



Office of the General Counsel

3211 FOURTH STREET NE • WASHINGTON DC 20017-1194 • 202-541-3300 • FAX 202-541-3337

Submitted Electronically

October 27, 2023

Raymond Windmiller
Executive Officer
Executive Secretariat
U.S. Equal Employment Opportunity Commission
131 M Street NE
Washington, DC 20507

**Subj: Proposed Enforcement Guidance on Harassment in the Workplace
Agency Docket No. EEOC-2023-0005, RIN 3046-ZA02**

Dear Mr. Windmiller:

On behalf of the United States Conference of Catholic Bishops (USCCB), we respectfully submit the following comments on the proposed enforcement guidance on harassment in the workplace, published by the Equal Employment Opportunity Commission. *See* 88 Fed. Reg. 67750 (Oct. 2, 2023) (notice of availability and request for comment).

The guidance states that sex-based harassment includes harassment based on (1) “a woman’s reproductive decisions, such as decisions about contraception or abortion,” and (2) “sexual orientation and gender identity.” Proposed Guidance at 10-11.¹

We believe that reading Title VII to chill or prohibit speech that upholds the sanctity of life, the nature of conjugal relationships, or the created, bodily reality of human beings is not supported by the text of Title VII and likely runs afoul of constitutional rights of speech, expressive association, and religious exercise.

1. Abortion

Title VII forbids workplace harassment—including speech so severe or pervasive as to alter the terms and conditions of one’s employment—based on specified categories, including sex. But for workplace comments to constitute *sexual* harassment under Title VII, the comments must be *based* on sex.

¹ The USCCB understands “gender” to be rooted in the biological reality of sexual difference as male and female.

Opposition to abortion (including speech opposing abortion) is not sexual harassment because it is not based on sex. *See Bray v. Alexandria Women’s Health Clinic*, 506 U.S. 263 (1993). *Bray* rejected the claim that opposition to abortion reflects an animus against women in general or against the class of women seeking abortion in particular. *Id.* at 269-74. As the Court pointed out, sex-based discrimination “demand[s] ... at least a purpose that focuses upon women by ‘reason of their sex,’” and opposition to abortion is not by reason of an individual’s sex. *Id.* at 270.

Bray (*id.* at 270-71) also rejected the notion that opposition to abortion functions as a proxy or surrogate for sex-based discrimination:

[O]pposition to voluntary abortion cannot possibly be considered ... an irrational surrogate for opposition to (or paternalism towards) women. Whatever one thinks of abortion, it cannot be denied that there are common and respectable reasons for opposing it, other than hatred of, or condescension toward (or indeed any view at all concerning), women as a class—as is evident from the fact that men and women are on both sides of the issue....

Respondents’ case comes down ... to the proposition that intent is legally irrelevant: that since voluntary abortion is an activity engaged in only by women, to disfavor it is *ipso facto* to discriminate invidiously against women as a class. Our cases do not support that proposition.

It follows that workplace speech opposing abortion does not violate Title VII.²

Furthermore, reading Title VII to bar workplace speech opposing abortion would raise serious problems with respect to constitutionally protected rights of free speech, expressive association, and religious exercise. *See NLRB v. Catholic Bishop*, 440 U.S. 490, 501 (1979) (a federal statute should not be construed in a way that raises serious constitutional problems in the absence of an “affirmative intention of the Congress clearly expressed”). It is inconceivable that our nation’s highest court, having just recently held that the Constitution does not enshrine a right to an abortion, would now interpret Title VII to forbid or chill workplace speech on this subject. As then-Judge Alito put it, writing for the Third Circuit, “[t]here is no categorical ‘harassment exception’ to the First Amendment’s free speech clause.” *Saxe v. State College Area Sch. Dist.*, 240 F.3d 200, 204 (3d Cir. 2001). The right of expressive association is also implicated, for many employers, especially in the nonprofit and religious community, advocate views on abortion as part of their mission. Opposition to abortion, including objections grounded in religious and moral rationales, has been recognized and protected in federal law for at least half a century. *E.g.*, 42 U.S.C. § 300a-7 (the Church amendment, first enacted in 1973 and amended from time to time thereafter).

² We encourage speech on abortion and other moral issues that is respectful, courteous, and constructive. It is reasonable for employers and employees to insist upon civility and non-disruption in the workplace as a general matter. But on issues that involve no protected category, such as abortion, Title VII itself is silent and therefore has no role. *See Oncale v. Sundowner Offshore Servs.*, 523 U.S. 75, 80 (1998) (noting that Title VII is concerned with discrimination on certain specified bases; it is not “a general civility code for the American workplace”).

For these reasons, we believe that references to abortion in the harassment guidance are problematic and should be removed.

2. Contraceptives

Lower federal courts are divided on whether Title VII's bar on sex discrimination encompasses contraceptives, but the only federal appellate decision to reach the issue has held that it does not. *In re Union Pacific Railroad Employment Practices Litigation*, 479 F.3d 936 (8th Cir. 2007). Moreover, workplace speech opposing artificial contraception, like speech opposing abortion, is not based on sex and therefore does not constitute sexual harassment under Title VII. As it happens, both men *and* women may practice or refrain from practicing artificial means of preventing conception, whether temporarily (including through use of condoms) or permanently (sterilization), further undermining the claim that opposition to artificial contraceptives is based on sex.

Furthermore, construing Title VII to chill or forbid workplace speech opposing contraceptives would raise the same raft of constitutional issues as discussed above with respect to abortion.

For these reasons, we believe that references to contraceptives in the guidance are problematic and should be removed.

3. Gender Identity and Sexual Orientation

Bostock v. Clayton County, 140 S. Ct. 1731, 1754 (2020), held that an employer “who fires an individual merely for being gay or transgender” violates Title VII. *Bostock* reached no other issue. And *Bostock* was explicit that it was not deciding other issues, all of which were reserved for future cases.

With respect to sexual orientation and gender identity, the proposed guidance creates at least two problems. First, the Commission comes perilously close to reading Title VII as a speech code by suggesting that “misgendering” an employee (that is, referring to an employee by their actual sex) or uttering critical speech on the issue of gender identity or sexual orientation may constitute sexual harassment. Second, the proposed guidance reads Title VII to require that at least some men be allowed in private areas reserved to women, and that at least some women be allowed in private areas reserved for men, to include locker rooms and restrooms.

Respectfully, we believe the proposed guidance is wrong on both counts.

Speech on sensitive and controversial political subjects that are of “profound value and concern to the public,” like “sexual orientation and gender identity,” “occupies the highest rung of the hierarchy of First Amendment values and merits special protection.” *Janus v. American Fed. of State, Cnty., and Mun. Employees*, 138 S. Ct. 2448, 2476 (2018) (internal quotation marks omitted). An individual’s interest in refusing to use gender pronouns at variance with biological sex is “especially strong” when the rationale for doing so “relates to his core religious and philosophical beliefs.” *Meriwether v. Hartop*, 992 F.3d 492, 509 (6th Cir. 2021) (reinstating

free speech and free exercise claims of professor who objected on religious and philosophical grounds to using pronouns corresponding to students' gender identity). Such an individual has a "strong claim ... that his public dissent implicates 'fundamental societal values' deeply embedded in our Constitutional Republic." *Loudoun Cty. Sch. Bd. v. Cross*, No. 210584, 2021 WL 9276274, at *6 (Va. Aug. 30, 2021) (upholding relief in favor of a public-school teacher with religious and other objections to referring to boys as girls or vice versa). The same high value must be placed on speech that pertains to marriage, understood as the union of one man and one woman, or to sexual relations outside of marriage.

Reading Title VII to chill or forbid speech on these issues is not only content-based but *viewpoint*-based because it prohibits speech on one side of the issue but not the other. It therefore triggers the most exacting scrutiny, a standard that such a reading of Title VII is not likely to survive. There is no legitimate interest, let alone a compelling one, in forbidding political and other speech on these issues on the basis of substantive content or viewpoint, nor is the guidance in this regard narrowly tailored to further any such interest.

Lastly, Title VII's prohibition of sexual harassment is not correctly applied to require employers to permit the admission of persons of one sex to areas, such as restrooms and dressing areas (e.g., locker rooms), that for reasons of privacy (and even for the *prevention* of sexual harassment) are lawfully reserved to members of the opposite sex. Congress did not remotely speak to this question in Title VII. Nor did the Court address it in *Bostock*. Title VII cannot reasonably be read to prescribe, or to give the Commission the authority to prescribe, nationwide rules barring employers from maintaining sex-specific workplace restrooms and dressing areas as to all employees.

Conclusion

We recommend that the Commission revise the guidance to remove references to contraceptives and abortion because speech on these subjects (a) is not sex-based and (b) is constitutionally protected. We also recommend that the Commission revise the guidance to remove references to speech concerning gender identity and sexual orientation because (a) application of Title VII's prohibition on sex-based harassment to encompass these categories goes beyond *Bostock*'s holding, (b) such speech is constitutionally protected, and (c) Title VII does not create nationwide workplace rules forbidding references to individuals by their actual sex, critical speech on the subject of gender identity or sexual orientation, or single-sex restrooms and dressing areas.

Thank you for the opportunity to comment on the proposed guidance.

Respectfully submitted,

William J. Quinn
General Counsel

Michael F. Moses
Director, Legal Affairs

Daniel E. Balsarak
Assistant General Counsel and
Director, Religious Liberty