoff, 517 F.3d 974, 983 (7th Cir. Ill. 2008). Accordingly, the court's finding was based on the unique work-related environment of the FLETC. Therefore, it does not in any way support the EEOC's broad proposition that any conduct outside the workplace can be considered as evidence of a hostile work environment.

Finally, the EEOC cites *Crowley v. L.L. Bean, Inc.*, 303 F.3d 387, 409–10 (1st Cir. 2002) as support for the notion that a harasser's outside-of-work conduct may be considered to prove that the harasser subjected a co-worker to a hostile work environment. As set forth above, ELA contends that only conduct occurring inside the workplace or at a work-related event should be considered in hostile work environment claims. If outside-of-work conduct is to be considered, it should be limited to conduct by those with direct supervisory authority over the alleged harassment victim.

Even if the EEOC were to reject these contentions and conclude that co-worker conduct occurring outside the workplace should be considered, such conduct should only be considered in particular situations similar to those in *Crowley*. The facts in *Crowley* do not support the EEOC's premise that the mere presence of a co-worker who allegedly engaged in harassing conduct outside the workplace is sufficient to establish a hostile work environment. In *Crowley*, the alleged harasser almost never left the complainant's side at the worksite. The alleged harasser was accused of "continually following [the complainant] at work…physically blocking her path and thereby forcing her to squeeze by him, giving her gifts designed to let her know that he was watching her, dancing in the aisles near her, [and] waiting in the dark for her to come upon him…" *Id.* *Crowley* in no way supports the theory that if an individual has engaged in harassing conduct outside the workplace, that individual's presence at work alone may create a hostile work environment. Thus, if the EEOC is insistent on finding that even outside-of-work conduct carried out by an individual in a non-supervisory role may be considered, such consideration should be narrowly limited to instances where the alleged harasser is in constant contact with the alleged harassment victim throughout the workday.[1] The mere presence of an alleged harasser in the workplace cannot alone be sufficient to create a hostile work environment.

In short, the Guidance ignores significant judicial authority finding that conduct outside the workplace should not be considered in evaluating hostile workplace environment claims, and relies on cases that do not support the propositions for which they are cited. The Guidance should therefore be reconsidered.

Conduct not Directed at the Complainant or that Occurs Outside of the Complainant's Presence

[1] Of course, the employer must also have knowledge of the conduct in order to be held responsible.

The Guidance states that harassing conduct may include conduct that is not directed at the complainant or that occurs outside of the complainant's presence. The Guidance, however, relies on hand-picked case law, contrary to other established precedent. Many courts have consistently explained that harassing conduct must be experienced by the complainant. *See Honor v. Booz-Allen & Hamilton, Inc.*, 383 F.3d 180, 190 (4th Cir. 2004) (explaining that the focus must be on the plaintiff's personal experience, not second-hand comments*); Septimus v. Univ. of Houston*, 399 F.3d 601, 612 (5th Cir. 2005) (holding that harassment experienced by other women was irrelevant when assessing plaintiff's hostile work environment claim); *Dove v. United Parcel Serv., Inc.*, 912 F. Supp. 2d 353, 363 (M.D.N.C. 2012) (same); *Dawson v. Rumsfeld*, No. 1:05-cv-1270, 2006 WL 325867, at *4 (E.D. Va. Feb. 8, 2006) (explaining that comments made outside the plaintiff's presence cannot independently sustain a hostile work environment claim).

Moreover, the Guidance fails to make clear that "second-hand" harassment, even when considered by certain courts, is granted far less weight than personally experienced incidents. Instead, the Guidance relies primarily on pattern and practice cases alleging harassment directed at multiple employees, while failing to provide that context for the reader. For example, the Eleventh Circuit's decision in *Adams v. Austal* includes conduct that was part of a pattern and practice by supervisors that not every employee experienced. *Adams v. Austal*, 754 F.3d 1240, 1256 (11th Cir. 2014) (notably, the Court found in favor of the employer in an instance where one employee "did not personally see the noose, but learned about it from other people. And she heard white employees call black employees 'boy,' but no one called her that name . . ."); *see also Ellis v. Houston*, 742 F.3d 307, 321 (8th Cir. 2014) ("individual remarks cited in the [plaintiffs'] complaint and revealed in the discovery process were not uttered in a vacuum, but became understood as part of a broader pattern and practice of racial harassment targeted at the [group]."). In reality, these cases are simply consistent with the approach of jurisdictions that consider "second-hand" harassment, which is considered to be "less objectionable" than harassment directed at the plaintiff personally. *See Moser v. Ind. Dep't of Corr.*, 406 F.3d 895, 903 (7th Cir. 2005).

Postings on Private Social Media Accounts

Next, the EEOC seeks to extend the improper rationale set forth above to postings on social media. The Guidance, as currently drafted, would support employer surveillance of private Facebook accounts. It would also impose an unreasonable burden on employers to investigate and remedy postings on Facebook accounts that may be inaccessible due to the privacy features selected by employees. The Guidance should acknowledge an employer's limitations in evaluating and remedying social media postings, and should only consider such postings as part of a hostile work environment claim when there is clear evidence that the post was actually discussed inside the workplace (and, of course, only when the employer has been made aware of such discussions). The EEOC's example appears to support the ELA's position, and we suggest it be further clarified in the Guidance. The example given provides:

> If an Asian American employee is the subject of a racist comment that a coworker posts on social media, and other coworkers see the

comment and discuss it at work, then the social media posting can contribute to a racially hostile work environment.

Thus, we respectfully request that the EEOC clarify what it appears to support: a single social media post that has not been discussed or shared inside the workplace cannot be considered evidence of a hostile work environment. Also, it should be clarified that employers are neither expected nor encouraged to monitor Facebook (or other social media) and that employers cannot be held responsible for postings on private social media pages of which they were never made aware.

Apparent Authority and Mistaken Beliefs

With respect to supervisor status and apparent authority, the Guidelines cite to cases that stand for the proposition that an employer can be held vicariously liable for the conduct of a non-supervisor, if the Complainant "reasonably believes" based upon the "employer's actions" that the alleged harasser has authority over him/her. Further, the Guidelines state that the severity of the harassment may be "heightened" if the Complainant reasonably believes that the harasser has authority over oven him/her, even if the belief is "mistaken."

"In the usual case, a supervisor's harassment involves misuse of actual power, not the false impression of its existence." *Burlington Industries, Inc. v. Ellerth,* 524 U.S. 742 (1998). Thus, it is indeed the highly unusual case where apparent authority (and a victim's "reasonable" beliefs regarding the extent of the same) can suffice to turn a co-worker harasser into a "supervisor" for employment law purposes. Since a clear reading of the small number of cases cited in the Guidelines as support for this proposition suggest that this scenario would indeed be the exception rather than the rule, we suggest that these statements be eliminated from the main Guidance lest they create a misleading impression that this type of claim is mainstream or these facts, commonplace. Minimally, if these statements remain, an acknowledgement of their rarity should be included and the same should be simply footnoted to the larger and more general discussion of vicarious liability.

If these suggestions are rejected, we suggest including specific examples or guidance as to what facts would provide appropriate support for a complainant's claim that they possessed a "reasonable belief" that the actor in question possessed supervisory powers and the ability to engage in tangible employment actions.

In fact, we would note that the case primarily cited by the Commission for this proposition, *Kramer v. Wasatch County Sheriff's Office*, 743 F.3d 726 (10th Cir. 2014), is hardly a ringing endorsement for the EEOC's position. In *Kramer*, while termination authority was disputed by the employer, the actor in question (a Sergeant), in actuality, possessed *significant* power over the Plaintiff (an officer report). As the *Restatement (Third) of Agency* § 3.03, cmt. c (2006) notes, one relevant fact question is how much power the principal has actually given to the agent. Apparent authority exists where an entity has created such an appearance of things that it causes a third party reasonably and prudently to believe that a second party has the power to act on behalf of the first party.

Among the significant factors that led the *Kramer* court to conclude that a question of fact existed as to the Plaintiff's reasonable beliefs as to the Sergeant's employment termination authority, was that he was the Plaintiff's direct "manager" and he was *solely responsible* for her employment evaluation which impacted promotion, demotion or termination. It was his responsibility to create corrective action plans and to "document noteworthy ...behaviors of employees" which were explicitly defined by the employer as potentially affecting his subordinates' "job advancement, rewards, discipline and discharge." Further, the employer actually referred to the Sergeant as the Plaintiff's "supervisor" and while the Sheriff was ostensibly the only person who could *officially* terminate employees, the Sergeant had the power to effectively recommend to the Sheriff that any of his supervisees be fired. Surely adding further support to the analysis was the fact that the Sergeant allegedly repeatedly told the Plaintiff that he did in fact possess such powers. These are significant and important facts that belie the simplicity of the apparent authority and liability propositions stated by the Guidelines.

Unwelcomeness Inquiry

The Commission proposes subsuming the unwelcomeness prong of the hostile work environment analysis into the objective hostility prong. As the Commission recognizes, this is contrary to case law. Indeed, the Commission relies entirely upon journal articles for support. It is not appropriate to usurp the judiciary's articulation of a hostile work environment claim.

Unspecified Fear of Retaliation Does Not Justify Failure to Complain

In discussing situations in which the employer's behavior justifies an employee's failure to complain, the Guidance should make clear that an unspecified fear of retaliation does not justify a failure to complain.

Civility & Bystander Training

On page 75 of the Guidance, almost as an afterthought, the Commission recommends conducting "workplace civility training" or "bystander" training. Not only does this directly contradict well-settled jurisprudence, which the Guidance references, that Title VII is not a civility code, but the footnote cites to written testimony that states incivility can create a hostile work environment. Moreover, the recommendation runs afoul of numerous decisions that the NLRB has made finding employers' workplace civility policies are illegal. We urge the EEOC to remove these suggestions from the Guidance.

Submitted on behalf of the ELA

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