



January 30, 2023

Equal Employment Opportunity Commission
131 M Street, NE
Washington, DC 20507

Submitted via regulations.gov

Re: First Liberty Institute's Public Comment on the EEOC's Draft Strategic Enforcement Plan for 2023-2027 (EEOC-2022-0006)

Equal Employment Opportunity Commission:

Thank you for the opportunity to comment on the EEOC's Draft Strategic Enforcement Plan ("SEP") for advancing equal opportunity in the workplace in fiscal years 2023-2027. 88 Fed. Reg. 1379 (Jan. 10, 2023). First Liberty Institute understands that the EEOC seeks input from the public on the effect that emerging issues should have on the agency's enforcement priorities.

The EEOC must continue to fulfill its mandate to combat employment discrimination based on race, sex, religion, color, national origin, age, disability, and genetic information. In light of the U.S. Supreme Court's June 15, 2020, *Bostock v. Clayton County* decision, employers and employees need increased direction from the EEOC about how to simultaneously protect employees from religious discrimination and from discrimination based on sexual orientation or transgender status. The EEOC must not favor one and disfavor the other.

The EEOC should use its enforcement priorities to demonstrate that it is possible for companies to employ workers with widely divergent views about religion and sexuality without discriminating against any employee. Employers can teach employees that they are obliged to work in a civil manner with fellow employees with whom they may strongly disagree on issues they deem important. Employers should emphasize their commitment to fulfilling their statutory duty to not discriminate against employees on either side of these contentious issues. The EEOC should set an example for employers in how to teach this statutory requirement to employees and require them to abide by it.

From the point of view of First Liberty Institute, which is a public interest law firm dedicated to defending religious liberty for all Americans, the public has come to understand that employers covered by the EEOC's statutes must not discriminate against employees simply because of their sexual orientation or because they are transgender. Employers have learned this through the media attention that followed the *Bostock* decision and the subsequent and ongoing efforts of the EEOC. However, to a notable extent, the public fails to grasp or has lost its prior understanding about Title VII's prohibition of employment discrimination on the basis of religious belief or practice.

Many of the world's major religions, including but not limited to Christianity, Hinduism, Islam, and Judaism, historically taught that only certain sexual behaviors are morally acceptable. Many religious people continue to hold such beliefs. However, employees are being discriminated against in the workplace and sometimes being barred from the workplace simply because of their religious beliefs about human sexuality and their inability in good conscience to uphold contrary beliefs. Pursuant to Title VII, no employee should be discriminated against on the basis of his religious beliefs.

According to Appendix A to §§ 1605.2 and 1605.3 of the EEOC's Title VII regulations, 29 CFR 1605.1ff:

In 1978, the Commission conducted public hearings on religious discrimination.... The Commission found from the hearings that ... [s]ome [religious] practices which are not being accommodated are:

- Observance of a Sabbath or religious holidays;
- Need for prayer break during working hours;
- Practice of following certain dietary requirements;
- Practice of not working during a mourning period for a deceased relative;
- Prohibition against medical examinations;
- Prohibition against membership in labor and other organizations; and
- Practices concerning dress and other personal grooming habits.

29 C.F.R. §§ 1605.2, 1605.3 App. A. Since 1978, the EEOC has taken efforts to remedy discrimination based on the above-referenced types of religious discrimination. However, an emerging issue in the workplace is that religious employees are now facing discrimination for reasons that do not appear on the above list. In particular, employees are being discriminated against not only because of religious practices that require accommodation, but also because they hold religious beliefs that prevent them from celebrating LGBTQ+ issues or from participating in the provision of birth control or abortion services. Employers are penalizing employees not for what their religion requires them to do so much as for what their religion forbids them to support or participate in. This is an emerging issue in employment law that the EEOC should strategically prioritize.

On September 15, 2020, the EEOC rightly addressed this issue by filing suit against Kroger Grocery Stores for firing two employees, Trudy Rickerd, a cashier with 12 years at Kroger, and Brenda Lawson, a deli worker with 8 years at Kroger, who asked not to be required to display appliques on their uniform that the employees understood to be LGBTQ-pride symbols. The employer insisted on coercing these employees' speech and fired them for noncompliance. However, First Liberty Institute is not aware of the EEOC's bringing any other cases on behalf of employees who are terminated because of similar religious beliefs.

Many such examples of religious discrimination exist. We have recently heard of several situations where employees have been disciplined because they were not able to provide

“correct” answers to questions on LGBTQ+ consciousness quizzes without violating their religious beliefs, and we have received an increasing number of inquiries from employees who have been pressured to violate their religious beliefs with regard to pronoun usage. We know of other situations where medical professionals have been discriminated against for not participating in abortion procedures or medical procedures related to gender dysphoria that violated their religious beliefs. The following are brief descriptions of recent religious discrimination cases that we are aware of:

- Marli Brown and Lacey Smith, two former flight attendants for Alaska Airlines, were fired for expressing religious views about the proposed Equality Act.
- Charlene Carter, a Southwest flight attendant, was fired for expressing her religious views on abortion.
- Stephanie Carter, a nurse practitioner at a veterans’ hospital, was denied a religious accommodation for participating in abortions under a new Veterans’ Administration interim final rule.
- Paige Casey, a licensed nurse practitioner in Northern Virginia, was fired by CVS because her religious beliefs prohibit her from providing abortion-inducing drugs to customers.
- Kelvin Cochran, a former fire chief in Atlanta, Georgia, was fired because of his religious views about marriage.
- Betsy Fresse, a New Jersey Starbucks barista, was fired because she did not want to wear an LGBTQ-Pride polo shirt, which espoused a belief contrary to her religious beliefs.
- John Gibson, a former company president, was fired for a social media post supporting a U.S. Supreme Court decision that affirmed a Texas law banning abortions for fetuses with a heartbeat.
- Valerie Kloosterman, a physician assistant, was fired after she sought a religious accommodation from referring patients for sex-obscuring procedures and experimental drugs and from using biology-obscuring pronouns.
- Nick Meriweather, a professor at Shawnee State University, was disciplined for refusing to refer to a biological male student with female pronouns.
- Dean Naylor, a jail administrator in Muscatine, Iowa, was fired because of a ten-year-old social media post expressing his religious beliefs.

- Robyn Strader, a nurse practitioner at CVS, who previously had a religious accommodation for her religious objection to prescribing contraceptives, was fired after the CVS minute clinic where she worked revoked her religious accommodation.
- Peter Vlaming, a French teacher at West Point High School in Virginia, was willing to use a student's newly chosen name and to avoid using male or female pronouns, but he was fired for not agreeing to use the student's preferred pronouns, conduct that would have violated his religious convictions.

As another example of discrimination, the COVID-19 pandemic and its economic fallout had a disproportionate impact on another protected class not mentioned in the SEP¹—on religious employees, as many were forced to choose between receiving a vaccination in violation of their sincerely held religious beliefs and losing their jobs. The Fifth Circuit recently explained the dilemma countless people of faith faced during the pandemic, saying, “It’s about a loss of faith. And it’s about a crisis of conscience. You’re being coerced into sacrificing your faith in order to keep your job.” *Sambrano v. United Airlines, Inc.*, 45 F.4th 877, 879 (5th Cir. 2022). In 2021 and 2022, First Liberty received thousands of calls from employees with a religious objection to their employer’s vaccine mandate. The EEOC also must have received a significant influx of charges stemming from employers firing employees who did not receive the COVID-19 vaccine because of their religious beliefs.

In the past, the EEOC advocated on behalf of employees whose requests for religious accommodations from an employer’s flu vaccine requirement were not accommodated, and it recently sued Children’s Healthcare of Atlanta on behalf of a worker who sought a religious accommodation from a flu vaccine mandate. However, to our knowledge, the EEOC has not brought a single case on behalf of an employee who was denied a religious accommodation to an employer’s COVID-19 vaccine requirement. The EEOC’s new SEP provides an opportunity for the agency to reaffirm its support for religious employees denied religious accommodations.

In particular, whether in the context of vaccine accommodations or in other contexts, the EEOC should address the concerning trend of employers acting from a presumption that their employees’ religious beliefs are insincere, rather than acting from a presumption of sincerity. Similarly, many employers wrongly dismiss requests for religious accommodations as “not religious” simply because they invoke an employee’s conscience or moral beliefs. *See* 29 C.F.R. § 1605.1.

Additionally, we have seen an increase in the number of calls from employees facing adverse employment action because of private social media posts reflecting their religious convictions. The EEOC should prioritize educating employers about the right of employees to communicate their religious beliefs about what is important to them to the same extent that employees are permitted to communicate their non-religious beliefs about what is important to them. We have also found that while Title VII makes clear that employees may not be subjected

¹ The Executive Summary of the EEOC’s proposed SEP explains, “The COVID-19 pandemic and its economic fallout continue to disproportionately impact people of color and other vulnerable workers, exposing and magnifying inequalities in our society.” 88 Fed. Reg. at 1379.

to adverse employment actions simply because of their personal religious beliefs, many employees are unaware that federal law protects them as religious workers. The EEOC should prioritize educating employees about their rights to be free from religious discrimination in the workplace.

These three issues—employees facing discrimination because of (1) their religious beliefs about issues related to sexuality and abortion, (2) their religious objections to vaccines, and (3) their expression of their religious beliefs—all meet multiple criteria used by the Commission to identify priorities for this SEP, including “Issues affecting workers who may be unaware of their rights under equal employment opportunity laws or reluctant ... to exercise their rights,” “Issues involving developing areas of the law, where the Commission’s expertise is particularly valuable,” and “Issues involving policies or practices that impede or impair full enforcement of federal employment discrimination laws.” 88 Fed. Reg. 1381.

On August 23, 2022, U.S. Secretary of State Anthony Blinken issued a statement recognizing the International Day Commemorating the Victims of Acts of Violence based on Religion or Belief in which he said:

May this day offer assurance to those suffering for their beliefs that the United States and likeminded partners have not forgotten or forsaken you. We see you, we hear you, and we remain unwavering in our commitment to ensure your freedom, protection, and peaceful exercise of your beliefs.

Violence based on religion or belief begins with the lesser but still very real problem of religious discrimination in the workplace. The EEOC should include in its Strategic Enforcement Plan for 2023-2027 the express goals of protecting employees from discrimination based on (1) their religious beliefs about issues related to sexuality and abortion, (2) their religious objections to vaccines, and (3) their expression of their religious beliefs. The EEOC’s new SEP should include prioritizing enforcement actions that will clarify the rights of religious employees to be free from religious discrimination in the workplace.

Respectfully submitted,



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