

United States Senate
WASHINGTON, DC 20510

July 14, 2021

Charlotte A. Burrows
Chair
Equal Employment Opportunity Commission
131 M St NE
Washington, DC 20002

Dear Ms. Burrows:

We write with serious concern about the Equal Employment Opportunity Commission’s (“EEOC”) purported guidance document entitled “Protections Against Employment Discrimination Based on Sexual Orientation or Gender Identity.”¹ This document takes an extreme and partisan interpretation of Supreme Court precedent and was issued in violation of established procedures, as detailed in 29 C.F.R. § 1695.2(d). It should be rescinded immediately.

Title VII of the Civil Rights Act of 1964 outlawed discrimination in the workplace on the basis of “race, color, religion, sex, or national origin.”² In *Bostock v. Clayton County*, the Supreme Court interpreted Title VII’s prohibition on discrimination on the basis of “sex” as including sexual orientation and gender identity.³ The Supreme Court clearly asserted that “The only question before us is whether an employer who fires someone simply for being homosexual or transgender has discharged or otherwise discriminated against that individual ‘because of such individual’s sex.’”⁴ The Court did not purport to address matters pertaining to sex-segregated spaces, pronoun usage, dress codes, or other terms, conditions, or privileges of employment such as training, promotions, or pay.

At the time, we criticized this decision on the Senate floor. Senator Hawley warned that the decision would result in “far-reaching” consequences “from employment law to sports to churches.”⁵ He predicted this based on what “every honest person knows,” namely, “that the laws in this country today are made almost entirely by unelected bureaucrats and courts.”⁶ Senator Lee criticized the decision for taking “a meat cleaver to the issue” without considering exceptions for religious entities or protections for women’s sports, restrooms, and shelters.⁷ We believe that *Bostock* was wrongly decided, but your guidance goes far beyond what even the Supreme Court sanctioned.

The EEOC’s new guidance document advances a radical interpretation of *Bostock* to support a far-Left agenda. Its interpretation is insupportable: as a senior EEOC official recently stated, “No one who has actually read the *Bostock* opinion could make such sweeping claims in good faith.”⁸

¹ EEOC, *Protections Against Employment Discrimination Based on Sexual Orientation or Gender Identity*, NVTA-2021-1 (June 15, 2021), <https://www.eeoc.gov/laws/guidance/protections-against-employment-discrimination-based-sexual-orientation-or-gender>.

² Pub. L. 88-362, § 703, 78 Stat. 241, 255 (July 2, 1964).

³ 140 S. Ct. 1731, 1737 (2020).

⁴ *Id.* at 1753.

⁵ 116 Cong. Rec. S2998–99 (June 16, 2020) (statement of Sen. Hawley).

⁶ *Id.* at S2999.

⁷ 116 Cong. Rec. S3082-83 (June 18, 2020) (statement of Sen. Lee).

⁸ Kevin Daley, *Career Officials Chafe at EEOC Transgender Guidance*, WASH. FREE BEACON (June 25, 2021), available at <https://freebeacon.com/courts/career-officials-chafe-at-eeoc-transgender-guidance/>.

Here are a few examples of the guidance’s disregard for the actual precedent of the Court:

- The EEOC’s guidance states that “employers may not deny an employee equal access to a bathroom, locker room, or shower that corresponds to the employee’s gender identity.” But the Supreme Court explicitly did not address this issue in its decision, stating that “we do not purport to address bathrooms, locker rooms, or anything else of the kind.”⁹
- The document also claims that the use of pronouns inconsistent with an employee’s gender identity can be unlawful harassment. This interpretation cannot be found in the *Bostock* majority opinion; the only mention of pronouns is in Justice Alito’s dissent, which warned that government pronoun policies would abridge the freedom of speech.¹⁰
- Further, the document asserts that “Prohibiting a transgender person from dressing or presenting consistent with that person’s gender identity would constitute sex discrimination.” But while the *Bostock* opinion mentioned that some observers feared “dress codes will prove unsustainable after our decision,” the Court explicitly stated that “we do not prejudge any such question today.”¹¹
- The guidance document discusses not just hiring and firing practices but also “promotions, demotions, discipline, training, work assignments, pay, overtime, or other compensation, fringe benefits, [and] other terms, conditions, and privileges of employment.” This broad language explicitly contradicts the majority opinion in *Bostock*, which stated that although “[f]iring employees . . . surely counts” as unlawful discrimination, whether “other policies or practices might or might not qualify as unlawful discrimination . . . are questions for future cases, not these.”¹²

In case after case, the guidance document purports to “apply” *Bostock* to issues that the opinion went to great lengths to distinguish.¹³ But the guidance extends *Bostock* to numerous issues that the opinion expressly disavowed.

In addition to misrepresenting the Court’s decision in *Bostock*, the guidance document was also issued in violation of agency procedure. According to reports, you unilaterally issued this document without allowing a vote of the EEOC’s five-member panel, despite the EEOC’s internal requirement that a vote be taken before the agency advances novel legal interpretations.¹⁴ In the words of a high-ranking EEOC official, this constitutes “a flagrant disregard for the EEOC’s own procedures and for the rule of law.”¹⁵

⁹ 140 S. Ct. at 1753.

¹⁰ See *id.* at 1782 (Alito, J., dissenting).

¹¹ *Id.* at 1754.

¹² *Id.*

¹³ For example, the guidance document implausibly asserts that, “This information is not new policy.”

¹⁴ 29 C.F.R. § 1695.29(d) (“If the guidance document sets forth the Commission’s position on a legal principle for the first time or changes the Commission’s legal position on any issue, the Commission must approve the guidance document by majority vote. Any significant guidance or guidance that is otherwise subject to notice and comment procedures must be approved by a Commission vote. Any guidance document that requires a vote of the Commission to be approved shall be circulated to the Commissioners, and, if approved, shall be signed by the Chair on behalf of the Commission.”).

¹⁵ Daley, *supra* note 8.

This is especially concerning because a majority of the Commissioners were appointed by a different political party than your own. This irregularity therefore gives rise to the inference that the Democrat-appointed Chair of the EEOC skirted regular protocol in order to enact her preferred policy preferences, knowing full well that a majority of the Commissioners would never vote for this outcome if the required process had been followed. These reports thus raise serious questions about the Biden Administration's commitment to the rule of law.

It is also flagrantly unfair to issue such substantively and procedurally flawed guidance to private parties, who are now threatened with fines and sanctions if they disagree with your partisan interpretation of *Bostock*. Employers across the country will now feel compelled, under threat of prosecution, to comply with this incorrect and extreme interpretation of Supreme Court precedent. This guidance is yet another example of how Democrat-appointed bureaucrats wish to leverage the machinery of the administrative state to bully private employers to kowtow to the social justice agenda.

The document bears out every fear that dissenting Justices Thomas, Alito, and Kavanaugh expressed in *Bostock*. It is part of a pattern of disregard for the religious liberty of millions of Americans. We worry that it is only the beginning of more to come in the Biden Administration's march toward social justice, critical race theory, and the far-Left agenda.

The guidance issued is legally wrong, procedurally invalid, and inconsistent with the rule of law. It should be rescinded immediately, or at a minimum, put to a vote of the Commission as a whole.

Please provide the following records and answer the following questions by July 16, 2021:

1. The guidance document states that it was “issued upon approval of the Chair of the [EEOC].” Did you consult with any other EEOC Commissioners prior to issuing this document?
2. Prior to issuing this document, did you notify the other Commissioners that you planned to issue guidance interpreting the Supreme Court’s decision in *Bostock*?
 - a. If so, when were they notified?
 - b. What information did you include in this notification?
 - c. Did any Commissioners express concern or object to the substance or issuance of the document?
 - d. Please provide all records notifying the other Commissioners and their staff of that you planned to issue this guidance.
3. Did you consult the EEOC’s General Counsel prior to issuing this guidance?
 - a. Did anyone at the EEOC object to the legality or express concern with the substance or procedure used to issue this guidance?
 - b. Please provide all records documenting concerns with the substance or procedure of issuing this guidance.
4. Did you consult with the Department of Justice, including the Office of Legal Counsel, prior to issuing this guidance?

- a. Please provide all records between any employee at the EEOC and any employee at the Department of Justice concerning this guidance.
5. Did you consult with the Office of Management and Budget prior to issuing this guidance?
 - a. Please provide all records between any employee at the EEOC and any employee at the Office of Management and Budget concerning this guidance.
6. Did you consult with the Office of Personnel Management prior to issuing this guidance?
 - a. Please provide all records between any employee at the EEOC and any employee at the Office of Personnel Management concerning this guidance.
7. Has anyone within the Executive Office of the President communicated with you or any EEOC employee about this guidance?
 - a. Please provide all records between any employee at the EEOC and any employee within the Executive Office of the President—including the President and Vice President—concerning this guidance.
8. Have any other agencies endorsed the guidance document's interpretation of *Bostock*?

We are sending a copy of this letter to the Department of Justice so they can take remedial action as appropriate. Thank you for your prompt attention to this matter.

Sincerely,



Josh Hawley
U.S. Senator



Mike Lee
U.S. Senator

CC:
Attorney General Merrick Garland
950 Pennsylvania Ave, NW
Washington, DC 20530