



College and University Professional
Association for Human Resources

March 21, 2017

Public Input
U.S. Equal Employment Opportunity Commission
Executive Officer
131 M Street, NE
Washington, DC 20507

RE: Comment on Proposed Harassment Enforcement Guidance

Dear Acting Chair Lipnic and Distinguished Commissioners:

The Society for Human Resource Management (“SHRM”) and the College and University Professional Association for Human Resources (“CUPA-HR”) welcome the opportunity to submit the following comments in response to the proposed Harassment Enforcement Guidance (“Enforcement Guidance”) by the Equal Employment Opportunity Commission (“EEOC” or “Commission”).

The Society for Human Resource Management (SHRM) is the world’s largest HR professional society, representing 285,000 members in more than 165 countries. For nearly seven decades, the Society has been the leading provider of resources serving the needs of HR professionals and advancing the practice of human resource management. SHRM has more than 575 affiliated chapters within the United States and subsidiary offices in China, India and United Arab Emirates.

CUPA-HR serves as the voice of human resources in higher education, representing more than 23,000 HR professionals at over 1,900 colleges and universities across the country, including 93 percent of all U.S. doctoral institutions, 78 percent of all master’s institutions, 56 percent of all bachelor’s institutions and almost 700 community colleges and specialize institutions. Higher education employs 3.3 million workers nationwide, with colleges and universities in all 50 states

Introduction

SHRM and CUPA-HR recognize that preventing and effectively addressing harassment is critical to creating positive employee engagement and maintaining a productive workplace. Toward that end, we focus information and training for our members on both the law covering harassment and legal investigations, but also on practices that create a positive, productive and inclusive workplace culture.

While SHRM and CUPA-HR support strong enforcement guidance on harassment, we have several concerns with certain sections of the proposed Enforcement Guidance, which are considered in more detail below.

Analysis

1. Sexual Orientation

SHRM and CUPA-HR support public policy efforts to bar workplace discrimination based on sexual orientation. The Guidance should be clearer, however, about the state of the law.

The EEOC has taken the position that sexual orientation is a form of sex discrimination covered by Title VII. SHRM and CUPA-HR appreciate that in footnote 17 the EEOC has noted that not all courts agree. We respectfully suggest, however, that the EEOC make clear in the body of the Guidance that it is stating the EEOC's position as opposed to established law. This is precisely what the EEOC did in other areas of the proposed Guidance. For example, on page 27, the EEOC notes the Commission's view that conduct that is subjectively and objectively hostile is also necessarily unwelcome is contrary to certain courts' analysis of "unwelcomeness" as an element of proving unlawful harassment.

2. Severe harassing behavior

SHRM and CUPA-HR fully agree that the examples of behavior listed by the EEOC on pages 22 and 23 are quite severe. However, we are concerned that there could be an implication, by virtue of the EEOC's language, that there is strict liability for such severe conduct, when, in fact, that is not always the case.

For example, let's assume there is a threat of physical violence by one co-worker against another. Assume further than the employer has a robust anti-harassment policy and complaint procedure that the employee uses, resulting in the termination of the co-worker making the threat.

Under the above circumstances, the employer should not be liable under the analysis set forth by the EEOC on page 39 because the employer has acted reasonably to prevent the harassment and taken strong corrective action to remedy it. Indeed, the employer should not be liable under the hypothetical fact pattern above, even if the employee engaging in the threat were a supervisor.

To the contrary, the employer meets both prongs of the Supreme Court's Faragher-Ellerth affirmative defense. See Faragher v. City of Boca Raton, 524 U.S. 775 (1998); Burlington Indus., Inc. v. Ellerth, 524 U.S. 742 (1998).

We respectfully request that the EEOC make clear that the severity of the conduct is entirely relevant to what is appropriate (that is, proportionate) corrective action. However, the severity of the conduct does not, in and of itself, give rise to liability for the reasons noted.

3. Unwelcomeness

The EEOC guidance states, as an example, that flirtatious behavior may or may not be facially offensive depending on the circumstances. SHRM and CUPA-HR agree. The EEOC continues: "If the actor is on notice, however, that the conduct is unwelcome, then a reasonable person in the complainant's position may perceive the actor's persistence....to be hostile."

The problem with the EEOC's analysis is that it suggests that an indication that conduct is unwelcome may help show the conduct is objectively offensive, that is, to a "reasonable person." If an employee makes clear that conduct is unwelcome, that ordinarily should establish that the conduct is subjectively offensive but may be entirely irrelevant as to whether it is objectively offensive. The following example illustrates the point.

A supervisor asks a subordinate whether she had a good weekend. The subordinate perceives the question to be an indirect way of asking about her sexual activity and states that she finds the question offensive. The next week, notwithstanding the employee's making clear the question is not welcome, the supervisor asks again.

The supervisor has exercised bad judgment. The supervisor also has not respected the employee's wishes. But the employee's statement that the question is unwelcome does not turn the question into objectively offensive conduct simply because the employee does not like it. Indeed, the EEOC's language would allow an employee to dictate what can and cannot be said simply by saying "that offends me." If everything is harassment, then nothing is harassment. We respectfully suggest the current language not only is inconsistent with the case law but also could undermine the seriousness of what harassment is and should, therefore, be revised.

4. Alter Ego or Proxy of Employer

The EEOC states that if an individual is an "alter ego" or "proxy" for an employer, the employer is strictly liable for his or her conduct. The EEOC gives the following as examples of those who "speak" for the organization and are therefore deemed its "alter ego" or "proxy": sole proprietors, owners, partners, corporate officers and high-level supervisors.

The EEOC's guidance is directly at odds with the Supreme Court's unambiguous holding in Faragher and Ellerth (cited in full above). While in Faragher the Supreme Court references cases that had applied some form of proxy analysis, the Supreme Court did not hold, or even suggest,

that there is an “alter ego” or “proxy” exception to the 2-pronged affirmative defense established by the case.

To the contrary, the Supreme Court briefly made reference to “proxy” individuals in Faragher solely in summarizing pre-existing Title VII case law, like Harris v. Forklift Systems, Inc., 510 U.S. 17 (1993), and explaining why those prior decisions *had neglected* to discuss the standards governing an employer’s liability for sexual harassment by its supervisors. See Faragher, 524 U.S. at 789-90.

As the concurring opinion in Ackel v. National Communications, Inc. (a case cited by the EEOC), rightly emphasized, “[w]hen the Court subsequently established those standards, it made no mention of proxy liability.” 339 F.3d 376, 387 (5th Cir. 2003) (Garza, J., concurring).

Indeed, the holding of the twin cases speaks for itself and includes no exclusion for certain high-level individuals:

An employer is subject to vicarious liability to a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee. *When no tangible employment action is taken, a defending employer may raise an affirmative defense to liability or damages, subject to proof by a preponderance of the evidence, see FED. RULE CIV. PROC. 8(c).* The defense comprises two necessary elements: (a) that the employer exercised reasonable care to prevent and correct promptly any sexually harassing behavior, and (b) that the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.... *No affirmative defense is available, however, when the supervisor's harassment culminates in a tangible employment action, such as discharge, demotion, or undesirable reassignment.*

Faragher, 524 U.S. at 807-08 (emphasis added); see Ellerth, 524 U.S. at 765 (same).

Thus, under Faragher and Ellerth, the presence or absence of a tangible employment action is the *only* relevant factor when determining whether the affirmative defense is available. See Ackel v. National Communications, Inc., 339 F.3d 376, 387-88 (5th Cir. 2003) (Garza, J., concurring). The Supreme Court had discussed the alter ego/proxy concept but tellingly did not include an exception for it in its articulation of the 2-pronged affirmative defense.

The EEOC cites, in footnotes 136 and 138, cases in support of its position that there is an alter ego/proxy exception to the affirmative defense. Respectfully, it is not appropriate for lower courts or the EEOC following them to create an exception to the Supreme Court’s clear and unambiguous holding.

5. Dissemination of the Policy

The EEOC states that, for an anti-harassment policy to be effective, it must be “widely disseminated.” We agree with the concept but respectfully suggest that the EEOC make explicit that a policy is widely disseminated if it is posted on an intranet so as to allow employees easy, unrestricted access to it.

We agree that unrestricted access, rather than dissemination per se, would be insufficient if:

- a. Dissemination in hard copy were a reasonable accommodation under the ADA; or
- b. An employee works in a field, factory or other job where he or she did not have easy, unrestricted access to the employer’s intranet.

6. Ineffective Complaint Mechanism

The EEOC states that an employee’s failure to use the employer’s complaint procedure may be reasonable if “the complainant is aware of instances in which the employer had failed to take appropriate corrective action in response to prior complaints filed by the complainant or co-workers.” SHRM and CUPA-HR have two concerns with this language.

First, many employers do not disclose the specifics of the corrective action taken but rather only make clear that strong corrective action was taken. An employee may believe that inadequate corrective action was taken when, in fact, strong corrective action was taken, such as a final warning and ineligibility for a discretionary bonus.

This language could be read to suggest that employers need to disclose to the complainant the specifics of corrective action so that employees can assess the adequacy of it. The disclosure of what otherwise would be confidential information puts the employer at risk of claims of violation of privacy and defamation.

Respectfully, it is for the EEOC and the courts, not employees, to determine the adequacy of the employer’s corrective action

Second, the EEOC also states that an employee’s failure to use the complaint procedure may be reasonable if he or she or another employee previously had been subjected to retaliation for complaining about harassment. While retaliation is a persistent problem, this language suggests that employees, not the EEOC or the courts, get to assess what constitutes retaliation.

An example illustrates the point: an employee complains about harassment. For entirely lawful reasons unrelated to the complaint, the employee receives a negative performance review. The employee may perceive a causal connection and share that with a co-worker. The initial complainant’s erroneous perception cannot be the basis for the co-worker’s failure to take advantage of the complaint procedure available to him or her.

Therefore, EEOC should remove references that allow an employee's possibly erroneous perceptions of the adequacy of employers' corrective actions to justify a failure to use the employer's complaint procedure.

7. Corrective Action

In its discussion of "Unreasonable Failure to Correct Harassment of Which the Employer Had Notice," the EEOC cites a 2006 7th Circuit case – Erickson v. Wis. Dep't of Corr., 469 F.3d 600, 605-06 (7th Cir. 2006) – in support of its proposition that an employer has a duty to take corrective action in response to conduct even before such conduct rises to the level of actionable harassment/hostile work environment, if such corrective action would have prevented escalation.

The 7th Circuit decision does not go as far as the EEOC suggests and, moreover, is limited, in many respects, to its unique facts. In Erickson, the court applied a negligence standard to determine whether the employer, a division of the state correctional system, was liable for sexual harassment where an inmate in an all-male minimum security prison housed in the same building as the employer, and who had been authorized by the prison to perform janitorial work in the employer's offices, sexually assaulted a female employee, after the employee had reported she found the prisoner in her office after hours staring at her in a way that made her very uncomfortable.

In rejecting the employer's contention that it could be held liable only if it had notice of actual prior acts of sexual harassment, the court stated that an employer who receives notice that some probability of sexual harassment exists must adequately respond to that information within a reasonable amount of time. The court did not hold, as the EEOC suggests, that an employer must take corrective action in response to inappropriate co-worker conduct, even when such conduct does not rise to the level of actionable harassment.

We agree that an employer who receives notice that some probability of harassment may exist must respond to the information it has. However, it is an erroneous stretch to say that, even if the conduct is not actionable, there is a legal requirement to take corrective action in response to it. The Guidance should be revised to reflect that there is no legal requirement to take corrective action in response to conduct which is not actionable.

8. Promising practices

We appreciate the EEOC's suggestions in Section VI, "Promising Practices." Implicit in the suggestions is that they are not legal requirements. To avoid confusion, however, we respectfully request that the EEOC state affirmatively in the text of the Guidance that the promising factors are not legal requirements.

This suggestion is consistent with footnote 254 on page 69 of the proposed Guidance. It also is consistent with the EEOC's disclaimer relative to each of the Checklists that are included as

Appendix B to the July 2016 Report of the Co-Chairs of the EEOC Select Task Force Report on the Study of Harassment:

A reminder that this checklist is meant to be a useful tool in thinking about and taking steps to prevent harassment in the workplace, and responding to harassment when it occurs. It is not meant to convey legal advice or to set forth legal requirements relating to harassment. Checking all of the boxes does not necessarily mean an employer is in legal compliance; conversely, the failure to check any particular box does not mean an employer is not in compliance.

As you know, many of the “promising practices” in the proposed Guidance parallel the Checklists for Employers that are part of Appendix B.

SHRM and CUPA-HR appreciate the opportunity to comment on the proposed harassment guidance and would be happy to answer any questions the Commission may have about the issues raised in this comment letter.

Respectfully Submitted,



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