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June 4, 2024

The Honorable Charlotte A. Burrows
Chair
U.S. Equal Employment Opportunity Commission
131 M Street, NE
Washington, DC 20507

Dear Chair Burrows:

The Equal Employment Opportunity Commission (EEOC) and the National Labor Relations Board (NLRB) are working on a joint memorandum on offensive workplace speech that may constitute harassment under Title VII of the *Civil Rights Act*.¹ The Committee on Education and the Workforce (Committee) seeks assurances that EEOC will receive public input before issuing a final joint memorandum on this important topic, as EEOC has done in the past.²

In 2023, the Biden administration NLRB overruled precedent and expanded the standard of offensive conduct and speech that employers must allow as protected activity under the *National Labor Relations Act* (NLRA).³ Absurd results have followed from this ruling. In January 2024, an NLRB administrative law judge (ALJ) ruled that Amazon could not fire a warehouse worker for using abusive, harassing, sexist, and misogynistic language directed at a female coworker using a bullhorn. The ALJ later ruled Amazon must reinstate the warehouse worker.⁴

EEOC's current stated policy is in stark contrast to the NLRB's. In 2019, EEOC, on a bipartisan basis, authorized the filing of an amicus brief stating that an employer may discipline an

¹ Khorri Atkinson, *EEOC, NLRB Promise Guidance on Profanity During Union Activity*, BLOOMBERG L., Mar. 21, 2024.

² *See, e.g.*, EEOC, PROPOSED ENFORCEMENT GUIDANCE ON HARASSMENT IN THE WORKPLACE, <https://www.eeoc.gov/proposed-enforcement-guidance-harassment-workplace>; EEOC, WHAT YOU SHOULD KNOW ABOUT THE EEOC'S STRATEGIC ENFORCEMENT PLAN (SEP), <https://www.eeoc.gov/what-you-should-know-about-eeocs-strategic-enforcement-plan-sep>; Press Release, EEOC Seeks Public Input on Revised Enforcement Guidance on Religious Discrimination (Nov. 17, 2020), <https://www.eeoc.gov/newsroom/eeoc-seeks-public-input-revised-enforcement-guidance-religious-discrimination>.

³ Lion Elastomers LLC, 372 NLRB No. 83 (May 1, 2023).

⁴ Haleluya Hadero, Judge rules Amazon must reinstate fired warehouse worker, AP, YAHOO!LIFE, Apr. 18, 2024, <https://ca.style.yahoo.com/news/judge-rules-amazon-must-reinstate-022507631.html>.

The Honorable Charlotte A. Burrows

June 4, 2024

Page 2

employee for abusive or offensive statements that might be protected by the NLRA.⁵ Any backsliding from the position taken in this amicus brief will demonstrate that the Biden administration's insistence on appeasing labor unions takes precedence over protecting workers from harassment. It would also be a sad commentary on EEOC's leadership. Ironically, EEOC only recently issued final guidance on workplace harassment, which will be a dead letter if EEOC accedes to the NLRB's approach.⁶

To ensure EEOC receives input from the public on a draft EEOC-NLRB memorandum on workplace speech before it is finalized, the Committee requests responses to the following questions by June 19, 2024:

1. Will EEOC post a draft EEOC-NLRB memorandum for public comment before a final memorandum is published, and, if so, for how many days will it be posted for public comment?
2. If a draft memorandum is posted, will EEOC take the comments it receives into consideration and revise the draft memorandum as necessary?
3. If a draft memorandum is not posted for public comment, what is EEOC's justification for failing to take public comments on this important topic?

Thank you for your prompt responses to these questions.

Sincerely,



Virginia Foxx
Chairwoman

⁵ Brief of EEOC as Amicus Curiae, General Motors LLC, Cases 14-CA-197985, 14-CA-208242 (NLRB Nov. 4, 2019).

⁶ EEOC, ENFORCEMENT GUIDANCE ON HARASSMENT IN THE WORKPLACE (Apr. 29, 2024). The new harassment guidance should be rescinded or revised on other grounds. See Press Release, Comm., Chair Foxx on EEOC's Distorted Workplace Guidance (Apr. 29, 2024), <https://edworkforce.house.gov/news/documentsingle.aspx?DocumentID=410497>.