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THE PRESIDENT'S GUIDELINES ON RELIGIOUS EXERCISE AND RELIGIOUS EXPRESSION IN THE FEDERAL WORKPLACE: A RESTATEMENT OR REINTERPRETATION OF LAW?

STEPHEN S. KAO*

On August 14, 1997, the President announced the issuance of *Guidelines on Religious Exercise and Religious Expression in the Federal Workplace*[1] which "apply to all civilian executive branch agencies, officials, and employees in the Federal workplace." The Guidelines are a valiant attempt to provide greater uniformity in an area of law that depends on input from various governmental entities. In the short term, the Guidelines may appear beneficial to religious freedom because they bring attention to an area of law often ignored by both public and private employers and employees. However, by dismissing a whole body of laws and regulations that have evolved to the present, the Guidelines fall considerably short of presenting an accurate, balanced treatment of the parameters of religious conduct in the federal workplace.

Throughout the Guidelines, the President makes bold pronouncements of supposedly established legal standards. With only a few exceptions, however, he repeatedly fails to support his pronouncements with citations to statutory or case law. Therefore, while the Guidelines create the impression of being a mere restatement of the law, they actually invent some *new* legal standards and embrace some standards that have gained only partial acceptance among the courts. The result is that federal officials who are unfamiliar with established law will likely enforce incorrect legal standards concerning their employees' religious exercise and expression, and those familiar with established law will be confused about which standards to apply.

A close examination of the President's Guidelines leads to three major conclusions. *First*, the Guidelines exceed the scope of the President's statutory and constitutional authority. *Second*, they contain incorrect legal standards regarding the parameters of religious exercise and religious expression in the federal work-

* B.A. 1985, Columbia University; J.D. 1988, University of Virginia. Mr. Kao serves as Director of Research and Communications at Justice Fellowship, a public policy organization devoted to restorative criminal justice and religious freedom. At the time this article was written, Mr. Kao was serving as Education Counsel at The Rutherford Institute, a civil liberties organization specializing in religious freedom issues, which has handled numerous cases involving the rights of religious persons in the workplace. Mr. Kao wishes to acknowledge: John W. Whitehead, for encouraging the writing and publication of this article; Rita R. Woltz and Colleen K. Pinyan, for their insightful observations and creative input, and Tonya N. Hairston, David E. White and Jennifer R. Schans, for their research and administrative assistance.

[1] Please see Appendix of this article to read the full text of the President's Guidelines.

place. *Third*, they contain vague and contradictory standards that will likely generate much confusion in this area of law.

I. THE PRESIDENT HAS EXCEEDED THE SCOPE OF HIS AUTHORITY

A. *Overstepping Statutory Authority*

While the President possesses the statutory authority to regulate the conduct of employees in the *executive branch*,[2] he lacks the statutory authority to regulate the conduct of employees in the legislative and judicial branches of the federal government.

The title of the Guidelines seems to indicate that the President is dealing with "the Federal workplace" as a whole. There are also additional references to "Federal employers," "Federal employees" and "the Federal workplace" in the text. Even though the first sentence of the text states that the Guidelines "apply to all civilian executive branch agencies, officials, and employees in the Federal workplace," the phrase "and employees in the Federal workplace" (following the comma) appears to broaden the scope of the Guidelines' coverage to more than just executive branch employees.

B. *Breaching the Separation of Powers*

Notwithstanding the issue of statutory authority, any directives which the President requires all federal employees or only executive branch employees to follow *must still* comport with the United States Constitution and other federal law.[3] Because the Guidelines consistently fail to comport with correct constitu-

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[2] 5 U.S.C. § 7301 (1997) ("The President may prescribe regulations for the conduct of employees in the executive branch.").

[3] Although the President could conceivably argue that by implementing these Guidelines, he is merely enforcing the goals and principles of the Equal Employment Opportunity Commission concerning religious discrimination, he must still act in accordance with established constitutional and statutory law. For example, in *Chamber of Commerce v. Reich*, the D.C. Court of Appeals ruled that notwithstanding the broad discretionary authority delegated to the President to administer the Procurement Act,

> the President . . . does not have unlimited authority to make decisions . . . 'The procurement power *must* be exercised consistently with the structure and purposes of the statute that delegates that power'. . . we think it untenable to conclude that there are no judicially enforceable limitations on presidential actions, besides actions that run afoul of the Constitution or which contravene direct statutory prohibitions, so long as the President *claims* that he is acting pursuant to the Procurement Act . . . .

74 F.3d 1322, 1330-32 (D.C. Cir.) , *reh'g denied*, 83 F.3d 439 (D.C. Cir. 1996), *quoting* AFL-CIO v. Kahn, 618 F.2d 784, 793 (D.C. Cir.) (en banc), *cert. denied*, 443 U.S. 915 (1979). By contrast, the authority conferred upon the President in the language of Title VII of the Civil Rights Act ("to exercise his authority to carry out the principles of the EEOC") is not nearly as broad as the authority given to him under the Procurement Act (which is "in addition and paramount to any authority conferred by any other law and shall not be subject to the provisions of any law inconsistent therewith . . . .") 40 U.S.C.

tional and federal legal standards, the President has exceeded his constitutional authority and breached the separation of powers in two key respects: *first*, he is effectively writing *new* federal employment law, which conflicts with Congress' legislative authority under the Constitution;[4] and *second*, he is interpreting (or misinterpreting) constitutional and federal law, which conflicts with the judicial power that the Constitution delegates to the federal judiciary.[5]

C. *Avoiding the Public Scrutiny Which Congress Deemed Necessary for EEOC's Proposed Guidelines*

The President's Guidelines circumvent the procedures and authority of the Equal Employment Opportunity Commission ("EEOC"), the executive agency responsible for administering and enforcing federal law prohibiting discrimination, including religious discrimination. Congress specifically created the EEOC through the Civil Rights Act of 1964 to exercise enforcement and regulatory powers over employees of the federal government.[6] Thus, the EEOC has been the appropriate agency used to promulgate employment guidelines.

With the passage of the Equal Employment Act of 1972, Congress acknowledged that the federal government, just like private employers, could not adequately police itself in the area of employment. As a House Report predating the founding of the EEOC stated, "the Equal Employment Opportunity Commission is the expert agency in the field of employment discrimination and because it is an independent agency removed from the administration of Federal employment, it is the most logical place for the enforcement power to be vested."[7]

Accordingly, the President should have requested the EEOC to issue guidelines on religious exercise and expression in the federal workplace. By issuing the Guidelines under his own authority, rather than that of the EEOC, the President has bypassed the procedural safeguards that govern the actions of indepen-

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§ 474 (1986), *as quoted in Reich,* 83 F.3d at 439.

[4] Pursuant to the careful balance and separation of powers described in the U.S. Constitution, the President's legislative power is limited to the presentment of laws for signature or veto. U.S. Const., Art. I, § 7, cl. 2. *See also* Immigration and Naturalization Service v. Chadha, 462 U.S. 919, 946-48 (1983); Alexander Hamilton, Federalist No. 73 (Chadwick ed., 1987) (discussing reasons for veto power).

[5] As propounded by Chief Justice Marshall in *Marbury v. Madison*, 1 Cranch (5 U.S.) 137 (1803), judicial review means the power of the U.S. Supreme Court to pass on the validity of legislation in cases and controversies actually before it. According to this landmark decision, "[i]t is, emphatically, the province and the duty of the judicial department, to say what the law is." *See also* Alexander Hamilton, Federalist No. 78 (Lodge ed., 1904) ("The interpretation of the laws is the proper and peculiar province of the courts.").

[6] 42 U.S.C. § 2000e-16(b) (1997). Congress' intention that the EEOC serve as the guarantor against discrimination was reiterated as recently as 1996 when it brought many exempted White House employees under the protection of the EEOC by passing the Presidential and Executive Office Accountability Act. 3 U.S.C. § 401 et seq. (1997).

[7] H.R. Rep. No. 92-238 (1971), *reprinted in* 1972 U.S.C.C.A.N. 2137, 2160.

dent federal agencies, which Congress mandated under the Freedom of Information Act,[8] the Government in the Sunshine Act,[9] as well as the basic rule-making procedures provided in the Administrative Procedure Act.[10] As the Sunshine Act declares:

> It is hereby declared to be the policy of the United States that the public is entitled to the fullest practicable information regarding the decisionmaking processes of the Federal Government. It is the purpose of this Act to provide the public with such information while protecting the rights of individuals and the ability of the Government to carry out its responsibilities.[11]

Recent history confirms the necessity for such procedural safeguards. On October 1, 1993, the EEOC proposed Guidelines on Harassment Based On Race, Color, Religion, Gender, National Origin, Age, or Disability. The EEOC's document contained language remarkably similar to the President's Guidelines with respect to the issue of religious harassment.[12] During the public comment period, which EEOC proposals are required to undergo, the EEOC received over 100,000 letters urging it to exclude religion from its Guidelines.[13]

During Senate hearings concerning the EEOC's Guidelines, Senators repeatedly criticized the EEOC's attempt to prevent religious harassment at the cost of blocking individual employees' free exercise of religion.[14] As a consequence, in June 1994, the U.S. Senate approved a resolution by a 94-0 vote calling on the EEOC to drop religion from its Guidelines.[15] One month later, the Senate inserted an amendment to fiscal 1995 spending legislation for the EEOC, instructing it to remove religion from the proposed rules; and close to this time, the House voted by a wide margin, 366-37, to approve an amendment that would deny funding for the EEOC's Guidelines for one year.[16] Finally, in Sep-

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[8] 5 U.S.C. § 552 (1997).

[9] 5 U.S.C. § 552b (1997).

[10] 5 U.S.C. § 553 (1997).

[11] Section 2 of Pub. L. No. 94-409 *reprinted in Historical and Statutory Notes: Declaration of Policy and Statement of Purpose*, 5 U.S.C. § 552b (1997).

[12] For example, in addressing whether speech or conduct is sufficiently severe or pervasive to create an abusive work environment, the EEOC's Guidelines focus on "whether a reasonable person in the same or similar circumstances would find the conduct intimidating, hostile, or abusive." *Guidelines on Harassment Based on Race, Color, Religion, Gender, National Origin, Age, or Disability*, 58 Fed. Reg. 51, 266, 268-69 (Oct. 1, 1993).

[13] *See Religious Harassment Rules Shelved*, L.A. TIMES, Sept. 21, 1994, at A17; David Pace, Associated Press, *Religion Rules Dropped for Harassment at Work*, BUFFALO NEWS, Sept. 21, 1994, at A7.

[14] *See generally The Effect of the EEOC's Proposed Guidelines on Religion in the Workplace: Hearing Before the Subcommittee on Courts and Administrative Practice of the Senate Committee on the Judiciary*, 103rd Congress (June 9, 1994).

[15] *See Religious Harassment Rules Shelved*, *supra* note 13; Pace, *supra* note 13.

[16] *See Religious Harassment Rules Shelved*, *supra* note 13; Pace, *supra* note 13; Scott Harris, *Legislating the Fine Line Between Church and State*, L.A. TIMES, July 7, 1994, at B3.

tember 1994, the EEOC voted 3-0 to withdraw the portion of its Guidelines dealing with religious harassment in the workplace.[17]

By releasing his Guidelines on Religious Exercise and Religious Expression in the Federal Workplace, the President has made an end-run around the EEOC, and especially the public scrutiny which the EEOC must endure with each of its proposals. This is particularly unfortunate, given that his Guidelines fail to comport with established standards in this area of law.

II. Incorrect Legal Standards

A. *Excessive Reliance on the Establishment Clause*

1. Title VII Provides the Most Relevant Legal Standard for Federal Employees

The President's Guidelines repeatedly and incorrectly defer to the Establishment Clause as the ultimate standard for evaluating the rights of federal employees to engage in religious expression and other religious activities. The President fails to acknowledge that Congress intended for Title VII of the Civil Rights Act[18] to be the primary recourse for addressing religious rights in the federal workplace.[19]

In *Brown v. General Services Administration*,[20] the U.S. Supreme Court held that Title VII is the *exclusive* judicial remedy for claims of discrimination in the federal workplace.[21] Based on *Brown*, some courts assert that Title VII precludes federal employees from pursuing *First Amendment* claims for damages from the government.[22] Thus, the Establishment Clause and the other First Amendment

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[17] *See Religious Harassment Rules Shelved, supra* note 13; Pace, *supra* note 13.

[18] Title VII forbids discrimination on the basis of race, color, religion, sex, or national origin. 42 U.S.C. § 2000e-1 et seq. (1997).

[19] Congress' codification of the "reasonable accommodation rule" (summarized in note 22, *infra*) as part of Title VII in 1972 reflects the appropriate constitutional procedure for introducing new standards in employment law. Although the EEOC adopted the "reasonable accommodation rule" in 1967, several courts initially concluded that the EEOC had exceeded its authority under Title VII because, at the time, Title VII prohibited discrimination but did not mandate reasonable accommodation. *See, e.g.*, Dewey v. Reynolds Metal Co., 429 F.2d 324 (6th Cir. 1970), *aff'd*, 402 U.S. 689 (1971); Kettel v. Johnson & Johnson, 337 F. Supp. 892 (D.C. Ark. 1972). The courts, however, viewed Congress' codification of the "reasonable accommodation rule," 42 U.S.C. §§ 2000e(j)-e2(a)(1) (1972), as resolving this controversy. *See, e.g.*, Riley v. Bendix Corp., 464 F.2d 1113 (5th Cir. 1972); Reid v. Memphis Publ'g Co., 468 F.2d 346 (6th Cir. 1972), *later op.*, 369 F. Supp. 684 (D.C. Tenn. 1973).

[20] Brown v. Gen. Serv. Admin., 425 U.S. 820, 835 (1976).

[21] *Id.* at 832 (1976) (basing decision on legislative intent and the "balance, completeness, and structural integrity" of Title VII).

[22] *See, e.g.*, Kizas v. Webster, 707 F.2d 524, 542-43 (D.C. Cir. 1983), *cert. denied*, 464 U.S. 1042 (1984); White v. Gen. Serv. Admin., 652 F.2d 913, 916-17 (9th Cir. 1981); Porter v. Adams, 639 F.2d 273, 278 (5th Cir. 1981); Gissen v. Tackman, 537 F.2d 784,

Clauses may play no role, or at best, a secondary role, in cases involving religious discrimination in the *federal* workplace.

The Guidelines fail to mention that Title VII provides the most critical legal standard for federal employees' religious rights in three specific situations: *first*, it requires employers to make a reasonable accommodation for an employee's religious observances and practices;[23] *second*, it protects employees against intentional discrimination;[24] and *third*, it is designed to prevent employment practices or policies that are neutral on their face, but religiously discriminatory in their application.[25]

2. Giving Proper Weight to the Free Speech and Free Exercise Clauses

In addition to Title VII claims, a few courts suggest that federal employees who allege that the government has violated their constitutional rights may be able to pursue a constitutionally based action for damages against their supervi-

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786 (3d Cir. 1976); Sugrue v. Derwinski, 26 F.3d 8, 11-12 (2nd Cir. 1994); Hines v. The Irvington Counseling Ctr. 933 F. Supp. 382, 385 (D.N.J. 1996); Assar v. Crescent Counties Found. for Med. Care, 13 F.3d 215, 218-19 (7th Cir. 1993). Furthermore, the Supreme Court has held that federal employees must rely on the administrative remedial scheme established by Congress to seek damages for constitutional violations, rather than pursuing a constitutional action in federal court. *See* Schweiker v. Chilicky, 487 U.S. 412, 425 (1988); Bush v. Lucas, 462 U.S. 367, 389 (1983).

[23] The "reasonable accommodation rule" requires an employee to establish a prima facie case that the employer failed to accommodate his or her religious belief. The employee must show that he or she: (1) holds a sincere religious belief that conflicts with an employment requirement (e.g., working on the Sabbath); (2) has informed the employer about the conflict; and (3) was discharged or disciplined for failing to comply with the conflicting employment requirement. *See* Ansonia Bd. of Educ. v. Philbrook, 479 U.S. 60, 65-66 (1986), appeal after remand, 925 F.2d 47, cert. denied, 501 U.S. 1218 (1991). Once the employee makes out a prima facie case, the burden of proof shifts to the employer to show either that: (1) the employer made a good faith effort to reasonably accommodate the conflicting religious belief or practice; or (2) the employer was not able to reasonably accommodate the employee without experiencing undue hardship. *See id.* at 67-68.

[24] Section 703(a)(1) of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2(a)(1), provides that "[i]t shall be an unlawful employment practice for an employer . . . to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex or national origin . . . ."

[25] A disparate impact claim alleges that an ostensibly neutral policy or practice has a disparate impact or effect on a protected class. *See* Int'l Bhd. of Teamsters, 431 U.S. 324, 335-36 n.15 (1977; Bridgeport Guardians, Inc. v. City of Bridgeport, 933 F.2d 1140, 1146 (2d Cir. 1991) ("Title VII prohibits not only overt and intentional discrimination, but also discrimination resulting from practices that are facially neutral but have 'disparate impact,' i.e., significant adverse effects on protected groups."), citing Int'l Bhd. of Teamsters v. United States, 431 U.S. at 335-36 n.15. *See also* Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).

sors on a personal basis[26] or an action for equitable relief[27] in federal court.

However, even if a court were to hear a First Amendment claim by a federal employee alleging religious discrimination, it would not necessarily defer to the Establishment Clause as the preeminent First Amendment legal standard for assessing First Amendment concerns. Rather, the court would have to weigh carefully other First Amendment rights such as free speech and free exercise.[28] In the Guidelines, however, the President relies upon the Establishment Clause as the sole or dominant legal standard in weighing an individual's religious rights. Such reliance puts federal supervisors in a "Catch-22" situation: they must allow their employees the right to religious expression, but they also have the duty to censor such expression when "a reasonable observer" might attribute the expression to the government. Arbitrary, and probably unconstitutional, determinations will inevitably result from this standard as federal employers try to draw the line between affirmative accommodation and the supposed duty to censor. In practical application, each individual supervisor will become the "reasonable observer," imposing his or her subjective understanding of what is tolerable religious expression on members of his or her staff.

3. Citing Only One Establishment Clause Test when the Courts Rely on Various Tests, Including the Most Commonly Relied upon *Lemon* Test

Lastly, where the Establishment Clause applies to the federal workplace, the President should have referred to the commonly used Establishment Clause test

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[26] *See* Neely v. Blumenthal, 458 F. Supp. 945, 952-54 (D.D.C. 1978); Langster v. Schweiker, 565 F. Supp. 407, 410 (N.D. Ill. 1983).

[27] The courts are divided on this issue. *Compare* Spagnola v. Mathis, 859 F.2d 223, 227 (D.C. Cir. 1988) (en banc) ("Spagnola II") (permitting action for civil servants' constitutional claims for equitable cause of action); Perry v. Thomas, 849 F.2d 484, 484-85 (11th Cir. 1988) (same); *with* Saul v. United States, 928 F.2d 829, 843 (9th Cir. 1991) (denying equitable cause of action); Roth v. United States, 952 F.2d 611, 614 (1st Cir. 1991) (same); Lombardi v. Small Bus. Admin., 889 F.2d 959, 961-62 (10th Cir. 1989) (same); Paige v. Cisneros, 91 F.3d 40, 44 (7th Cir. 1996) (same); Pinar v. Dole, 747 F.2d 899, 909-12 (4th Cir. 1984), *cert. denied*, 471 U.S. 1016 (1985) (same).

[28] The Supreme Court relied on the Free Speech Clause to prohibit viewpoint discrimination despite Establishment Clause concerns regarding a public university's funding of an evangelical Christian student newspaper. In addition, the Guidelines overlook the Supreme Court's concern over "prior restraints" on free speech. In a 1993 decision, the Court pointed out that a regulation is particularly suspect if it imposes a "prior restraint" prohibiting some form of communication in advance of the time it is to occur. *See* Alexander v. United States, 509 U.S. 544, 553-54 (1993). Such a restriction on speech is always subject to a "heavy presumption against its constitutional validity." Bantam Books Inc. v. Sullivan, 372 U.S. 58, 70 (1963). In the context of public employment, the Supreme Court also emphasized: "The Government must show that the interests of both potential audiences and a vast group of present and future employees in a broad range of present and future expression are outweighed by that expression's 'necessary impact on the actual operation' of the Government." Pickering v. Bd. of Educ., 391 U.S. 563, 571 (1968).

introduced by the Supreme Court in *Lemon v. Kurtzman*,[29] or at a minimum, disclosed that there is much debate among judges and scholars over the proper test to use when evaluating Establishment Clause concerns.[30] Instead, the Guidelines repeatedly and incorrectly rely solely on the "reasonable observer" or "endorsement" test to assess Establishment Clause concerns. Although the Supreme Court has relied upon this test in certain cases, it has never been formally adopted to supplant the *Lemon* test.[31] The President's reliance on only one of the

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[29] 403 U.S. 602, 612-13 (1971). *See* Wallace v. Jaffree, 472 U.S. 38, 63 (1985) (Powell, J., concurring) (the Establishment Clause test in "*Lemon v. Kurtzman* identifies standards that have proved useful in analyzing case after case both in our decisions and in those of other courts. It is the only coherent test a majority of the Court has ever adopted.") According to the *Lemon* test, to avoid an establishment of religion: *first*, the government must have a secular purpose; *second*, the action's primary effect can neither advance nor inhibit religion; and *third*, the action cannot foster an excessive entanglement between government and religion. *See id.*

[30] In addition to the *Lemon* test, the Supreme Court has used no fewer than four other tests. First, it has used the "endorsement" test, which renders a challenged government action unconstitutional if "a reasonable observer would view [the challenged government action] as a disapproval of his or her particular religious choices." County of Allegheny v. ACLU, 492 U.S. 573, 631 (1989) (O'Connor, J., concurring in part). Second, it has used the "coercion" test, which renders a government action unconstitutional if state officials direct the performance of a formal religious exercise at an event if "attendance and participation in the state-sponsored religious activity are in a fair and real sense obligatory . . . ." Lee v. Weisman, 505 U.S. 577, 586 (1992). Third, in *Larson v. Valente*, it applied a "strict scrutiny" test, which renders a government action unconstitutional if it favors or prefers one religion over others, rather than religion over non-religion. 456 U.S. 228, 245-46 (1982). Finally, in *Marsh v. Chambers*, it applied a "historical exception" test, which relied on historical evidence that the draftsmen of the Establishment Clause allowed legislative sessions to be opened with prayer as sufficient justification for allowing the continuation of the process. 463 U.S. 783, 790 (1983).

Even while relying on other tests, the Court has sought to preserve the *Lemon* test. For example, in *Lee*, although the plurality opinion ultimately relied on the "coercion" test mentioned above, it refused to reject the *Lemon* test ("we do not accept the invitation of petitioners and amicus the United States to reconsider our decision in *Lemon v. Kurtzman*"), implying that the "coercion" test was a variation of the traditional *Lemon* approach. *Lemon*, 505 U.S. at 587.

[31] As Justice O'Connor, the most vocal proponent of the "endorsement" test, acknowledged in her concurring opinion in *Board of Education of Kiryas Joel Village v. Grumet*, "Experience proves that the Establishment Clause, like the Free Speach Clause, cannot easily be reduced to a single test." 512 U.S. 698, 720 (1994) (O'Connor, J., concurring in the judgement). Some analysts point out that Justice O'Connor's frequent support of the "endorsement" test (*see County of Allegheny*, 492 U.S. at 631), plus the votes of the block of four other Justices in *Capitol Square Review v. Pinette* (Justice Scalia's plurality opinion) who argued that they might be willing to rely on the "endorsement" test except in cases involving a traditional public forum, means that the majority of current Justices favor the "endorsement" test. 115 S. Ct. 2440, 2449-50 (1995). But a majority of Justices has never expressly held that *Lemon* is no longer the "official Establishment Clause test. *See, e.g.*, *Lee*, 505 U.S. at 587 ("we do not accept the invitation of petitioner and

proposed tests to the exclusion of all others is simplistic and an inaccurate reflection of the law.

4. Sections of the Guidelines Incorrectly Rely on the Establishment Clause:

a. Section 1 ("Guidelines for Religious Exercise and Religious Expression in the Federal Workplace"), subsection D ("Establishment of Religion"), paragraph 1, sentence 1:

"Supervisors and employees must not engage in activities or expression that a *reasonable observer would interpret as Government endorsement or denigration of religion or a particular religion*;" and Section 2 ("Guiding Legal Principles"), subsection F ("Establishment of Religion"), paragraph 1, sentence 1:

"The Establishment Clause of the First Amendment prohibits the Government—including its employees—from acting in a manner that would lead *a reasonable observer to conclude that the Government is sponsoring, endorsing or inhibiting religion generally or favoring or disfavoring a particular religion.*"

Comment: These sentences misrepresent the "endorsement" test as the official or exclusive Establishment Clause test.

In addition, the inappropriate application of this standard may actually violate an employee's religious rights under Title VII and the Free Speech Clause of the First Amendment.

b. Section 1 ("Guidelines for Religious Exercise and Religious Expression in the Federal Workplace"), subsection A ("Religious Expression"), paragraph 1, sentence 1:

"As a matter of law, agencies shall not restrict personal religious expression by employees in the Federal workplace except where the employee's interest in the expression is outweighed by the government's interest in the efficient provision of public services or where the expression intrudes upon the legitimate rights of other employees or *creates the appearance, to a reasonable observer, of an official endorsement of religion.*"

Comment: The President fails to mention the "reasonable accommodation" standard found in Title VII. To the extent that a court may decide to weigh free speech concerns beyond an accommodation of religious expression, the Guidelines inappropriately rely on an Establishment Clause test (the avoidance of "an official endorsement of religion" as a legitimate justification for restricting religious speech) to evaluate the employee's free speech rights.

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amicus the United States to reconsider our decision in Lemon v. Kurtzman"). In fact, in the recent Supreme Court decision, *Agostini v. Felton*, 117 S. Ct. 1997 (1998), Justice O'Connor, writing for the majority did not even mention her favored "endorsement" test, but relied entirely upon the *Lemon* test to conclude that the placement of public employees in a sectarian school did not create an "excessive entanglement" between church and state, nor advanced or inhibited religion. *See id.* at 2000-01.

c. Section 1 ("Guidelines for Religious Exercise and Religious Expression in the Federal Workplace"), subsection A ("Religious Expression"), subsection (2) ("Expression Among Fellow Employees"), Example (b):
"Employees are entitled to display religious messages on items of clothing to the same extent that they are permitted to display other comparable messages. *So long as they do not convey any governmental endorsement of religion*, religious messages *may not typically* be singled out for suppression."
Comment: The Guidelines again fail to mention the "reasonable accommodation" standard found in Title VII. They also inappropriately use an "endorsement" test to evaluate free speech rights when restricting religious messages on clothing that "convey any governmental endorsement of religion." In addition, by stating that "religious messages may not typically be singled out for suppression," it appears that religious messages *may occasionally* be singled out for suppression. This creates the opportunity for an employer to use fear of government endorsement as a pretext for censoring speech with which he or she or other workers disagree.

d. Section 1 ("Guidelines for Religious Exercise and Religious Expression in the Federal Workplace"), subsection A ("Religious Expression"), subsection (3) ("Expression Directed at Fellow Employees"), paragraph 1, sentence 1:
"Employees are permitted to engage in religious expression directed at fellow employees, and may even attempt to persuade fellow employees of the correctness of their religious views *to the same extent as those employees may engage in comparable speech not involving religion.*"
Comment: This statement ignores the fact that while Title VII provides for equal treatment among employees on the basis of race, sex, and religion, it also provides for the accommodation of religious individuals, which does not entail equal treatment. For example, someone should be allowed to opt out of a religiously objectionable seminar, but all other employees would have to attend unless they too had religious objections.
In any case, the Guidelines do not clarify to what extent employees may engage in nonreligious speech. The Guidelines also use a comparative standard that treats all employees' free speech rights the same, even though the U.S. Constitution provides an additional Free Exercise right to support *religious* free speech under the First Amendment.

e. Section 1, subsection A ("Religious Expression"), subsection (3) ("Expression Directed at Fellow Employees"), paragraph 1, sentence 3:
"As a general matter, proselytizing is as entitled to constitutional protection as any other form of speech — as long as a reasonable observer would not interpret the expression as government endorsement of religion."
Comment: The President fails to mention the "reasonable accommodation" test under Title VII, which is the most relevant standard applicable to employee proselytizing. Further, to the extent that a court may weigh free speech concerns beyond an accommodation of religious expression, this statement evinces an exclusive reliance on an Establishment Clause test to evaluate rights under the Free Speech and Free Exercise clauses. Finally, this statement misrepresents the "endorsement" or "reasonable observer" test as the official or exclusive Establishment Clause test.

f. Section 1 ("Guidelines for Religious Exercise and Religious Expression in the Federal Workplace"), subsection A ("Religious Expression"), subsection (4) ("Expression in Areas Accessible to the Public"), paragraph 1, sentence 1:

"Where the public has access to the federal workplace, all federal employers must be sensitive to the Establishment Clause's requirement that *expression not create the reasonable impression that the government is sponsoring, endorsing, or inhibiting religion generally, or favoring or disfavoring a particular religion.*"

Comment: Again, the President fails to mention the "reasonable accommodation" test under Title VII. Further, to the extent that a court may weigh free speech concerns beyond an accommodation of religious expression, this statement evinces an exclusive reliance on the Establishment Clause test to evaluate free speech rights in the public fora.

In the free speech context, this statement also generates confusion because it does not indicate whether the federal work areas are public fora, or whether they are reserved for specific official uses. The Guidelines also make no reference to whether restrictions are necessary and narrowly drawn to serve a compelling state interest.

Finally, once more, this statement misrepresents the "endorsement" or "reasonable observer" test as the official or exclusive Establishment Clause test.

B. *Incorrect Hostile Work Environment Standard*

In *Meritor Savings Bank v. Vinson*[32] and *Harris v. Forklift Systems,*[33] the U.S. Supreme Court stated that a discriminatorily hostile or abusive work environment occurs when the workplace is permeated with intimidation, ridicule and insult that is sufficiently severe or pervasive to alter the conditions of the alleged victim's employment.[34] The Court further stated that conduct that is not severe or pervasive enough to create an objectively hostile or abusive work environment is beyond the purview of Title VII.[35] The Court emphasized that "whether an environment is 'hostile' or 'abusive' can be determined only by looking at all the circumstances."[36]

Although the Guidelines allude to the "pervasive and severe" standard established by the Supreme Court, they also make statements that essentially modify that standard.

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[32] 477 U.S. 57, 65 (1986).

[33] 510 U.S. 17, 21 (1993).

[34] *See Meritor*, 477 U.S. at 65; *Harris*, 510 U.S. at 21.

[35] *See Harris*, 510 U.S. at 21.

[36] *Id.* at 23 (listing such factors as: the frequency and severity of the discriminatory conduct; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance).

Examples of Modifying the Supreme Court's "pervasive and severe" standard

1. Section 1 ("Guidelines for Religious Exercise and Religious Expression in the Federal Workplace"), subsection B ("Religious Discrimination"), subsection (3) ("Hostile Work Environment and Harassment"), paragraph 1, sentences 3-4:
"The use of derogatory language in an assaultive manner can constitute statutory religious harassment if it is severe or invoked repeatedly. *A single incident, if sufficiently abusive, might also constitute statutory harassment.*"
Comment: The courts disagree over whether a "single incident" is sufficient to create a hostile work environment.[37] By failing to mention that this is an unresolved area of law, the President may mislead federal officials and employees to accept his statement as a definitive treatment of the subject. The Supreme Court, however, asserted in *Harris* that the " 'mere utterance of an . . . epithet which engenders offensive feelings in an employee' does not sufficiently affect the conditions of employment to implicate Title VII."[38]

2. Section 2 ("Guiding Legal Principles"), subsection D ("Hostile Work Environment and Harassment"), paragraph 1, sentences 1-2:
"Employers violate Title VII's ban on discrimination by creating or tolerating a 'hostile environment' in which an employee is subject to discriminatory intimidation, ridicule, or insult sufficiently severe or pervasive to alter the conditions of the victim's employment. This statutory standard can be triggered (at the very least) when an employee, because of her or his religion or lack thereof, is *exposed to intimidation, ridicule, and insult.*"
Comment: This paragraph is internally inconsistent. Although the first sentence refers to the correct standard of harassment ("severe or pervasive") promulgated by the Supreme Court in *Meritor* and *Harris*, the subsequent sentence introduces a lower showing (a mere exposure to intimidation, ridicule and insult) for satisfying this statutory standard. As noted earlier, the Supreme Court asserted in *Harris* that the " 'mere utterance of an . . . epithet which engenders offensive

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[37] *Compare* West v. Philadelphia Elec. Co., 45 F.3d 744, 755 (3d Cir. 1995) ("hostile work environment results from acts of . . . harassment which are pervasive and continue over time, whereas isolated or single incidents of harassment are insufficient to constitute a hostile environment"); Moylan v. Maries County, 792 F.2d 746, 749-50 (8th Cir. 1986) ("a single incident or isolated incidents generally will not be sufficient" to constitute a hostile environment); *with* Creamer v. Laidlaw Transit, Inc., 86 F.3d 167, 170 (10th Cir. 1996) (employee may prevail in action for sexual harassment if a single incident, standing alone, was sufficiently severe); Bohen v. City of E. Chicago, 799 F.2d 1180, 1186-87 (7th Cir. 1986) (single act can be enough). Even courts that favor a "single incident" scenario, however, acknowledge that generally, repeated incidents create a stronger claim of hostile environment harassment, with the strength of the claim depending on the number of incidents and the intensity of each incident. *See* King v. Bd. of Regents, 898 F.2d 533, 537 (7th Cir. 1990).

[38] *Harris*, 510 U.S. at 21 (quoting *Meritor*, 477 U.S. at 67).

feelings in an employee' does not sufficiently affect the conditions of employment to implicate Title VII."[39]

Further, it is not at all clear what qualifies as "intimidation, ridicule, and insult." Certainly, there is no statutory or case authority supporting a right not to be offended.[40] In fact, this concept is quite antithetical to the free speech principles found in the First Amendment and repeatedly affirmed by the Supreme Court.[41]

3. Section 1 ("Guidelines for Religious Exercise and Religious Expression in the Federal Workplace"), subsection A ("Religious Expression"), subsection (4) ("Expression in Areas Accessible to the Public"), paragraph 2, sentence 4:
"Similarly, in their private time employees may discuss religion with *willing coworkers* in public spaces *to the same extent as they may discuss other subjects*, so long as the public would reasonably understand the religious expression to be that of the employees acting in their personal capacities."
Comment: To the extent that the speaker could be a supervisor, only statements that are "severe or pervasive to alter conditions" of employment and create an "abusive working environment" violate Title VII. Here, the President again introduces a lower standard for religious harassment than what *Harris* would require. Since *Harris* provides the minimum legal standard for harassment in the workplace, and the Guidelines reach below this standard only for religious matters (and no other Title VII concerns), they discriminate against religion and arguably violate the Establishment Clause. Moreover, by making an employee's willingness to hear another employee's religious expression a factor in determining proper expression, the President is effectively implementing a legal standard

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[39] *Id.*

[40] "The First Amendment does not permit official repression or homogenization of ideas, even odious ideas, and even when the expression of these ideas may result in hurt feelings or a sense of being harassed." Pyle v. S. Hadley Sch. Comm., 861 F. Supp. 157, 159 (D. Mass. 1994). In Texas v. Johnson, 491 U.S. 397 (1988), for example, the Supreme Court held that a state law prohibiting flag-burning was unconstitutional, even though the flag-burning had "seriously offended" others. *Id.* at 399. The Supreme Court concluded that "[i]f there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable." *Id.* at 414.

[41] *See, e.g.*, Cohen v. California, 403 U.S. 15, 25 (1971) ("one man's vulgarity is another's lyric"); Terminiello v. Chicago, 337 U.S. 1, 4 (1949) ("[A] function of free speech under our system of government is to invite dispute. It may indeed best serve its high purposė when it induces a condition of unrest, creates dissatisfaction with conditions as they are, or even stirs people to anger. Speech is often provocative and challenging. It may strike at prejudices and preconceptions and have profound unsettling effects as it presses for acceptance. . . ."); Cantwell v. Connecticut, 310 U.S. 296, 310 (1940) ("In the realm . . . of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor."); R.A.V. v. St. Paul, 505 U.S. 377, 391 (1992) ("The First Amendment does not permit [the government] to impose special prohibitions on those speakers who express views on disfavored subjects.").

that is similar to the standards proposed by the EEOC in its failed guidelines on religious harassment.

The Guidelines may also be inconsistently applied because the distinction between a willing and an unwilling co-worker is unclear. Finally, to the extent that a court may decide to weigh free speech and free exercise concerns, the comparative standard introduced here ("employees may discuss religion . . . to the same extent as they may discuss other subjects") also treats everyone's free speech rights the same, whereas the U.S. Constitution expressly provides an additional free exercise right to support religious expression under the First Amendment.

C. *Other Non-Legal Standards*

The following are additional examples of incorrect legal standards in the President's Guidelines:

1. Section 1 ("Guidelines for Religious Exercise and Religious Expression in the Federal Workplace"), paragraph 1, sentence 1:
"Executive departments and agencies ("agencies") shall permit personal religious expression by Federal employees to the greatest extent possible, consistent with requirements of law *and interests in workplace efficiency* as described in this set of Guidelines."
Comment: Although the Supreme Court has performed a balancing test weighing the efficiency of public services against the free speech rights of public employees,[42] no court has yet to use workplace efficiency as a factor when considering a public employee's free exercise rights or the accommodation of his or her religious beliefs under Title VII. Under section 2000e(j),[43] a determination of whether the employer would experience an "undue hardship" is the primary factor in deciding whether an employer has failed to accommodate an employee's religious needs.

2. Section 1 ("Guidelines for Religious Exercise and Religious Expression in the Federal Workplace"), subsection A ("Religious Expression"), subsection (1) ("Expression in Private Work Areas"), paragraph 1, sentence 1:
"Employees should be permitted to engage in private religious expression in personal work areas *not regularly open to the public* to the same extent that they may engage in nonreligious private expression, subject to reasonable content- and viewpoint-neutral standards and restrictions: Such religious expression must be permitted so long as it does not interfere with the agency's carrying out of its official responsibilities."
Comment: The caveat, "not regularly open to the public," does not appear to be based on any case law. This sentence implies that federal employees

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[42] *See, e.g.*, Pickering v. Bd. of Educ., 391 U.S. 563, 568 (1968). *Cf.* Fyfe v. Curlee, 902 F.2d at 405 ("The state may legitimately interfere with the constitutionally protected conduct of a public school employee only when that conduct materially and substantially impedes the operation or effectiveness of the educational program"), *citing* Tinker v. Des Moines Indep. Comm. Sch. Dist., 393 U.S. 503 (1969).

[43] 42 U.S.C. § 2000e(j) (1995).

are prohibited from engaging in religious expression in areas open to the public, and federal employers may interpret it as requiring a gag order. Such a blanket prohibition would go beyond the "endorsement" test standard and would also violate the Free Speech Clause.

3. Section 1 ("Guidelines for Religious Exercise and Religious Expression in the Federal Workplace"), subsection C ("Accommodation of Religious Exercises"), paragraph 2, Example (a):

"An agency must adjust work schedules to accommodate an employee's religious observance—for example, a Sabbath or religious holiday observance—if an adequate substitute is available, or if the employee's absence would not otherwise impose an undue burden on the agency."

Comment: The availability of an "adequate substitute" is not the correct test for accommodating Sabbath or holiday observers. Although the availability of an adequate substitute may be a factor in an overall determination of accommodation, the correct standard to apply is the "reasonable accommodation" test.[44]

III. VAGUENESS

The President's Guidelines also contain vague standards that will inevitably engender confusion among both employers and employees.

A. Section 1 ("Guidelines for Religious Exercise and Religious Expression in the Federal Workplace"), paragraph 1, sentence 3:

"And agencies shall accommodate employees' exercise of their religion in the *circumstances specified in these Guidelines.*"

Comment: Employers will inevitably become confused when reading this statement. It is uncertain whether the Guidelines apply to circumstances not described therein, or whether this sentence connotes that a firm limitation exists as to the type of circumstances affected by the Guidelines.

B. Section 1 ("Guidelines for Religious Exercise and Religious Expression in the Federal Workplace"), subsection A ("Religious Expression"), paragraph 1, sentence 1:

"As a matter of law, agencies shall not restrict personal religious expression by employees in the federal workplace except where the employee's interest in the expression is outweighed by the government's interest in the efficient provision of public services or where *the expression intrudes upon the legitimate rights of other employees* or creates the appearance, to a reasonable observer, of an official endorsement of religion."

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[44] *See supra*, note 23.

Comment: It is unclear what the legal basis is for considering the "legitimate rights" of other employees, and the "legitimate rights" that might be intruded upon, when restricting the free speech rights of federal employees.

C. Section 1 ("Guidelines for Religious Exercise and Religious Expression in the Federal Workplace"), subsection A ("Religious Expression"), paragraph 3, sentence 3:
"Agencies are not required, however, to permit employees to use work time *to pursue religious or ideological agendas*. Federal employees are paid to perform official work, not to engage in personal religious or ideological campaigns during work hours."
Comment: It is unclear what is meant by "religious or ideological agendas." In any case, if "agendas" have anything to do with the motivations of employees or prospective employees, then the Guidelines appear to discriminate against anyone who is motivated to serve in the government and to perform capably in their place of employment as part of fulfilling his or her religious duty. This would constitute *per se* discrimination against the employee or prospective employee. Even if federal officials do not interpret the provision in this way, it should not matter to the government whether an individual's religious convictions motivate him or her to work in and for the government as a means to integrate with and reach out to the secular community. This could be interpreted as evangelizing.
Further, the Guidelines acknowledge that a limited right to proselytize exists, which makes the statement on "agendas" contradictory and confusing. For some individuals, it may be impossible to segregate one's religious motivations from one's service to the government. Ultimately, determining someone's "agenda" is not the appropriate legal inquiry, and the government should not be concerned with whether someone has a religious agenda so long as that "agenda" imposes no undue burden on the employer.
Also, the restriction on "personal religious or ideological campaigns during work hours" appears to prevent employees from engaging in any informal discussions (however brief) of their religious beliefs or inviting fellow employees to religious activities; and since the lunch hour is part of the overall paid workday, it would appear that lunch conversations cannot contain such expression. Yet the subsequent paragraphs indicate that such expression is permissible in certain situations. Once again, the Guidelines provide contradictory information and confusion.

D. Section 1 ("Guidelines for Religious Exercise and Religious Expression in the Federal Workplace"), subsection B ("Religious Discrimination"), subsection (2) ("Coercion of Employee's Participation or Nonparticipation in Religious Activities"), paragraph 1, sentence 2:
"Nor may a supervisor insist that an employee refrain from participating in religious activities outside the workplace except pursuant to *otherwise legal, neutral restrictions that apply to employees' off-duty conduct and expression in general (e.g., restrictions on political activities prohibited by the Hatch Act)*."
Comment: As worded, the Guidelines apparently provide for a supervisor's restrictions of an employee's outside religious activities on grounds other than those present in the Hatch Act. It is unclear, however, what other

grounds the Guidelines contemplate. Consequently, a supervisor unfamiliar with case law dealing with restrictions on public employees' outside activities[45] could view this as a catch-all provision and enforce overly restrictive measures against religious employees.

IV. CONCLUSION

The Constitutional framers did not intend the federal government to be run on executive decree alone. The interplay among Congress, the courts, the EEOC, and the President is born out of necessity in a federal government operating through checks and balances. Although this process means that laws may sometimes develop slowly, it ensures meaningful public debate, judicial scrutiny, and sensitivity to constitutional concerns, particularly with respect to individual civil liberties.

Beyond this concern, the Guidelines' attempt at uniformity fails to accurately reflect the constitutional provisions, laws, and regulations interpreted by the courts and/or passed by Congress. In fact, the Guidelines engender more confusion than uniformity because of their vague wording and inaccuracies. Further, various portions of the Guidelines subtly introduce legal standards less protective of federal employees' religious freedom than the actual law.

In the final analysis, it appears that the Guidelines are an unfortunate product of executive decision-making, without accountability and consultation from the other branches of government and the public at large.

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[45] For example, the Supreme Court has spoken clearly in defense of the First Amendment rights of public school teachers outside the classroom, including such rights as freedom of association and free speech. *See* Pickering v. Bd. of Educ., 391 U.S. 563 (1968); Mt. Healthy City Bd. of Educ. v. Doyle, 429 U.S. 274 (1977). The courts have held that a public school teacher cannot lose his or her position for exercising constitutional rights outside the school environment unless school officials can demonstrate that the teacher's conduct substantially interfered with his or her ability to perform classroom duties or with the regular operation of the school. *See* Fyfe v. Curlee, 902 F.2d at 405, citing Tinker v. Des Moines Indep. Comm. Sch. Dist., 393 U.S. 503 (1969); Stough v. Crenshaw County Bd. of Educ., 744 F.2d 1479, 1481 (11th Cir. 1984); Brantley v. Surles, 718 F.2d 1354, 1359 (5th Cir. 1983), *appeal after remand*, 765 F.2d 478 (5th Cir. 1985), *appeal after remand*, 804 F.2d 321 (5th Cir. 1986).

APPENDIX

The White House

Office of the Press Secretary

August 14, 1997

GUIDELINES ON RELIGIOUS EXERCISE AND RELIGIOUS EXPRESSION IN THE FEDERAL WORKPLACE

The following Guidelines, addressing religious exercise and religious expression, shall apply to all civilian executive branch agencies, officials, and employees in the Federal workplace.

These Guidelines principally address employees' religious exercise and religious expression when the employees are acting in their personal capacity within the Federal workplace and the public does not have regular exposure to the workplace. The Guidelines do not comprehensively address whether and when the government and its employees may engage in religious speech directed at the public. They also do not address religious exercise and religious expression by uniformed military personnel, or the conduct of business by chaplains employed by the Federal Government. Nor do the Guidelines define the rights and responsibilities of non-governmental employers —including religious employers — and their employees. Although these Guidelines, including the examples cited in them, should answer the most frequently encountered questions in the Federal workplace, actual cases sometimes will be complicated by additional facts and circumstances that may require a different result from the one the Guidelines indicate.

Section 1. **Guidelines for Religious Exercise and Religious Expression in the Federal Workplace.** Executive departments and agencies ("agencies") shall permit personal religious expression by Federal employees to the greatest extent possible, consistent with requirements of law and interests in workplace efficiency as described in this set of Guidelines. Agencies shall not discriminate against employees on the basis of religion, require religious participation or non-participation as a condition of employment, or permit religious harassment. And agencies shall accommodate employees' exercise of their religion in the circumstances specified in these Guidelines. These requirements are but applications of the general principle that agencies shall treat all employees with the same respect and consideration, regardless of their religion (or lack thereof).

A. **Religious Expression.** As a matter of law, agencies shall not restrict personal religious expression by employees in the Federal workplace except where the employee's interest in the expression is outweighed by the government's interest in the efficient provision of public services or where the expression intrudes upon the legitimate rights of other employees or creates

the appearance, to a reasonable observer, of an official endorsement of religion. The examples cited in these Guidelines as permissible forms of religious expression will rarely, if ever, fall within these exceptions.

As a general rule, agencies may not regulate employees' personal religious expression on the basis of its content or viewpoint. In other words, agencies generally may not suppress employees' private religious speech in the workplace while leaving unregulated other private employee speech that has a comparable effect on the efficiency of the workplace —including ideological speech on politics and other topics — because to do so would be to engage in presumptively unlawful content or viewpoint discrimination. Agencies, however, may, in their discretion, reasonably regulate the time, place and manner of all employee speech, provided such regulations do not discriminate on the basis of content or viewpoint.

The Federal Government generally has the authority to regulate an employee's private speech, including religious speech, where the employee's interest in that speech is outweighed by the government's interest in promoting the efficiency of the public services it performs. Agencies should exercise this authority evenhandedly and with restraint, and with regard for the fact that Americans are used to expressions of disagreement on controversial subjects, including religious ones. Agencies are not required, however, to permit employees to use work time to pursue religious or ideological agendas. Federal employees are paid to perform official work, not to engage in personal religious or ideological campaigns during work hours.

(1) **Expression in Private Work Areas.** Employees should be permitted to engage in private religious expression in personal work areas not regularly open to the public to the same extent that they may engage in nonreligious private expression, subject to reasonable content- and viewpoint-neutral standards and restrictions: such religious expression must be permitted so long as it does not interfere with the agency's carrying out of its official responsibilities.

Examples

(a) An employee may keep a Bible or Koran on her private desk and read it during breaks.

(b) An agency may restrict all posters, or posters of a certain size, in private work areas, or require that such posters be displayed facing the employee, and not on common walls; but the employer typically cannot single out religious or anti-religious posters for harsher or preferential treatment.

(2) **Expression Among Fellow Employees.** Employees should be permitted to engage in religious expression with fellow employees, to the same extent that they may engage in comparable nonreligious private expression, subject to reasonable and content-neutral standards and restrictions: such expression should not be restricted so long as it does not interfere with workplace efficiency. Though agencies are entitled to regulate such employee speech based on reasonable predictions of disruption, they should not restrict speech based on merely hypothetical concerns, having little basis in fact, that the speech will have a deleterious effect on workplace efficiency.

Examples

(a) In informal settings, such as cafeterias and hallways, employees are entitled to discuss their religious views with one another, subject only to the same rules of order as apply to other employee expression. If an agency permits unrestricted nonreligious expression of a controversial nature, it must likewise permit equally controversial religious expression.

(b) Employees are entitled to display religious messages on items of clothing to the same extent that they are permitted to display other comparable messages. So long as they do not convey any governmental endorsement of religion, religious messages may not typically be singled out for suppression.

(c) Employees generally may wear religious medallions over their clothes or so that they are otherwise visible. Typically, this alone will not affect workplace efficiency, and therefore is protected.

(3) **Expression Directed at Fellow Employees.** Employees are permitted to engage in religious expression directed at fellow employees, and may even attempt to persuade fellow employees of the correctness of their religious views, to the same extent as those employees may engage in comparable speech not involving religion. Some religions encourage adherents to spread the faith at every opportunity, a duty that can encompass the adherent's workplace. As a general matter, proselytizing is as entitled to constitutional protection as any other form of speech — as long as a reasonable observer would not interpret the expression as government endorsement of religion. Employees may urge a colleague to participate or not to participate in religious activities to the same extent that, consistent with concerns of workplace efficiency, they may urge their colleagues to engage in or refrain from other personal endeavors. But employees must refrain from such expression when a fellow employee asks that it stop or otherwise demonstrates that it is unwelcome. (Such expression by supervisors is subject to special consideration as discussed in Section B(2) of these guidelines.)

Examples

(a) During a coffee break, one employee engages another in a polite discussion of why his faith should be embraced. The other employee disagrees with the first employee's religious exhortations, but does not ask that the conversation stop. Under these circumstances, agencies should not restrict or interfere with such speech.

(b) One employee invites another employee to attend worship services at her church, though she knows that the invitee is a devout adherent of another faith. The invitee is shocked, and asks that the invitation not be repeated. The original invitation is protected, but the employee should honor the request that no further invitations be issued.

(c) In a parking lot, a non-supervisory employee hands another employee a religious tract urging that she convert to another religion lest she be condemned to eternal damnation. The proselytizing employee says nothing further and does not inquire of his col-

league whether she followed the pamphlet's urging. This speech typically should not be restricted.

Though personal religious expression such as that described in these examples, standing alone, is protected in the same way, and to the same extent, as other constitutionally valued speech in the Federal workplace, such expression should not be permitted if it is part of a larger pattern of verbal attacks on fellow employees (or a specific employee) not sharing the faith of the speaker. Such speech, by virtue of its excessive or harassing nature, may constitute religious harassment or create a hostile work environment, as described in Part B(3) of these Guidelines, and an agency should not tolerate it.

(4) **Expression in Areas Accessible to the Public.** Where the public has access to the Federal workplace, all Federal employers must be sensitive to the Establishment Clause's requirement that expression not create the reasonable impression that the government is sponsoring, endorsing, or inhibiting religion generally, or favoring or disfavoring a particular religion. This is particularly important in agencies with adjudicatory functions.

However, even in workplaces open to the public, not all private employee religious expression is forbidden. For example, Federal employees may wear personal religious jewelry absent special circumstances (such as safety concerns) that might require a ban on all similar nonreligious jewelry. Employees may also display religious art and literature in their personal work areas to the same extent that they may display other art and literature, so long as the viewing public would reasonably understand the religious expression to be that of the employee acting in her personal capacity, and not that of the government itself. Similarly, in their private time employees may discuss religion with willing coworkers in public spaces to the same extent as they may discuss other subjects, so long as the public would reasonably understand the religious expression to be that of the employees acting in their personal capacities.

B. **Religious Discrimination.** Federal agencies may not discriminate against employees on the basis of their religion, religious beliefs, or views concerning religion.

(1) **Discrimination in Terms and Conditions.** No agency within the executive branch may promote, refuse to promote, hire, refuse to hire, or otherwise favor or disfavor, an employee or potential employee because of his or her religion, religious beliefs, or views concerning religion.

Examples

(a) A Federal agency may not refuse to hire Buddhists, or impose more onerous requirements on applicants for employment who are Buddhists.

(b) An agency may not impose, explicitly or implicitly, stricter promotion requirements for Christians, or impose stricter discipline on Jews than on other employees, based on their religion. Nor may Federal agencies give advantages to Christians in promo-

tions, or impose lesser discipline on Jews than on other employees, based on their religion.

(c) A supervisor may not impose more onerous work requirements on an employee who is an atheist because that employee does not share the supervisor's religious beliefs.

(2) **Coercion of Employee's Participation or Nonparticipation in Religious Activities.** A person holding supervisory authority over an employee may not, explicitly or implicitly, insist that the employee participate in religious activities as a condition of continued employment, promotion, salary increases, preferred job assignments, or any other incidents of employment. Nor may a supervisor insist that an employee refrain from participating in religious activities outside the workplace except pursuant to otherwise legal, neutral restrictions that apply to employees' off-duty conduct and expression in general (e.g., restrictions on political activities prohibited by the Hatch Act).

This prohibition leaves supervisors free to engage in some kinds of speech about religion. Where a supervisor's religious expression is not coercive and is understood as his or her personal view, that expression is protected in the Federal workplace in the same way and to the same extent as other constitutionally valued speech. For example, if surrounding circumstances indicate that the expression is merely the personal view of the supervisor and that employees are free to reject or ignore the supervisor's point of view or invitation without any harm to their careers or professional lives, such expression is so protected.

Because supervisors have the power to hire, fire, or promote, employees may reasonably perceive their supervisors' religious expression as coercive, even if it was not intended as such. Therefore, supervisors should be careful to ensure that their statements and actions are such that employees do not perceive any coercion of religious or non-religious behavior (or respond as if such coercion is occurring), and should, where necessary, take appropriate steps to dispel such misperceptions.

Examples

(a) A supervisor may invite co-workers to a son's confirmation in a church, a daughter's bat mitzvah in a synagogue, or to his own wedding at a temple. — but — A supervisor should not say to an employee: "I didn't see you in church this week. I expect to see you there this Sunday."

(b) On a bulletin board on which personal notices unrelated to work regularly are permitted, a supervisor may post a flyer announcing an Easter musical service at her church, with a handwritten notice inviting co-workers to attend. — but — A supervisor should not circulate a memo announcing that he will be leading a lunch-hour Talmud class that employees should attend in order to participate in a discussion of career advancement that will convene at the conclusion of the class.

(c) During a wide-ranging discussion in the cafeteria about various non-work related matters, a supervisor states to an employee her belief that religion is important in one's life. Without more, this is not coercive, and the statement is protected in the Federal

workplace in the same way, and to the same extent, as other constitutionally valued speech.

(d) A supervisor who is an atheist has made it known that he thinks that anyone who attends church regularly should not be trusted with the public weal. Over a period of years, the supervisor regularly awards merit increases to employees who do not attend church routinely, but not to employees of equal merit who do attend church. This course of conduct would reasonably be perceived as coercive and should be prohibited.

(e) At a lunchtable discussion about abortion, during which a wide range of views are vigorously expressed, a supervisor shares with those he supervises his belief that God demands full respect for unborn life, and that he believes it is appropriate for all persons to pray for the unborn. Another supervisor expresses the view that abortion should be kept legal because God teaches that women must have control over their own bodies. Without more, neither of these comments coerces employees' religious conformity or conduct. Therefore, unless the supervisors take further steps to coerce agreement with their view or act in ways that could reasonably be perceived as coercive, their expressions are protected in the Federal workplace in the same way and to the same extent as other constitutionally valued speech.

(3) **Hostile Work Environment and Harassment.** The law against workplace discrimination protects Federal employees from being subjected to a hostile environment, or religious harassment, in the form of religiously discriminatory intimidation, or pervasive or severe religious ridicule or insult, whether by supervisors or fellow workers. Whether particular conduct gives rise to a hostile environment, or constitutes impermissible religious harassment, will usually depend upon its frequency or repetitiveness, as well as its severity. The use of derogatory language in an assaultive manner can constitute statutory religious harassment if it is severe or invoked repeatedly. A single incident, if sufficiently abusive, might also constitute statutory harassment. However, although employees should always be guided by general principles of civility and workplace efficiency, a hostile environment is not created by the bare expression of speech with which some employees might disagree. In a country where freedom of speech and religion are guaranteed, citizens should expect to be exposed to ideas with which they disagree.

The examples below are intended to provide guidance on when conduct or words constitute religious harassment that should not be tolerated in the Federal workplace. In a particular case, the question of employer liability would require consideration of additional factors, including the extent to which the agency was aware of the harassment and the actions the agency took to address it.

Examples

(a) An employee repeatedly makes derogatory remarks to other employees with whom she is assigned to work about their faith or lack of faith. This typically will constitute religious harassment. An agency should not tolerate such conduct.

(b) A group of employees subjects a fellow employee to a barrage of comments about his sex life, knowing that the targeted employee would be discomforted and offended by such comments because of his religious beliefs. This typically will constitute harassment, and an agency should not tolerate it.

(c) A group of employees that share a common faith decides that they want to work exclusively with people who share their views. They engage in a pattern of verbal attacks on other employees who do not share their views, calling them heathens, sinners, and the like. This conduct should not be tolerated.

(d) Two employees have an angry exchange of words. In the heat of the moment, one makes a derogatory comment about the other's religion. When tempers cool, no more is said. Unless the words are sufficiently severe or pervasive to alter the conditions of the insulted employee's employment or create an abusive working environment, this is not statutory religious harassment.

(e) Employees wear religious jewelry and medallions over their clothes or so that they are otherwise visible. Others wear buttons with a generalized religious or anti-religious message. Typically, these expressions are personal and do not alone constitute religious harassment.

(f) In her private work area, a Federal worker keeps a Bible or Koran on her private desk and reads it during breaks. Another employee displays a picture of Jesus and the text of the Lord's Prayer in her private work area. This conduct, without more, is not religious harassment, and does not create an impermissible hostile environment with respect to employees who do not share those religious views, even if they are upset or offended by the conduct.

(g) During lunch, certain employees gather on their own time for prayer and Bible study in an empty conference room that employees are generally free to use on a first-come, first-served basis. Such a gathering does not constitute religious harassment even if other employees with different views on how to pray might feel excluded or ask that the group be disbanded.

C. **Accommodation of Religious Exercise.** Federal law requires an agency to accommodate employees' exercise of their religion unless such accommodation would impose an undue hardship on the conduct of the agency's operations. Though an agency need not make an accommodation that will result in more than a de minimis cost to the agency, that cost or hardship nevertheless must be real rather than speculative or hypothetical: the accommodation should be made unless it would cause an actual cost to the agency or to other employees or an actual disruption of work, or unless it is otherwise barred by law. In addition, religious accommodation cannot be disfavored vis-a-vis other, nonreligious accommodations. Therefore, a religious accommodation cannot be denied if the agency regularly permits similar accommodations for nonreligious purposes.

Examples

(a) An agency must adjust work schedules to accommodate an employee's religious observance —for example, Sabbath or religious holiday observance — if an adequate substitute is available, or if the employee's absence would not otherwise impose an undue burden on the agency.

(b) An employee must be permitted to wear religious garb, such as a crucifix, a yarmulke, or a head scarf or hijab, if wearing such attire during the work day is part of the employee's religious practice or expression, so long as the wearing of such garb does not unduly interfere with the functioning of the workplace.

(c) An employee should be excused from a particular assignment if performance of that assignment would contravene the employee's religious beliefs and the agency would not suffer undue hardship in reassigning the employee to another detail.

(d) During lunch, certain employees gather on their own time for prayer and Bible study in an empty conference room that employees are generally free to use on a first-come, first-served basis. Such a gathering may not be subject to discriminatory restrictions because of its religious content.

In those cases where an agency's work rule imposes a substantial burden on a particular employee's exercise of religion, the agency must go further: an agency should grant the employee an exemption from that rule, unless the agency has a compelling interest in denying the exemption and there is no less restrictive means of furthering that interest.

Examples

(a) A corrections officer whose religion compels him or her to wear long hair should be granted an exemption from an otherwise generally applicable hair-length policy unless denial of an exemption is the least restrictive means of preserving safety, security, discipline or other compelling interests.

(b) An applicant for employment in a governmental agency who is a Jehovah's Witness should not be compelled, contrary to her religious beliefs, to take a loyalty oath whose form is religiously objectionable.

D. **Establishment of Religion.** Supervisors and employees must not engage in activities or expression that a reasonable observer would interpret as Government endorsement or denigration of religion or a particular religion. Activities of employees need not be officially sanctioned in order to violate this principle; if, in all the circumstances, the activities would leave a reasonable observer with the impression that Government was endorsing, sponsoring, or inhibiting religion generally or favoring or disfavoring a particular religion, they are not permissible. Diverse factors, such as the context of the expression or whether official channels of communication are used, are relevant to what a reasonable observer would conclude.

Examples

(a) At the conclusion of each weekly staff meeting and before anyone leaves the room, an employee leads a prayer in which nearly all employees participate. All employees are required to attend the

weekly meeting. The supervisor neither explicitly recognizes the prayer as an official function nor explicitly states that no one need participate in the prayer. This course of conduct is not permitted unless under all the circumstances a reasonable observer would conclude that the prayer was not officially endorsed.

(b) At Christmas time, a supervisor places a wreath over the entrance to the office's main reception area. This course of conduct is permitted.

Section 2. **Guiding Legal Principles.** In applying the guidance set forth in section 1 of this order, executive branch departments and agencies should consider the following legal principles

A. **Religious Expression.** It is well-established that the Free Speech Clause of the First Amendment protects Government employees in the workplace. This right encompasses a right to speak about religious subjects. The Free Speech Clause also prohibits the Government from singling out religious expression for disfavored treatment: "[P]rivate religious speech, far from being a First Amendment orphan, is as fully protected under the Free Speech Clause as secular private expression," *Capitol Sq. Review Bd. v. Pinette*, 115 S. Ct. 2448 (1995). Accordingly, in the Government workplace, employee religious expression cannot be regulated because of its religious character, and such religious speech typically cannot be singled out for harsher treatment than other comparable expression.

Many religions strongly encourage their adherents to spread the faith by persuasion and example at every opportunity, a duty that can extend to the adherents' workplace. As a general matter, proselytizing is entitled to the same constitutional protection as any other form of speech. Therefore, in the governmental workplace, proselytizing should not be singled out because of its content for harsher treatment than nonreligious expression.

However, it is also well-established that the Government in its role as employer has broader discretion to regulate its employees' speech in the workplace than it does to regulate speech among the public at large. Employees' expression on matters of public concern can be regulated if the employees' interest in the speech is outweighed by the interest of the Government, as an employer, in promoting the efficiency of the public services it performs through its employees. Governmental employers also possess substantial discretion to impose content-neutral and viewpoint-neutral time, place, and manner rules regulating private employee expression in the workplace (though they may not structure or administer such rules to discriminate against particular viewpoints). Furthermore, employee speech can be regulated or discouraged if it impairs discipline by superiors, has a detrimental impact on close working relationships for which personal loyalty and confidence are necessary, impedes the performance of the speaker's duties or interferes with the regular operation of the enterprise, or demonstrates that the employee holds views that could lead his employer or the public reasonably to question whether he can perform his duties adequately.

Consistent with its fully protected character, employee religious speech should be treated, within the Federal workplace, like other expression on issues of public concern: in a particular case, an employer can discipline an

employee for engaging in speech if the value of the speech is outweighed by the employer's interest in promoting the efficiency of the public services it performs through its employee. Typically, however, the religious speech cited as permissible in the various examples included in these Guidelines will not unduly impede these interests and should not be regulated. And rules regulating employee speech, like other rules regulating speech, must be carefully drawn to avoid any unnecessary limiting or chilling of protected speech.

B. **Discrimination in Terms and Conditions.** Title VII of the Civil Rights Act of 1964 makes it unlawful for employers, both private and public, to "fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to compensation, terms, conditions, or privileges of employment, because of such individual's . . . religion." 42 U.S.C. § § 2000e-2(a)(1). The Federal Government also is bound by the equal protection component of the Due Process Clause of the Fifth Amendment, which bars intentional discrimination on the basis of religion. Moreover, the prohibition on religious discrimination in employment applies with particular force to the Federal Government, for Article VI, clause 3 of the Constitution bars the Government from enforcing any religious test as a requirement for qualification to any Office. In addition, if a Government law, regulation or practice facially discriminates against employees' private exercise of religion or is intended to infringe upon or restrict private religious exercise, then that law, regulation, or practice implicates the Free Exercise Clause of the First Amendment. Last, under the Religious Freedom Restoration Act, 42 § U.S.C.2000bb-1, Federal governmental action that substantially burdens a private party's exercise of religion can be enforced only if it is justified by a compelling interest and is narrowly tailored to advance that interest.

C. **Coercion of Employees' Participation or Nonparticipation in Religious Activities.** The ban on religious discrimination is broader than simply guaranteeing nondiscriminatory treatment in formal employment decisions such as hiring and promotion. It applies to all terms and conditions of employment. It follows that the Federal Government may not require or coerce its employees to engage in religious activities or to refrain from engaging in religious activity. For example, a supervisor may not demand attendance at (or a refusal to attend) religious services as a condition of continued employment or promotion, or as a criterion affecting assignment of job duties. Quid pro quo discrimination of this sort is illegal. Indeed, wholly apart from the legal prohibitions against coercion, supervisors may not insist upon employees' conformity to religious behavior in their private lives any more than they can insist on conformity to any other private conduct unrelated to employees' ability to carry out their duties.

D. **Hostile Work Environment and Harassment.** Employers violate Title VII's ban on discrimination by creating or tolerating a "hostile environment" in which an employee is subject to discriminatory intimidation, ridicule, or insult sufficiently severe or pervasive to alter the conditions of the victim's employment. This statutory standard can be triggered (at the very least) when an employee, because of her or his religion or lack thereof, is exposed to intimidation, ridicule, and insult. The hostile conduct — which may take the form of speech —need not come from supervisors or from the

employer. Fellow employees can create a hostile environment through their own words and actions.

The existence of some offensive workplace conduct does not necessarily constitute harassment under Title VII. Occasional and isolated utterances of an epithet that engenders offensive feelings in an employee typically would not affect conditions of employment, and therefore would not in and of itself constitute harassment. A hostile environment, for Title VII purposes, is not created by the bare expression of speech with which one disagrees. For religious harassment to be illegal under Title VII, it must be sufficiently severe or pervasive to alter the conditions of employment and create an abusive working environment. Whether conduct can be the predicate for a finding of religious harassment under Title VII depends on the totality of the circumstances, such as the nature of the verbal or physical conduct at issue and the context in which the alleged incidents occurred. As the Supreme Court has said in an analogous context:

> [W]hether an environment is "hostile" or "abusive" can be determined only by looking at all the circumstances. These may include the frequency of the discriminatory conduct; its severity; whether it is physically threatening or humiliating, or a mere offensive utterance; and whether it unreasonably interferes with an employee's work performance. The effect on the employee's psychological well-being is, of course, relevant to determining whether the plaintiff actually found the environment abusive. *Harris v. Forklift Systems, Inc.*, 510 U.S. 17, 23 (1993).

The use of derogatory language directed at an employee can rise to the level of religious harassment if it is severe or invoked repeatedly. In particular, repeated religious slurs and negative religious stereotypes, or continued disparagement of an employee's religion or ritual practices, or lack thereof, can constitute harassment. It is not necessary that the harassment be explicitly religious in character or that the slurs reference religion: it is sufficient that the harassment is directed at an employee because of the employee's religion or lack thereof. That is to say, Title VII can be violated by employer tolerance of repeated slurs, insults and/or abuse not explicitly religious in nature if that conduct would not have occurred but for the targeted employee's religious belief or lack of religious belief. Finally, although proselytization directed at fellow employees is generally permissible (subject to the special considerations relating to supervisor expression discussed elsewhere in these Guidelines), such activity must stop if the listener asks that it stops or otherwise demonstrates that it is unwelcome.

E. **Accommodation of Religious Exercise**. Title VII requires employers "to reasonably accommodate . . . an employee's or prospective employee's religious observance or practice" unless such accommodation would impose an "undue hardship on the conduct of the employer's business." 42 U.S.C. § 2000e(j). For example, by statute, if an employee's religious beliefs require her to be absent from work, the Federal Government must grant that employee compensation time for overtime work, to be applied against the time lost, unless to do so would harm the ability of the agency to carry out its mission efficiently. 5 U.S.C. § 5550a.

Though an employer need not incur more than de minimis costs in providing an accommodation, the employer hardship nevertheless must be real rather than speculative or hypothetical. Religious accommodation cannot be disfavored relative to other, nonreligious, accommodations. If an employer regularly permits accommodation for nonreligious purposes, it cannot deny comparable religious accommodation: "Such an arrangement would display a discrimination against religious practices that is the antithesis of reasonableness." *Ansonia Bd. of Educ. v. Philbrook*, 479 U.S. 60, 71 (1986).

In the Federal Government workplace, if neutral workplace rules —that is, rules that do not single out religious or religiously motivated conduct for disparate treatment — impose a substantial burden on a particular employee's exercise of religion, the Religious Freedom Restoration Act requires the employer to grant the employee an exemption from that neutral rule, unless the employer has a compelling interest in denying an exemption and there is no less restrictive means of furthering that interest. 42 U.S.C. § 2000bb-1.

F. **Establishment of Religion.** The Establishment Clause of the First Amendment prohibits the Government —including its employees — from acting in a manner that would lead a reasonable observer to conclude that the Government is sponsoring, endorsing or inhibiting religion generally or favoring or disfavoring a particular religion. For example, where the public has access to the Federal workplace, employee religious expression should be prohibited where the public reasonably would perceive that the employee is acting in an official, rather than a private, capacity, or under circumstances that would lead a reasonable observer to conclude that the Government is endorsing or disparaging religion. The Establishment Clause also forbids Federal employees from using Government funds or resources (other than those facilities generally available to government employees) for private religious uses.

Section 3. **General.** These Guidelines shall govern the internal management of the civilian executive branch. They are not intended to create any new right, benefit, or trust responsibility, substantive or procedural, enforceable at law or equity by a party against the United States, its agencies, its officers, or any person. Questions regarding interpretations of these Guidelines should be brought to the Office of the General Counsel or Legal Counsel in each department and agency.