



November 1, 2023

Submitted electronically

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

**Re: Public comment regarding “Proposed Enforcement Guidance on Harassment in the Workplace”**

**RIN: 3046–ZA02**

Dear Mr. Windmiller,

Family Research Council (FRC) is a nonprofit research and educational organization whose vision is a prevailing culture in which all human life is valued, families flourish, and religious liberty thrives. FRC recognizes and respects the dignity of every human life, from conception to natural death.

FRC possesses a particular concern for laws, regulations, and guidance documents and policies that may infringe upon the religious freedom of all Americans. In light of this concern, we respectfully submit this comment in response to the notice published by the Equal Employment Opportunity Commission (EEOC or the Commission) entitled “Proposed Enforcement Guidance on Harassment in the Workplace,” 88 Fed. Reg. 67750 (Oct. 2, 2023). The EEOC’s accompanying 99-page proposed harassment guidance document (“Guidance”) was not published in the Federal Register but was posted online.

The Guidance states (p. 1) that, when finalized, it will supersede a number of previous guidance documents issued by the EEOC. This is a sweeping document that seeks to reframe EEOC harassment policy and law. FRC believes the most notable and worrisome aspect of this proposed Guidance is the agency’s claim that the U.S. Supreme Court’s 2020 decision in *Bostock* (which only “concerned allegations of discriminatory discharge”) “logically extends to claims of harassment.” (Guidance 10-11, fn. 29, citation omitted). See *Bostock v. Clayton Cnty.*, 140 S. Ct. 1731 (2020). FRC believes that this expansion of *Bostock*’s reach is excessive because the case focused merely on a dismissal, and Justice Gorsuch, the author of the majority opinion in *Bostock*, expressly and intentionally limited the decision to that context. *Bostock*, 140 S. Ct. 1731, 1753.

#### Free Speech and Religious Protections

This aggressive infusion of sexual orientation and gender identity into harassment policy is troubling for religious believers, both employers and employees. On this point, we take note of the excellent comment submitted in this proceeding by the Christian Employers Alliance (CEA and CEA Comment).

CEA states categorically that its members adhere to a biblical worldview regarding sex and gender. CEA holds that “God ‘made them male and female,’ CEA’s Statement of Faith and Ethical Convictions provides that ‘[m]ale and female are immutable realities defined by biological sex.’” CEA Comment at 1.

Furthermore, CEA points out that the new Guidance may pit employment law against companies that adhere to the same biblical worldview that CEA does (CEA Comment at 1).

Given this Biblical understanding of human sexuality as binary and immutable, our members do not adhere to the pervasive ideology that there are multiple genders beyond the male and female sexes. They oppose providing or paying for actions supporting purported gender transition and reassignment, and they oppose speaking in ways that contradict the binary biological fact of male and female sexuality.

We find CEA’s attestation as to the problematic reality of the employment law being stealthily created by EEOC to be completely plausible.

Like CEA, FRC also believes that the Guidance offers no comfort to religious believers or those exercising their free speech rights on such important matters as sex or gender. The Commission states that sex-based harassment may include “intentional and repeated use of a name or pronoun inconsistent with the individual’s gender identity (misgendering).” Guidance at 10-11. There is no discussion at this point or anywhere in the Guidance indicating an awareness of concerns related to compelled speech and First Amendment protections.

The Guidance ought to have had a discussion or at least an acknowledgment of *Meriwether v. Hartop*, 992 F.3d 492 (6<sup>th</sup> Cir. 2020). In that case, university officials punished a Christian professor, Dr. Nicholas Meriwether, because he declined a biological male student’s demand to be referred to with feminine titles and pronouns (“Miss,” “she,” etc.). According to Dr. Meriwether’s attorneys, he “offered to use the student’s preferred first or last name instead.” The university decided to punish him, and he went to court being unwilling to act in a manner that was “contrary to his own philosophical and Christian ideals.” In March 2021, the Sixth Circuit decided against the university, stating, “Simply put, professors at public universities retain First Amendment protections at least when engaged in core academic functions, such as teaching and scholarship.” *Meriwether*, 992 F.3d at 505.

The Commission tries to glide by the extensive case law regarding protections for religious organizations and provides no discussion of the ministerial exception. The First Amendment, Title VII, Religious Freedom Restoration Act (RFRA) protections are given unsympathetic treatment. This is not acceptable, in particular, because *Bostock* itself references the U.S. Constitution, Title VII (religious exemption, § 2000e-1(a)), and RFRA as possible avenues of defense for religious employers. *Bostock*, 140 S.Ct. at 1753-1754.

In fact, the Commission’s treatment of accommodating religious beliefs is egregious. Such protections are practically dismissed outright in this paragraph (Guidance at 93, citations omitted):

Special consideration when balancing anti-harassment and accommodation obligations with respect to religious expression: Title VII requires that employers accommodate employees' sincerely held religious beliefs, practices, and observances in the absence of undue hardship. Employers, however, also have a duty to protect workers against religiously motivated harassment. Employers are not required to accommodate religious expression that creates, or reasonably threatens to create, a hostile work environment. As with other forms of harassment, an employer should take corrective action before the conduct becomes sufficiently severe or pervasive to create a hostile work environment.

This is an extreme reading of the law. A recent Fifth Circuit opinion issued three months before this Guidance was proposed demonstrates that an earlier EEOC guidance document suffered from similar problems. Yet, the Commission paid no heed and proceeded accordingly, as evidenced by the Guidance now under consideration.

In *Braidwood Management, Inc., v. Equal Employment Opportunity Commission*, 70<sup>th</sup> F.4th 914 (5<sup>th</sup> Cir. 2023), the Court held that the earlier guidance interpreting sex discrimination to include sexual orientation and gender identity could not be enforced against the plaintiffs, who were religious employers with deeply held beliefs informing their policies. It was found that, in such circumstances, “the EEOC guidance almost assuredly burdens the exercise of religious practice.” *Braidwood*, 70<sup>th</sup> F.4<sup>th</sup> at 937. Furthermore, the Court found that the EEOC “does not show a compelling interest in denying Braidwood, individually, an exemption.” *Braidwood*, 70<sup>th</sup> F.4<sup>th</sup> at 939-40. Furthermore, “refusing to exempt Braidwood, and forcing it to hire and endorse the views of employees with opposing religious and moral views is not the least restrictive means of promoting that interest.” *Braidwood*, 70<sup>th</sup> F.4<sup>th</sup> at 940. This seems to be a thorough-going rejection of the EEOC’s mindset regarding its power to easily override religious beliefs.

A similar rationale will be brought to bear against the proposed guidance on harassment if the final version mirrors those standards put forth in this document. The Fifth Circuit rejected EEOC’s wide-ranging view of its authority in *Braidwood* while offering restricted protections for religious believers.

In closing, there is something awry about the Commission’s treatment of the rights of religious believers when they come into conflict with other laws or regulations. Accordingly, we believe that the Commission should withdraw this Guidance and fix it.

Respectfully submitted,

/s/ Christopher M. Gacek, J.D. Ph.D.  
Senior Fellow for Regulatory Policy

Family Research Council  
801 G Street, NW  
Washington, DC 20001