



**LEGAL MOMENTUM®**  
The Women's Legal Defense and Education Fund

November 1, 2023

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

*Submitted via regulations.gov*

RE: RIN 3046–ZA02, Proposed Enforcement Guidance on Harassment in the Workplace

Dear Chair Burrows:

Thank you for the opportunity to provide comments on the U.S. Equal Employment Opportunity Commission's ("EEOC" or "the Commission") Proposed Enforcement Guidance on Harassment in the Workplace ("Proposed Enforcement Guidance").

As organizations dedicated to advocating for the employment rights of survivors of gender-based violence and harassment, we are committed to ensuring that sex discrimination and/or harassment experienced by employees who are victims<sup>1</sup> of domestic violence, sexual assault, dating violence, and stalking based on their status as a victim is prohibited under Title VII of the Civil Rights Act of 1964, as amended.

Legal Momentum, the Women's Legal Defense and Education Fund is the nation's first and longest serving legal advocacy organization dedicated to advancing women's rights and gender equality. For more than 50 years, we have used strategic litigation, innovative public policy, and education and training initiatives to ensure that all women are protected under the law. Employment discrimination, issues impacting women's economic equality, and gender-based violence have been areas of particular focus throughout our five decades of work. Since 2017, our *Women Valued* Initiative has taken an intersectional approach to women's economic empowerment and workplace equality that prioritizes the unmet needs of the most underserved women through targeted legal education and advocacy.

FUTURES is a national nonprofit organization that has worked for more than 35 years to prevent and end interpersonal and family violence in the United States (U.S.) and worldwide. We educate about and work to eliminate gender-based violence and harassment (GBVH) including domestic violence, sexual assault, child abuse, stalking, sexual harassment, and human trafficking. With education and prevention campaigns, training, and technical assistance to state agencies, public and private entities, workplaces, court systems, colleges and universities, and global organizations, we advance promising policies and practices at the state and federal levels that prevent violence and help survivors and workers heal and

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<sup>1</sup> Throughout this comment we use the terms victim and survivor in reference to those who have experienced or are experiencing domestic violence, dating violence, sexual assault and stalking to reflect that our clients have expressed a preference for one or the other term.

thrive. FUTURES leads Workplaces Respond, the National Resource Center on Domestic and Sexual Violence (Workplaces Respond), created through the Violence Against Women Act. Workplaces Respond provides resources, training, and technical assistance to employers, survivors, coworkers, and advocates to prevent and respond to domestic violence, sexual harassment and violence, and stalking impacting the workplace.

Legal Aid at Work (LAAW) is a public interest legal organization that helps people understand and assert their workplace rights and advocates for employment laws and systems that empower low-paid workers and marginalized communities. LAAW's Project SURVIVE protects the rights of survivors of domestic violence, sexual assault, and stalking to keep their jobs, take time off, and obtain accommodations while seeking safety, or medical or legal help. We provide free legal advice through our SURVIVE helpline, represent survivors, provide community education, and advocate for policy change to expand survivors' workplace rights.

We write to express our strong support for the Proposed Enforcement Guidance and believe it will advance the reduction of sex-based discrimination and harassment in the workforce. The EEOC last issued policy guidance on harassment in 1999. Since then, the law has evolved significantly, as has our understanding of the discrimination and harassment that survivors of gender-based violence and harassment experience in the workplace. We further write to urge that the final guidance clarify the scope of harassment to include harassment based on sex-based assumptions of victims of domestic violence, dating violence, sexual assault, and stalking.

## **I. Gender-based Violence is Prevalent with Significant Impacts on the Workplace**

Domestic violence is one of the most prevalent forms of gender-based violence in the United States. Between 2003–2012, domestic violence accounted for 21 percent of all violent victimization.<sup>2</sup> Anyone may be a victim; however, the majority of survivors are girls and women. Over 2 in 5 women in the United States report being subjected to violence by a current or former boyfriend or spouse at some point in her lifetime.<sup>3</sup> Women of color and immigrant women experience even higher rates of gender-based violence and harassment. Almost two-thirds of non-Hispanic multiracial women (63.8%), more than half of non-Hispanic American Indian or Alaska Native women (57.7%), more than half of non-Hispanic Black women (53.6%), about half of non-Hispanic white women (48.4%), two-fifths of Hispanic women (42.1%), and more than one-quarter of non-Hispanic Asian or Pacific Islander women reported intimate partner violence in their lifetimes.<sup>4</sup> Domestic violence also occurs in LGBTQI relationships at high rates with transgender women three times more likely to be stalked and subjected to financial abuse than those who do not identify as transgender.<sup>5</sup> Furthermore, women with disabilities are

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<sup>2</sup> JENNIFER L. TRUMAN & RACHEL E. MORGAN, U.S. DEP'T OF JUST., BUREAU OF JUST. STAT., SPECIAL REPORT: NONFATAL DOMESTIC VIOLENCE, 2003-2012, at 1 (April 2014), <https://bjs.ojp.gov/content/pub/pdf/ndv0312.pdf>.

<sup>3</sup> See RUTH LEEMIS ET AL., THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2016/2017 REPORT ON INTIMATE PARTNER VIOLENCE 14 (2022), [https://www.cdc.gov/violenceprevention/pdf/nisvs/nisvsreportonipv\\_2022.pdf](https://www.cdc.gov/violenceprevention/pdf/nisvs/nisvsreportonipv_2022.pdf); INT'L ASS'N OF CHIEFS OF POLICE, INTIMATE PARTNER VIOLENCE RESPONSE POLICY AND TRAINING GUIDELINES 4 (2017), <https://www.theiacp.org/sites/default/files/all/i-j/IACPIntimatePartnerViolenceResponsePolicyandTrainingGuidelines2017.pdf> (finding 10 million people in the US are physically abused by their partner each year and framing domestic violence as an epidemic).

<sup>4</sup> See RUTH LEEMIS ET AL., *supra* note 3, at 26.

<sup>5</sup> See EMILY WATERS, ET AL., NAT'L COAL. OF ANTI-VIOLENCE PROGRAMS, LESBIAN, GAY, BISEXUAL, TRANSGENDER, QUEER, AND HIV-AFFECTED INTIMATE PARTNER VIOLENCE IN 2015, at 9 (2016), <http://avp.org/wp->

significantly more likely to experience domestic violence in their lifetime.<sup>6</sup> In 2010, 7.1% of women with disabilities reported experiencing physical violence by an intimate partner in the past year, more than twice the rate of women without disabilities.<sup>7</sup>

Sexual violence is another prevalent form of gender-based violence in the United States, and a large percentage of rape victims also identify as survivors of domestic violence. One in four women (26.8% or 33.5 million) in the United States reported completed or attempted rape victimization at some point in her lifetime.<sup>8</sup> Moreover, nearly one in two women (47.6% or 59.4 million) in the United States reported unwanted sexual contact victimization at some point in her lifetime.<sup>9</sup> Although domestic and sexual violence may be committed by and against persons identifying as men, women, and nonbinary, these crimes have a disproportionate impact on women as well.

Given the high rates of participation of women in the workforce and the prevalence of gender-based violence, it stands to reason that a large percentage of the workforce identifies as survivors of domestic and sexual violence. Because domestic and sexual violence have significant impacts on the workplace, many survivors struggle to remain connected to the workforce as they face numerous barriers in obtaining and maintaining employment.<sup>10</sup> This includes sex-based discrimination and harassment because of their status as victims. Between one-quarter and one-half of domestic violence victims report that they lost a job at least in part due to domestic violence.<sup>11</sup> Seventy-eight percent of survivors reported being late to work as a result of domestic abuse; 47 percent reported being assaulted before work; and 96 to 98 percent experienced problems at work related to the violence.<sup>12</sup> Others miss work because of health conditions caused or exacerbated by domestic violence for which they may need

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[content/uploads/2017/04/2015\\_ncavp\\_lgbtqipvreport.pdf](https://www.cdc.gov/violenceprevention/pdf/nisvs/nisvsReportonSexualIdentity.pdf); see generally JIERU CHEN, ET AL., THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2016/2017 REPORT ON VICTIMIZATION BY SEXUAL IDENTITY (2023), <https://www.cdc.gov/violenceprevention/pdf/nisvs/nisvsReportonSexualIdentity.pdf>.

<sup>6</sup> See Kirsten. Barrett ET AL, *Intimate Partner Violence, Health Status, and Health Care Access Among Women with Disabilities*, 19 WOMEN'S HEALTH ISSUES 94 (2009) 1; Mónica Miriam García-Cuéllar et al., *The Prevalence of Intimate Partner Violence against Women with Disabilities: A Systematic Review of the Literature*, 45 *Disability and Rehabilitation* 1 (2023); Kylee Trevillion et al., *Experiences of Domestic Violence and Mental Disorders: A Systematic Review and Meta-Analysis*, 7 PLOS ONE e51740 (2012).

<sup>7</sup> See Matthew J. Breiding & Brian S. Armour, *The Association between Disability and Intimate Partner Violence in the United States*, 25 *Annals Epidemiology* 455 (2015).

<sup>8</sup> See KATHLEEN C. BASILE, ET AL., THE NATIONAL INTIMATE PARTNER AND SEXUAL VIOLENCE SURVEY: 2016/2017 REPORT ON SEXUAL VIOLENCE 4 fig.1, 22 tbl.1 (2022), <https://www.cdc.gov/violenceprevention/pdf/nisvs/nisvsreportonsexualviolence.pdf>.

<sup>9</sup> *Id.*

<sup>10</sup> See generally, Marcy L. Karin, *Changing Federal Statutory Proposals To Address Domestic Violence at Work: Creating Societal Response By Making Business A Part of the Solution*, 74 *BROOK. L. REV.* 377 (2009); Maria Amelia Calaf, *Breaking the Cycle: Domestic Violence, Title VII, and Workplace Discrimination*, 21 *LAW & INEQ.* 167 (2003)(describing the challenges that survivors of domestic violence face in maintaining employment); Robin R. Runge et al., *Domestic Violence as a Barrier to Employment*, 34 *CLEARINGHOUSE REV.* 552, 553 (2001) (describing a situation where a woman, who had recently started a new job, requested a day off to obtain an order of protection against her abusive ex-boyfriend and was fired upon her return to work for “bringing her personal life into work”).

<sup>11</sup> See Therese Zink & Morgan Sill, *Intimate Partner Violence and Job Instability*, 59 *J. AM. WOMEN'S MED. ASS'N.* 32 (2004).

<sup>12</sup> See JULIE GOLDSCHIED & ROBIN RUNGE, *AM. BAR ASS'N COMM'N ON DOMESTIC VIOLENCE, EMPLOYMENT LAW AND DOMESTIC VIOLENCE: A PRACTITIONER'S GUIDE* (2009) (citing ELLEN RIDLEY, ET AL., *ME. DEP'T OF LAB. & FAM. CRISIS SERVS., HOW PERPETRATORS IMPACT EMPLOYMENT, A JOINT RESEARCH PROJECT* (October 2005)); see also Deborah Widiss, *Domestic Violence and The Workplace: The Explosion of State Legislation and the Need for a Comprehensive Strategy*, 35 *FLA. ST. U. L. REV.* 669, 677-79 (2008).

medical assistance.<sup>13</sup> It is also broadly understood that the degree of gender-based violence and the impact on the workplace is vastly under-reported, in large part because workers fear employer stereotypes and retaliation and because workers lack express workplace protections under federal and many state laws.

One study found that perpetrators' power and control tactics—including physically restraining a partner from going to work, beating her severely enough that she could not or did not want to go to work, keeping her from sleeping, making a car unavailable, or cutting up work clothes—prevented fifty-six percent of women in that study from going to work.<sup>14</sup> Perpetrators also abused their victims by coming to the workplace, making harassing phone calls to victims and their supervisors, and stalking the victim to and from the workplace.<sup>15</sup> One study found that over 90 percent of the employed battered women surveyed had either resigned or been terminated as a result of the abuse in the previous two years.<sup>16</sup> Women in lower-wage industries face unique vulnerabilities. Farm worker women, for example, typically work in isolated spaces; face high rates of sexual harassment, abuse, and domestic violence; and often live on the farms where they work and share housing with abusive partners or live in close proximity to their abusers.<sup>17</sup> These circumstances create heightened risks and make it difficult for women to safeguard themselves and their children absent workplace supports and intervention.

## II. Victims of Gender-Based Violence Experience Sex-Based Harassment

Misunderstanding, stigma, and discrimination against survivors of domestic violence, sexual assault, and stalking are widely held among Americans and manifest as gender-based bias.<sup>18</sup> Victim blaming and cultural stereotypes are highly prevalent and tend to be directed at women and grounded in a range of gender-based biases about how survivors should behave.<sup>19</sup> Assumptions about survivors of violence include the belief that survivors are lying, that they deserve abuse, or that they are at fault for their victimization.<sup>20</sup> Research demonstrates public stigma particularly against female survivors and survivors who do not conform to the “ideal victim” stereotype.<sup>21</sup> Sex-based stereotypes depict survivors of domestic violence as “dramatic” or “weak.”<sup>22</sup> Furthermore, domestic and sexual violence are often

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<sup>13</sup> See Karin, Calaf, Runge, *supra* note 10, at 677.

<sup>14</sup> See Jennifer E. Swanberg & T.K. Logan, *Domestic Violence and Employment: A Qualitative Study*, 10 J. OCCUPATIONAL HEALTH PSYCH. 3, 6-8 (2005).

<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 3, 9.

<sup>17</sup> See *Cultivating Fear: The Vulnerability of Immigrant Farmworkers in the US to Sexual Violence and Sexual Harassment*, HUM. RTS. WATCH (May 15, 2012), <https://www.hrw.org/report/2012/05/15/cultivating-fear/vulnerability-immigrant-farmworkers-us-sexual-violence-and>.

<sup>18</sup> See Kristen C. Elmore et al., *Rape Myth Acceptance Reflects Perceptions Of Media Portrayals As Similar To Others, But Not The Self*, 27 VIOLENCE AGAINST WOMEN 529 (2021).

<sup>19</sup> See Angie C. Kennedy & Kristen A. Prock, “I Still Feel Like I Am Not Normal”: A Review of the Role of Stigma and Stigmatization Among Female Survivors of Child Sexual Abuse, Sexual Assault, and Intimate Partner Violence, 19 TRAUMA, VIOLENCE, & ABUSE 512 (2018).

<sup>20</sup> See Geneva Brown, *Ain't I a Victim - The Intersectionality of Race, Class, and Gender in Domestic Violence and the Courtroom*, 19 CARDOZO J.L. & GENDER 147, 165-69 (2012).

<sup>21</sup> See Federica Taccini & Stefania Mannarini, *An Attempt to Conceptualize the Phenomenon of Stigma toward Intimate Partner Violence Survivors: A Systematic Review*, 13 BEHAV. SCIS. 194 (2023).

<sup>22</sup> See Christina Policastro & Brian K. Payne, *The Blameworthy Victim: Domestic Violence Myths and the Criminalization of Victimhood*, 22 J. AGGRESSION, MALTREATMENT & TRAUMA 329 (2013).

perceived as private violence, issues that do not require specific regulatory or workplace guidance or intervention.<sup>23</sup>

Employers regularly perceive survivors as a nuisance, and the absence of express federal anti-discrimination protections for survivors further empowers employers to terminate survivors based on this problematic stereotype. These sex-based stereotypes reinforce each other in the workplace, leading to harassment and discrimination.<sup>24</sup> Because survivors fear retaliation and because of the private nature of gender-based violence, employers are typically unaware of the number of people they employ who are survivors of violence, despite the high prevalence of these experiences.<sup>25</sup> Employers often doubt an employee can “perform effectively if she cannot even take care of her own family problems.”<sup>26</sup> Many employers believe survivors of violence are a potential liability or drain on their bottom line.<sup>27</sup> Because survivors are predominantly women, employers’ stereotypes and biases regarding survivors tend to be directed at female employees or assume that violence occurs only in heterosexual relationships. As employers react to and manage the effects of gender-based violence in the workplace, sex-based stereotypes against survivors of violence lead to harassment and discrimination, including retaliation.

Sex-stereotyping causes survivors of violence to lose and leave jobs and other employment opportunities.<sup>28</sup> A 2022 study noted that employer’s discriminatory expectations of how survivors should act impacted survivors’ ability to stay in their jobs.<sup>29</sup> A 2020 survey found that 76 percent of survivors found it difficult to keep a job due to violence.<sup>30</sup> In a 2019 survey of stalking victims, 17 percent described being terminated or losing job opportunities because of their employers’ knowledge of their victimization.<sup>31</sup> Many survivors report being demoted or losing promotional or training opportunities due to their status as a survivor.<sup>32</sup> Indeed, as the real-life examples of employee experiences provided in this comment from those who assist survivors demonstrate, employer responses to victims of domestic and sexual violence victims reflect gender- and sex-based biases and stereotypes regarding domestic and sexual violence.

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<sup>23</sup> See Gustavo J Bobonis, Melissa González-Brenes & Roberto Castro, *Public Transfers and Domestic Violence: The Roles of Private Information and Spousal Control*, 5 AM. ECON. J.: ECON. POL’Y 179 (2013); KENNETH PLUMMER, *INTIMATE CITIZENSHIP: PRIVATE DECISIONS AND PUBLIC DIALOGUES* (2003).

<sup>24</sup> See Deborah A. Widiss, *Addressing the Workplace Effects of Intimate Partner Violence* (Maurer Sch. of L., Ind. Univ. Bloomington, Research Paper No. 379, 2019), <https://papers.ssrn.com/abstract=3056431>; Widiss, *supra* note 9.

<sup>25</sup> See generally K. C. BASILE ET AL., *supra* note 6.

<sup>26</sup> Eileen Kwesiga et al., *Exploring the Literature on Relationships Between Gender Roles, Intimate Partner Violence, Occupational Status, and Organizational Benefits*, 22 J. INTERPERSONAL VIOLENCE 312 (2007).

<sup>27</sup> See generally Julie Goldscheid, *Gendered Violence and Work: Reckoning with the Boundaries of Sex Discrimination Law*, 18 COLUM. J. GENDER & L. 61 (2008).

<sup>28</sup> See Robin R. Runge, *The Legal Response to the Employment Needs of Domestic Violence Victims: An Update*, 37 HUM. RTS. 13 (2010).

<sup>29</sup> See Sarah Tarshis, *Intimate Partner Violence and Employment-Seeking: A Multilevel Examination of Barriers and Facilitators*, 37 J. INTERPERSONAL VIOLENCE NP5774 (2022).

<sup>30</sup> See ADRIENNE E. ADAMS & SARA WEE, *DOMESTIC VIOLENCE AND ECONOMIC WELL-BEING STUDY 14* (2021), [https://csaj.org/wp-content/uploads/2022/05/DV\\_\\_EWB\\_Study-Service\\_Provider\\_Report\\_FINAL.pdf](https://csaj.org/wp-content/uploads/2022/05/DV__EWB_Study-Service_Provider_Report_FINAL.pdf).

<sup>31</sup> RACHEL E. MORGAN & JENNIFER L. TRUMAN, U.S. DEP’T OF JUST., BUREAU OF JUST. STAT., *STALKING VICTIMIZATION*, 2019 at 24 (2022), <https://bjs.ojp.gov/content/pub/pdf/sv19.pdf>.

<sup>32</sup> See Kathryn Showalter, *Women’s Employment and Domestic Violence: A Review of the Literature*, 31 AGGRESSION & VIOLENT BEHAVIOR 37 (2016); Kathryn Showalter & Rebecca J. McCloskey, *A Qualitative Study of Intimate Partner Violence and Employment Instability*, 36 J. INTERPERSONAL VIOLENCE NP12730 (2021).

Many survivors of violence feel compelled to disclose their experience to their employer to maintain their safety and to seek support to maintain their employment while addressing the abuse. Yet all too often, their disclosure is met with stigma, stereotypes, and discrimination.<sup>33</sup> This creates a double bind for survivors of violence: disclose their experience of violence to maintain their safety and face retaliation or not disclose and risk their safety and their job security.<sup>34</sup> When workers do disclose violence, common reactions among employers include not believing the survivor, failing to offer support in the workplace, or actively harming the survivor, forcing them to go on unpaid leave, applying more stringent standards or initiating punitive evaluations or write-ups, terminating them, and preventing them from accessing unemployment insurance.<sup>35</sup> In this way, when employers are aware of survivors' status they often utilize this information as the basis for adverse and discriminatory employment actions including harassment.<sup>36</sup>

The federal government has recognized that discrimination and harassment in employment against survivors of gender-based violence may be prohibited sex-based discrimination and/or harassment. The regulations implementing the nondiscrimination and equal opportunities protections of the Workforce Innovation and Opportunity Act define prohibited discrimination based on sex to include “denial of access to or adverse treatment based on sex stereotyping including the belief that a victim of domestic violence would disrupt the program or activity and/or may be unable to access any aid, benefit, service or training.”<sup>37</sup> In addition, the EEOC published Questions and Answers in 2012 explaining the application of Title VII and the Americans with Disabilities Act to survivors of domestic and dating violence, sexual assault, and stalking. Further, in its FY 2024-2028 Strategic Enforcement Plan, the EEOC identified protecting survivors of gender-based violence from employment discrimination as a subject matter priority.<sup>38</sup>

In the last several decades, some jurisdictions have gone even further to protect victims of gender-based violence from discrimination and harassment in the workplace: state laws have been passed; employers have adopted workplace policies; and unions and employers have negotiated language into collective bargaining agreements providing leave from work for survivors, clarifying eligibility for unemployment insurance benefits, and prohibiting discrimination.<sup>39</sup> In particular, ten states and Washington, D.C. have adopted laws that prohibit employment discrimination against victims of domestic violence based on their status as victims of these crimes.<sup>40</sup>

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<sup>33</sup> Katherine Lorenz & Erin O’Callaghan, “I Realized That I Couldn’t Act Normal”: A Qualitative Study of Sexual Assault Survivors’ Experiences of Workplace Disclosure, 37 J. FAM. VIOLENCE 381 (2022).

<sup>34</sup> Robin Runge, *Double Jeopardy: Victims of Domestic Violence Face Twice the Abuse*, 25 HUM. RTS. 19 (1998).

<sup>35</sup> See generally Jennifer E. Swanberg & Caroline Macke, *Intimate Partner Violence and the Workplace Consequences and Disclosure*, 21 J. WOMEN & SOC. WORK 391 (2006).

<sup>36</sup> Goldscheid, *supra* note 27.

<sup>37</sup> 29 CFR 38.7(d)(7) (2023).

<sup>38</sup> U.S. EQUAL EMP. OPPORTUNITY COMM’N, STRATEGIC ENFORCEMENT PLAN, FISCAL YEARS 2024-2028, at 6, <https://www.eeoc.gov/sites/default/files/2023-09/SEP%20FY%2020242028%20FINAL%20APPROVED.pdf> (last visited Oct. 25, 2023).

<sup>39</sup> See generally, Goldscheid and Runge, *supra* note 12; Widiss, *supra* note 12.

<sup>40</sup> See WORKPLACES RESPOND TO DOMESTIC & SEXUAL VIOLENCE & LEGAL MOMENTUM, STATE GUIDE ON EMPLOYMENT RIGHTS FOR SURVIVORS OF DOMESTIC VIOLENCE, SEXUAL ASSAULT, AND STALKING (2022) (listing California, Connecticut, Delaware, Hawaii, Illinois, New Hampshire, New York, Oregon, Puerto Rico, Vermont, U.S. Virgin Islands, Washington State and Washington, DC having anti-discrimination laws) <https://www.workplacesrespond.org/wp-content/uploads/2017/01/State-Employment-Guide.pdf>.

Moreover, international treaties including the Convention on the Elimination of All Forms of Discrimination Against Women have recognized domestic and sexual violence as forms of sex discrimination.<sup>41</sup> While recognition of the impacts of domestic violence and sexual assault on employment has increased in recent years, workplace harassment connected to these forms of violence persist. As a result, it is imperative that the EEOC's final harassment guidance clarify that illegal harassment under Title VII includes harassment perpetrated against survivors of domestic violence, dating violence, sexual assault, and stalking.

### **III. The Final Guidance Should Clarify the Scope of Harassment Based on Sex to Include Sex-Based Victims of Gender-based Violence**

1. We thank the EEOC for acknowledging that harassment based on sex also includes “non-sexual conduct based on sex and that harassment based on protected characteristics includes harassment based on social or cultural expectations regarding how persons of a particular protected group, such as persons of a particular race, national origin, or sex, usually act, appear, or behave...including harassment based on sex-based assumptions about family responsibilities, suitability for leadership roles, or sex roles.”<sup>42</sup>

We urge the EEOC to include language and further examples in the Final Enforcement Guidance of prohibited harassment against victims of gender-based violence consistent with its Question and Answer guidance issued in 2012.<sup>43</sup> Doing so will make clear that harassment based on sex encompasses harassment based on sex-based expectations about how victims of domestic violence, stalking, or sexual violence usually act, appear, or behave. From our work with survivors, we offer several examples below of employees who were harassed based on sex-based assumptions about survivors of domestic and sexual violence for this purpose. We urge the EEOC to include an example in the Final Enforcement Guidance in line with these examples from our collective work representing and working with survivors of gender-based violence.

In one case, an employee's supervisor started saying inappropriate things to her about her appearance and refused to promote her after she disclosed that she had previously experienced domestic violence because, as her supervisor explained, she must have poor judgment to be in such a relationship and could not rely on her to act appropriately in a position with authority.

Another client was fired after she used her accrued vacation time to address the impacts of domestic violence on her life; her employer told her that they were sorry she was going through this, but they were concerned she was not reliable anymore.

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<sup>41</sup> Convention on the Elimination of All Forms of Discrimination Against Women, Dec. 18, 1979, 1249 U.N.T.S. 13 (entered into force Sept. 3, 1981); Committee on the Elimination of Discrimination Against Women, 11<sup>th</sup> Sess., General Recommendation No. 19 (1992), <http://www.un.org/womenwatch/daw/cedaw/recommendations/recomm.htm>; Committee on the Elimination of Discrimination Against Women, General Recommendation No. 35 (2017), <https://www.ohchr.org/en/documents/general-comments-and-recommendations/general-recommendation-no-35-2017-gender-based>.

<sup>42</sup> Proposed Enforcement Guidance on Harassment in the Workplace at 18.

<sup>43</sup> *Questions and Answers: The Application of Title VII and the ADA to Applicants or Employees Who Experience Domestic or Dating Violence, Sexual Assault, or Stalking*, U.S. Equal Emp. Opportunity Comm'n (Oct. 12, 2012), <https://www.eeoc.gov/laws/guidance/questions-and-answers-application-title-vii-and-ada-applicants-or-employees-who>.

Another client reported her status as a victim of domestic violence, advised her employer that she had moved into a domestic violence shelter with her two small children, and requested a shift-change in order to comply with the shelter's curfew requirements and because she no longer had childcare during the night. Instead of responding to her request, her employer advised her to go on leave to "deal with her situation" and when she was unable to return, terminated her.

In another case, when a survivor's abusive ex-husband kidnapped her daughters, she told her employer that she had to leave to find and protect the safety of her children. Once the authorities apprehended him and returned her daughters to her, she told her employer she could return to work. However, the employer refused to reinstate her, telling her, "Sorry, I don't need the drama and don't feel like you'll be able to perform given what's going on in your personal life."

2. We thank the EEOC for acknowledging that conduct that occurs in a non-work-related context may be prohibited harassment based on sex when it has an impact on the workplace.<sup>44</sup>

Perpetrators of gender-based violence and harassment are also employees and use workplace resources and technology to commit domestic and sexual violence. A study of domestic abusers in batterer treatment programs in Maine found that 78 percent of "offenders used workplace resources at least once to express remorse or anger, check up on, pressure, or threaten the victim."<sup>45</sup> Abusers in the study reported coming to work late, leaving early and having other impacts on their work caused by their continued harassment and threats of victims. Employers have faced liability for failing to prevent and/or address the harassment where the abuser is continuing their abusive behavior in the workplace.<sup>46</sup> For this reason, we urge the EEOC to include an example of an employer treating a male employee who is committing domestic or sexual violence differently than women employees who are survivors who are otherwise similarly situated as a basis for sex-based harassment.

We also urge the EEOC to include an example of a survivor with a hostile work environment claim where she is faced with gender-based harassment at work as part of the perpetrator's continued domestic violence, dating violence, sexual assault, or stalking at work, and the employer fires the victim and retains the perpetrator.<sup>47</sup>

One example of harassment that was reported to us of this type of harassment involved a female farmworker who was raped by a coworker after work. When she reported the sexual assault to her employer, her employer took no action, asserting her abuser's claims that she had a drinking problem. As a result, she not only was subjected to the rape and the subsequent trauma, she was ostracized at work.

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<sup>44</sup> Proposed Enforcement Guidance on Harassment in the Workplace at 54.

<sup>45</sup> See KIM C. LIM, JOHN RIOUX, ELLEN RIDLEY, ME. DEP'T OF LAB. & FAM. CRISIS SERVS., IMPACT OF DOMESTIC VIOLENCE OFFENDERS ON OCCUPATIONAL SAFETY & HEALTH: A PILOT STUDY 1 (February 2004), [https://www.maine.gov/labor/labor\\_stats/publications/dvreports/domesticoffendersreport.pdf](https://www.maine.gov/labor/labor_stats/publications/dvreports/domesticoffendersreport.pdf).

<sup>46</sup> See *Excel Corp. v. Bosley*, 165 F. 3d 635, 637-39 (8th Cir. 1999) (ruling in favor of a female former employee in a Title VII sexual harassment case against her former employer alleging that her ex-husband harassed her at work, creating a hostile work environment, where the employer terminated her but failed to sanction her ex-husband).

<sup>47</sup> See *e.g.*, *Rohde v. K.O. Steel Castings, Inc.*, 649 F.2d 317, 322-23 (5th Cir. 1981) (holding that firing a female employee and retaining the male employee when both were engaged in an altercation may form the basis of a sex discrimination claim under Title VII).



Another client worked with her abusive ex-boyfriend and reported to her employer that he had assaulted her both at work and outside of work and gave her employer a copy of a restraining order, asking that they take steps to protect her safety by ensuring they did not work the same shift. The employer refused to honor her request, instead continuing to schedule the two together, failing to correct the gender-based harassment and neglecting to take steps to prevent future abuse at work.

We additionally urge the EEOC to include an example where the perpetrator, who is not an employee, is perceptibly verbally harassing the employee survivor at their workplace and the employer fails to take adequate action to address the harassment.

Furthermore, we suggest reframing Example 6.<sup>48</sup> Although this example seems intended to illustrate a situation in which there is insufficient evidence to establish harassment based on national origin and/or color, it risks implying there is no violation of federal discrimination law when one employee harasses his former romantic partner's new romantic partner in the workplace. Rather, such a situation could also amount to a form of associational discrimination prohibited by Title VII.<sup>49</sup>

Thank you for the opportunity to submit comments on the Proposed Enforcement Guidance. Please do not hesitate to contact [sgonzalez@futureswithoutviolence.org](mailto:sgonzalez@futureswithoutviolence.org) if we can provide further information.

Sincerely,

Sarah Gonzalez  
Associate Director, Workplace  
and Economic Justice  
Futures Without Violence

Sharon Terman  
Director, Family and Work  
Program  
Legal Aid at Work

Seher Khawaja  
Deputy Legal Director and  
Senior Attorney for Economic  
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<sup>48</sup> Proposed Enforcement Guidance on Harassment in the Workplace at 20. In this example, Zach threw paper at Isaiah, shoved him in the hall, and threatened to beat him up or harm him, and this behavior began after Isaiah started dating Zach's ex-girlfriend. *Id.* The proposed guidance concludes in this example that there was insufficient evidence of harassment based on national origin and/or color. *Id.*

<sup>49</sup> *See id.* at 16 ("The EEO laws also cover 'associational discrimination.' This includes harassment because the complainant associates with someone in a different protected class.").