

December 17, 2020

Public Input
Equal Employment Opportunity Commission
Executive Officer
131 M Street NE
Washington, D.C. 20507
Submitted via *regulations.gov*

RE: Proposed Updated Compliance Manual on Religious Discrimination (EEOC-2020-0007) (RIN Number 3046-ZA01)

To Whom It May Concern,

We are grateful for the opportunity to provide comments to the Equal Employment Opportunity Commission (the “Commission”) in response to its Notice of Availability¹ regarding the Proposed Updated Compliance Manual on Religious Discrimination released to the public on November 17, 2020 (the “Proposed Manual”).²

The undersigned are scholars with substantial expertise related to discrimination against lesbian, gay, bisexual, and transgender (“LGBT”) people. We are affiliated with the Williams Institute, a research center at the UCLA School of Law dedicated to conducting rigorous and independent academic research related to sexual orientation and gender identity, including on legal protections against sexual orientation and gender identity discrimination (collectively, “SOGI discrimination”).

As the Commission is aware,³ the U.S. Supreme Court recently decided in *Bostock v. Clayton County* that Title VII’s prohibition on sex discrimination⁴ includes SOGI discrimination.⁵ The undersigned write to express concern that the Proposed Manual, while acknowledging the holding central to the Court’s decision in *Bostock*, insufficiently incorporates that holding and other controlling legal principles by failing to articulate the balance that the law requires employers strike between religious liberty and other civil rights. More specifically, we note our concern that the Proposed Manual as written does not adequately address “the standards for evaluating wh[en] a hostile environment has been created and the scope of an employer’s . . . obligations”⁶ to accommodate religious observance. As a result, the Proposed Manual may lead employers to engage in or allow impermissible discrimination against LGBT employees.

¹ 85 Fed. Reg. 74,719 (Nov. 23, 2020).

² OFFICE OF LEGAL COUNSEL, EEOC, PROPOSED UPDATED COMPLIANCE MANUAL ON RELIGIOUS DISCRIMINATION, *available* at <https://beta.regulations.gov/document/EEOC-2020-0007-0001>.

³ *Id.* at 2.

⁴ 42 U.S.C. § 2000e-2(a).

⁵ 140 S. Ct. 1731 (2020).

⁶ *Meeting of November 9, 2020 - Discussion of an Update to the Compliance Manual Section on Religious Discrimination – Transcript*, EEOC, <https://www.eeoc.gov/meetings/meeting-november-9-2020-discussion-update-compliance-manual-section-religious/transcript> (last visited Dec. 17, 2020).

In Part I, we present the large body of research illustrating the widespread stigma, discrimination, and harassment that LGBT people have long faced in the workplace. In Part II, we provide additional research on reported instances of SOGI discrimination in the workplace—as well as in other contexts—that involve religious motivation. In Part III, we discuss research demonstrating that the experience and expectation of discrimination can harm LGBT people in a variety of ways, including by creating the minority stress shown to be a major cause of health disparities between LGBT and non-LGBT populations. Finally, in Part IV, we explain that guidance provided in the Proposed Manual as written will likely increase the risk that LGBT people will be discriminated against in the workplace, in turn exacerbating existing health disparities.

As the limited, 30-day window provided by the Commission for public comment significantly restricts our ability to produce concrete recommendations for how the Proposed Manual can be revised to account for these concerns, we instead provide our recommendation that the Commission withdraw the Proposed Manual, engage in its own analysis and revision consistent with this body of research to allow the Proposed Manual to “adequately anticipate and address harms that may flow from the curtailment of civil rights for certain populations[,]”⁷ and then reissue the Proposed Manual for a period sufficient to allow interested members of the public to fully review and comment on those revisions.

I. LGBT People Face Widespread Employment Discrimination

In the United States, approximately 4.5% of the adult population identifies as LGBT.⁸ Younger people are more likely than older people to identify as LGBT, including 8.2% of millennials (born 1980–1999).⁹ We estimate that approximately 11 million adults in the United States identify as LGBT.¹⁰

LGBT people have faced a long, painful history of public and private discrimination in the United States across a range of contexts.¹¹ In *Obergefell v. Hodges*, the Supreme Court

⁷ *Id.*

⁸ KERITH J. CONRON & SHOSHANA K. GOLDBERG, WILLIAMS INST., ADULT LGBT POPULATION IN THE UNITED STATES 1 (2020), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Adult-US-Pop-Jul-2020.pdf>.

⁹ Frank Newport, *In U.S., Estimate of LGBT Population Rises to 4.5%*, GALLUP (May 22, 2018), <https://news.gallup.com/poll/234863/estimate-lgbt-population-rises.aspx>.

¹⁰ CONRON & GOLDBERG, *supra* note 8.

¹¹ See generally *Amici Curiae* Brief of Scholars Who Study the LGB Population in Support of the Employees, *Bostock v. Clayton Cty., Georgia*, No. 17-1618, *Altitude Express, Inc. v. Zarda*, No. 17-1623 (U.S. filed July 3, 2019), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Amici-Brief-Bostock-and-Zarda-5.pdf>; *Amici Curiae* Brief of Scholars Who Study the Transgender Population in Support of Respondent Aimee Stephens, *R.G. v. G.R. Harris Funeral Homes, Inc. v. Equal Employment Opportunity Comm’n*, No. 18-107 (U.S. filed July 3, 2019), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Amici-Brief-Stephens-4.pdf>; Adam P. Romero, *Does the Equal Pay Act Prohibit Discrimination on the Basis of Sexual Orientation or Gender Identity?*, 10 ALA. C.R. & C.L. L. REV. 35 (2019); Christy Mallory & Brad Sears, *LGBT Discrimination, Subnational Public Policy, and Law in the United States*, in OXFORD ENCYCLOPEDIA OF LGBT POLITICS AND POLICY (Don Haider-Markel ed., 2019). For earlier reviews of this body of evidence, see M.V. Lee Badgett et al., *Bias in the Workplace: Consistent Evidence of Sexual Orientation and Gender Identity Discrimination 1998-2008*, 85 CHI. KENT L. REV. 559 (2009); Jennifer C. Pizer et al., *Evidence of Persistent and Pervasive Workplace Discrimination Against LGBT People: The Need for Federal Legislation Prohibiting Discrimination and Providing for Equal Employment Benefits*, 45 LOY. L.A. L. REV. 715 (2012).

observed that gay men and lesbians have been “prohibited from most government employment, barred from military service, excluded under immigration laws, targeted by police, and burdened in their rights to associate.”¹² The Seventh Circuit has similarly explained that “homosexuals are among the most stigmatized, misunderstood, and discriminated-against minorities in the history of the world[.]”¹³ With respect to transgender people, the District of Columbia Court of Appeals has observed that “[t]he hostility and discrimination that transgender individuals face in our society today is well-documented.”¹⁴

While social acceptance and the legal rights of LGBT people in the United States have generally improved over the past few decades, ample research confirms that LGBT people continue to experience persistent and pervasive discrimination in all areas of life.¹⁵ Employment discrimination specifically has been documented in a variety of sources including court cases, administrative complaints, anecdotal examples, surveys, wage gap analyses, and controlled experiments.¹⁶ For example, in one case, a gay machinist was subjected to years of “derogatory slurs for homosexuals,” such as “‘faggot get out of here’ . . . the demeaning treatment made him so upset that his body would shake, his work product suffered, and it became difficult for him to sleep.”¹⁷ In another, a prospective orthopedic surgeon saw her offer of employment rescinded after disclosing her transgender identity.¹⁸ Similarly, a transgender tenure-track professor was repeatedly denied tenure and ultimately discharged after transitioning.¹⁹ In a final example, a transgender school police officer was granted summary judgment after providing evidence that his employer banned his access to all-gender restrooms after he disclosed his intent to transition.²⁰

Survey data indicate that a large proportion of LGBT people across the country have had similar experiences. For example, one recent nationally representative survey found that LGB people were significantly more likely to report negative workplace experiences than their heterosexual peers, with 60% of LGB people reporting being fired from or denied a job and 48% reporting being denied a promotion or receiving a negative evaluation, compared to 40% and 32% respectively among heterosexuals.²¹ Similarly, according to a 2017 representative survey, “one in five LGBTQ people report[ed] being personally discriminated against because of their sexuality or gender identity when applying for jobs” and 22% said they had experienced such

¹² 135 S. Ct. 2584, 2596 (2015).

¹³ *Baskin v. Bogan*, 766 F.3d 648, 663 (7th Cir. 2014); *see also Windsor v. United States*, 699 F.3d 169, 182 (2d Cir. 2012) (“It is easy to conclude that homosexuals have suffered a history of discrimination.”), *aff’d*, 570 U.S. 744 (2013).

¹⁴ *Brooksmith v. United States*, 99 A.3d 690, 698 n.8 (D.C. 2014).

¹⁵ *See supra* note 11.

¹⁶ *See, e.g.*, BRAD SEARS & CHRISTY MALLORY, WILLIAMS INST., DOCUMENTED EVIDENCE OF EMPLOYMENT DISCRIMINATION & ITS EFFECTS ON LGBT PEOPLE (2011), <https://williamsinstitute.law.ucla.edu/publications/employ-discrim-effect-lgbt-people>.

¹⁷ *Patino v. Birken Mfg. Co.*, 41 A.3d 1013, 1018–20 (Conn. 2012).

¹⁸ *Fabian v. Hospital of Central Connecticut*, 172 F. Supp. 3d 509, 515 (D. Conn. 2016).

¹⁹ *\$1.16 Million Awarded in Transgender Employment Discrimination Jury Trial*, THE NAT’L L. R. (Dec. 4, 2017), <https://www.natlawreview.com/article/116-million-awarded-transgender-employment-discrimination-jury-trial>.

²⁰ *Roberts v. Clark Cty. School District*, 215 F. Supp. 3d 1001, 1015–16 (D. Nev. 2016).

²¹ ILAN H. MEYER, WILLIAMS INST., EXPERIENCES OF DISCRIMINATION AMONG LESBIAN, GAY AND BISEXUAL PEOPLE IN THE US 1 (2019), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGB-Discrimination-Work.pdf>.

discrimination in pay or promotion.²² A 2016 nationally representative survey found that “25.2 percent of LGBT respondents ha[d] experienced discrimination because of their sexual orientation or gender identity in the past year.”²³

Separate studies have shown a significant pay gap for gay and bisexual men when compared to heterosexual men with the same productive characteristics and have concluded that the difference is likely due to discrimination. A 2015 meta-analysis examining more than thirty separate studies found that gay and bisexual men, on average, earn 11% less than comparable straight men.²⁴ Lesbian and bisexual women generally earn the same as or more than heterosexual women, but researchers have noted that this finding is *not* explained by a lack of discrimination against lesbians at work.²⁵ In addition, lesbian and bisexual women, along with heterosexual women, continue to earn less than men with similar productive characteristics.

Controlled experiment studies, in which researchers change the environment to create scenarios that allow comparisons of the treatment of LGBT people with treatment of non-LGBT people, have also found evidence of SOGI discrimination.²⁶ In one study focused on female applicants, for example, the fictitious lesbian and bisexual applicants received 30% fewer callbacks than the control resumes.²⁷ In another experiment, employers in the retail and service industries received control resumes and resumes from applicants marked as transgender (and more qualified for the job than the control).²⁸ Thirty-three percent of employers offered interviews to one or more less-qualified applicants perceived as cisgender while not offering an interview to at least one of the *more* qualified applicants perceived as transgender.²⁹

Finally, SOGI discrimination has been well documented in administrative complaints filed with the Commission and its sister agencies. Since 2013, the Commission has allowed workers to file sex discrimination charges that allege SOGI discrimination. A recent study analyzed over 9,000 such charges filed with the Commission or an analogous state or local

²² NPR ET AL., DISCRIMINATION IN AMERICA: EXPERIENCES AND VIEWS OF LGBTQ AMERICANS 29 (2017), <https://www.npr.org/documents/2017/nov/npr-discrimination-lgbtq-final.pdf>.

²³ Sejal Singh & Laura E. Durso, *Widespread Discrimination Continues to Shape LGBT People's Lives in Both Subtle and Significant Ways*, CTR. FOR AM. PROGRESS (2017), <https://www.americanprogress.org/issues/lgbt/news/2017/05/02/429529/widespread-discrimination-continues-shape-lgbt-peoples-lives-subtle-significant-ways>.

²⁴ Marieka M. Klawitter, *Meta-Analysis of the Effects of Sexual Orientation on Earnings*, 54 INDUS. REL. 4, 21–25 (2015); see also, e.g., Trenton D. Mize, *Sexual Orientation in the Labor Market*, 81 AM. SOC. REV. 1132, 1152 (2016); Brendan Cushing-Daniels & Tsz-Ying Yeung, *Wage Penalties and Sexual Orientation: An Update Using the General Social Survey*, 27 CONTEMP. ECON. POL'Y 164 (2009).

²⁵ See, e.g., Klawitter, *supra* note 24, at 23–24; Badgett et al., *Bias in the Workplace*, *supra* note 11, at 585.

²⁶ Typically, these researchers send out pairs of resumes that are matched on qualifications, but one of the resumes indicates that the applicant is LGBT; the researchers then determine if real employers receiving these resumes treat the applicants differently.

²⁷ Emma Mischel, *Discrimination Against Queer Women in the U.S. Workforce: A Résumé Audit Study*, SOCIUS: SOC. RES. FOR A DYNAMIC WORLD 1 (2016); see also András Tilcsik, *Pride and Prejudice: Employment Discrimination Against Openly Gay Men in the United States*, 117 AM. J. SOC. 586, 599–601 (2011).

²⁸ TERESA RAINEY & ELLIOT E. IMSE, D.C. OFFICE OF HUMAN RIGHTS, QUALIFIED AND TRANSGENDER: A REPORT ON RESULTS OF RESUME TESTING FOR EMPLOYMENT DISCRIMINATION BASED ON GENDER IDENTITY 6 (2015), https://ohr.dc.gov/sites/default/files/dc/sites/ohr/publication/attachments/QualifiedAndTransgender_FullReport_1.pdf; see also MAKE THE ROAD N.Y., TRANSGENDER NEED NOT APPLY: A REPORT ON GENDER IDENTITY JOB DISCRIMINATION 4, http://www.maketheroadny.org/pix_reports/TransNeedNotApplyReport_05.10.pdf (2010).

²⁹ RAINEY & IMSE, *supra* note 28, at 6.

agency.³⁰ Charges were filed by a wide range of employees—with particularly high filing rates by African American workers and men for sexual orientation charges, and by women and White workers for gender identity charges—and half included claims of discriminatory discharges and harassment.³¹ Many were filed against employers in low-wage industries, such as the retail sector and the food services industry.³² Individuals living in states without express state-level protections against SOGI discrimination were found to be particularly vulnerable, with the study noting “a greater proportion of charges includ[ing] allegations of harassment (52% vs. 41%) and discharge (58% vs. 51%)” in these states.³³

II. Anti-LGBT Discrimination is Commonly Motivated by Religion

Many people and institutions of faith are welcoming and affirming of LGBT people—and many LGBT people are themselves people of faith.³⁴ However, a number of examples of employment discrimination against LGBT people show explicit signs of being driven by, animated by, or otherwise couched in terms of religion.³⁵

In some cases, employers have cited their religious beliefs in establishing hiring criteria explicitly meant to discriminate against LGBT people. In one instance, a theme park advertised that prospective applicants must adhere to the organization’s “statement of faith[,]” which included opposition to LGBT rights.³⁶ In other cases, LGBT people have reported that their employers raised religious beliefs as a justification for firing them in response to discovering that they are LGBT. For example, in *E.E.O.C. v. R.G. & G.R. Funeral Homes*, a funeral home director was fired after disclosing her intent to transition gender, with her employer stating that he would be “violating God’s commands” if he were to allow her to “deny [her] sex while acting as a representative of [the] organization” or if she were to “wear the uniform for female funeral directors while at work.”³⁷ In another case, a worker alleged that he was forced to resign after being told by a religious supervisor that discovery of his identity as a gay man “changed everything because . . . we view homosexuals as immoral, indecent . . . [and that he] ‘was going to hell.’” The supervisor also told the employee to require that he out himself to all coworkers and express his intention not “to go to bed with everybody [in that workplace.]”³⁸ In

³⁰ M. V. LEE BADGETT ET AL., *CTR. FOR EMP. EQUITY, EVIDENCE FROM THE FRONTLINES ON SEXUAL ORIENTATION AND GENDER IDENTITY DISCRIMINATION* (2018), <https://www.umass.edu/employmentequity/evidence-frontlines-sexual-orientation-and-gender-identity-discrimination>; see also Amanda K. Baumle et al., *New Research on Sexual Orientation and Gender Identity Discrimination: Effect of State Policy on Charges Filed at the EEOC*, 67 J. HOMOSEXUALITY 1135 (2019).

³¹ BADGETT ET AL., *supra* note 30.

³² *Id.*

³³ Baumle et al., *supra* note 30.

³⁴ KERITH J. CONRON ET AL., WILLIAMS INST., *RELIGIOSITY AMONG LGBT ADULTS IN THE US* (2020), <https://williamsinstitute.law.ucla.edu/publications/lgbt-religiosity-us>.

³⁵ See, e.g., HUMAN RIGHTS WATCH, “ALL WE WANT IS EQUALITY:” RELIGIOUS EXEMPTIONS AND DISCRIMINATION AGAINST LGBT PEOPLE IN THE UNITED STATES (2018), https://www.hrw.org/sites/default/files/report_pdf/lgbt0218_web_1.pdf.

³⁶ Mark Joseph Stern, *Non-Christians Need Not Apply*, SLATE (Oct. 27, 2014), <https://slate.com/news-and-politics/2014/10/ken-ham-ark-encounter-theme-park-religious-discrimination-may-block-kentucky-tax-credit.html>.

³⁷ 884 F.3d 560, 569 (6th Cir. 2018), *cert. granted in part sub nom.* R.G. & G.R. Harris Funeral Homes, Inc. v. EEOC, 139 S. Ct. 1599 (2019), and *aff’d sub nom.* Bostock v. Clayton Cty., Georgia, 140 S. Ct. 1731 (2020).

³⁸ *Erdmann v. Tranquility Inc.*, 155 F. Supp. 2d 1152, 1156–57 (N.D. Cal. 2001).

a third case, after accepting the role of food service director at a religious school, the plaintiff listed his husband as his emergency contact on a new employee form; the school then rescinded their employment offer, “citing an expectation that its employees will model its values, including the Catholic Church’s opposition to same-sex marriage.”³⁹ Similarly, a guidance counselor, who had worked at a school for 40 years, was fired after officials discovered that she married another woman, calling it a “violation of her contract and ‘contrary to the teachings of the Catholic Church.’”⁴⁰

LGBT employees have also experienced workplace harassment rooted in coworkers’ religious beliefs. For example, in *Roberts v. United Postal Serv.*, a lesbian proved unlawful sexual orientation discrimination based on years of harassment by her supervisor, who, among other things, repeatedly told her “that her sexual orientation as a lesbian was evil and needed to be changed in accordance with religious dictates.”⁴¹ In another case, a lesbian proved unlawful religious and sexual orientation discrimination by an employer that “subject[ed the plaintiff] to an incessant barrage of offensive anti-homosexual invective[,]” including statements “that homosexuality is ‘a sin,’ and that ‘gay people’ were ‘going to go to hell’[.]”⁴²

Examples from non-employment cases similarly indicate that religious beliefs often motivate SOGI discrimination, including through proselytizing intended to stigmatize LGBT people. In one such case, a nurse consultant who “visited the home of a same-sex couple, one of whom was in the end stages of AIDS,” was reported to have actively proselytized against “the ‘homosexual lifestyle.’”⁴³ In another, a counseling student was found to be in violation of the applicable professional code of ethics for expressing an intent, “arising from her Christian faith[] . . . to attempt to convert [her future] students from being homosexual to heterosexual.”⁴⁴ In a third example, an Alabama clinic refused a lesbian couple fertility services because of the doctor’s “religious belief that he only treats straight married couples.”⁴⁵ Finally, in 2015 a transgender man was denied a medically-necessary hysterectomy despite the willingness of his treating physician because the religiously-affiliated hospital where the physician had admitting privileges did not permit gender-affirming care.⁴⁶

Other research indicates that negative perceptions of LGBT people among the public are related to religious views. For example, according to a 2013 survey by Pew Research Center, “a significant share of the public believes that homosexuality should be discouraged and that same-sex marriage should not be legal. Much of this resistance is rooted in deeply held religious

³⁹ *Barrett v. Fontbonne Acad.*, No. NOCV2014-751, 2015 WL 9682042 (Mass. Super. Dec. 16, 2015).

⁴⁰ Janelle Griffith, *Gay Guidance Counselor Sues Indianapolis Archdiocese for Discrimination After Being Fired*, NBC NEWS (July 29, 2019), <https://www.nbcnews.com/feature/nbc-out/gay-guidance-counselor-sues-indianapolis-archdiocese-after-being-fired-school-n1035941>.

⁴¹ *Roberts v. United Parcel Serv., Inc.*, 115 F. Supp. 3d 344 (E.D.N.Y. 2015).

⁴² *Salemi v. Gloria’s Tribeca, Inc.*, 982 N.Y.S.2d 458, 459–60 (N.Y. App. Div. 2014) (citations omitted). Plaintiff ultimately prevailed on her claims before a jury, with an appellate court later noting that while her employer had a “right to express his religious beliefs and practice his religion, [he could not] discriminate against his employees based on . . . sexual orientation.” *Id.* at 460.

⁴³ *Knight v. Conn. Dep’t of Pub. Health*, 275 F.3d 156, 161 (2d Cir. 2001).

⁴⁴ *Keeton v. Anderson-Wiley*, 664 F.3d 865, 868–69 (11th Cir. 2011).

⁴⁵ See HUMAN RIGHTS WATCH, *supra* note 35, at 20–21; see also *See N. Coast Women’s Care Med. Grp., Inc. v. Superior Court (Benitez)*, 189 P.3d 959, 963–64 (Cal. 2008) (similar religious refusal).

⁴⁶ See Complaint, *Conforti v. St. Joseph’s Healthcare Sys.*, No. 2:17-cv-0050 (D.N.J., Jan. 5, 2017).

attitudes, such as the belief that engaging in homosexual behavior is a sin.”⁴⁷ More specifically, according to Pew:

The religious basis for opposition to homosexuality is seen clearly in the reasons people give for saying it should be discouraged by society. By far the most frequently cited factors – mentioned by roughly half (52%) of those who say homosexuality should be discouraged – are moral objections to homosexuality, that it conflicts with religious beliefs, or that it goes against the Bible. No more than about one-in-ten cite any other reasons as to why homosexuality should be discouraged by society.⁴⁸

Research finds, moreover, that anti-LGBT views are especially associated with certain religious affiliations.⁴⁹ Further, in the largest survey to date of transgender people in the United States, 19% of respondents who had been part of a faith community were rejected from it, and 39% of respondents who had been part of a faith community left it due to fear of rejection.⁵⁰ Respondents who experienced religious rejection, in turn, had higher prevalence of suicide thoughts and attempts than respondents who had not experienced such rejection.⁵¹

III. Stigma and Discrimination Adversely Impact the Health and Well-Being of LGBT People

Employment discrimination adversely impacts LGBT people’s financial security, health, well-being, and dignity. An individual who is fired from or not hired for a job for discriminatory reasons, for example, must at a minimum experience the difficulty of searching for a new job, assuming one for which they are qualified exists within a reasonable distance from their home. If such a job does not exist, they may face serious economic consequences, including under- or

⁴⁷ *A Survey of LGBT Americans*, PEW RESEARCH CENTER (2013), <https://www.pewsocialtrends.org/2013/06/13/a-survey-of-lgbt-americans>.

⁴⁸ *In Gay Marriage Debate, Both Supporters and Opponents See Legal Recognition as ‘Inevitable’*, PEW RESEARCH CENTER (2013), <https://www.people-press.org/2013/06/06/in-gay-marriage-debate-both-supporters-and-opponents-see-legal-recognition-as-inevitable>.

⁴⁹ See, e.g., Andrew Flores et al., *Public Opinion about Transgender People and Policies*, in *THE REMARKABLE RISE OF TRANSGENDER RIGHTS* (Jami K. Taylor et al. eds., 2018); Andrew Flores et al., *The Factors Underlying Public Opinion About Transgender Rights*, in *THE REMARKABLE RISE OF TRANSGENDER RIGHTS*, (Jami K. Taylor et al. eds., 2018); Andrew L. Whitehead & Joseph O. Baker, *Homosexuality, Religion, and Science: Moral Authority and the Persistence of Negative Attitudes*, 82 SOC. INQUIRY 487 (2012); Darren E. Sherkat, *Religion, Politics, & Support for Same-Sex Marriage in the United States, 1988-2008*, 40 SOC. SCI. RES. 167 (2011); Andrew L. Whitehead, *Sacred Rites and Civil Rights: Religion’s Effect on Attitudes Toward Same-Sex Unions and the Perceived Cause of Homosexuality*, 91 SOC. SCI. Q. 63 (2010); Laura R. Olson et al., *Religion and Public Opinion about Same-Sex Marriage*, 87 SOC. SCI. Q. 340 (2006).

⁵⁰ SANDY E. JAMES, ET AL., *THE REPORT OF THE 2015 U.S. TRANSGENDER SURVEY 77* (2016), <https://transequality.org/sites/default/files/docs/usts/USTS-Full-Report-Dec17.pdf>.

⁵¹ JODY L. HERMAN ET AL., WILLIAMS INST., *SUICIDE THOUGHTS AND ATTEMPTS AMONG TRANSGENDER ADULTS: FINDINGS FROM THE 2015 U.S. TRANSGENDER SURVEY 18–19 & tab. 6* (2019), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Transgender-Suicide-Sept-2019.pdf>.

unemployment, housing instability, and food insecurity.⁵² If this person has dependents such as children or an elder parent, a job loss can affect the economic security of a whole family.⁵³

In addition, anti-LGBT stigma and discrimination drive well-documented health disparities between the LGBT and non-LGBT populations, including higher rates of psychological distress, depression, anxiety, substance-use disorders, and suicidal ideation and attempts among LGBT people, many of which are two to three times greater than among non-LGBT people.⁵⁴ The relationship between stigma and health has most clearly been articulated in the “minority stress” research literature. The minority stress model, which the Institute of Medicine has recognized as a core perspective for understanding LGBT health,⁵⁵ describes how LGBT people experience chronic stress stemming from their stigmatization. While stressors—such as loss of a job or housing—are ubiquitous in society, experienced by LGBT and non-LGBT people alike, LGBT people are uniquely exposed to stress arising from anti-LGBT stigma and prejudice. Prejudice leads LGBT people to experience *excess* exposure to stress compared with non-LGBT people who are not exposed to anti-LGBT prejudice (all other things being equal). This excess stress exposure confers an elevated risk for certain mental and physical health conditions.

Employment discrimination—and the fear of discrimination—are examples of such minority stressors.⁵⁶ According to one recent nationally representative survey among LGBT people who experienced SOGI discrimination in the workplace and other settings in the past year: 68.5% reported that discrimination at least somewhat negatively affected their psychological well-being; 43.7% reported that discrimination negatively impacted their physical well-being; 47.7% reported that discrimination negatively impacted their spiritual well-being; 52.8% reported that discrimination negatively impacted their work environment; and 56.6% reported that it negatively impacted their neighborhood and community environment.⁵⁷

⁵² See generally ADAM P. ROMERO ET AL., WILLIAMS INST., LGBT PEOPLE AND HOUSING AFFORDABILITY, DISCRIMINATION, AND HOMELESSNESS (2020), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBT-Housing-Apr-2020.pdf>; BIANCA D.M. WILSON ET AL., WILLIAMS INST., “WE’RE STILL HUNGRY” – LIVED EXPERIENCES WITH FOOD INSECURITY AND FOOD PROGRAMS AMONG LGBT PEOPLE (2020), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/LGBTQ-Food-Bank-Jun-2020.pdf>; M. V. LEE BADGETT ET AL., WILLIAMS INST., LGBT POVERTY IN THE UNITED STATES: A STUDY OF DIFFERENCES BETWEEN SEXUAL ORIENTATION AND GENDER IDENTITY GROUPS (2019), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/National-LGBT-Poverty-Oct-2019.pdf>.

⁵³ See, e.g., M.V. Lee Badgett, *Left Out? Lesbian, Gay, and Bisexual Poverty in the U.S.*, 37 Pop. Research & Pol’y Rev. 667, 691 (2018); Christopher S. Carpenter et al., *Transgender Status, Gender Identity, and Socioeconomic Outcomes in the United States*, INDUSTRIAL & LABOR RELATIONS REV. (2020), doi:10.1177/0019793920902776 (volume not yet assigned).

⁵⁴ See, e.g., Office of Disease Prevention and Health Promotion, *Lesbian, Gay, Bisexual, and Transgender Health*, <https://www.healthypeople.gov/2020/topics-objectives/topic/lesbian-gay-bisexual-and-transgender-health> (last visited Dec. 17, 2020); INSTITUTE OF MEDICINE, THE HEALTH OF LESBIAN, GAY, BISEXUAL, AND TRANSGENDER PEOPLE: BUILDING A FOUNDATION FOR BETTER UNDERSTANDING 62 (2011), <https://www.ncbi.nlm.nih.gov/books/NBK64806>.

⁵⁵ INSTITUTE OF MEDICINE, *supra* note 54, at 20.

⁵⁶ See Brandon L. Velez et al., *Testing the Tenets of Minority Stress Theory in Workplace Contexts*, 60 J. COUNSELING PSYCH. 532 (2013); Craig R. Waldo, *Working in a Majority Context: A Structural Model of Heterosexism as Minority Stress in the Workplace*, 46 J. COUNSELING PSYCH. 218 (1999).

⁵⁷ Singh & Durso, *supra* note 23.

Finally, SOGI discrimination in the workplace can negatively affect employees' performance which, in turn, has a negative impact on employers.⁵⁸ Research indicates that LGBT employees in unsupportive environments are less committed to their employers, less satisfied with their jobs, less productive, and have poorer relationships with their coworkers compared to employees in supportive workplaces.⁵⁹ These outcomes can have a negative impact on employers' bottom line.⁶⁰

IV. The Proposed Manual Fails to Properly Articulate the Law, Risks Increasing Anti-LGBT Discrimination, and Should Be Withdrawn

The Proposed Manual does not fully and properly articulate the balance that must be struck between religious liberty and other civil rights, including SOGI non-discrimination protections. This balancing should take into account harms to LGBT people and others that can result from religious exercise, such as proselytizing, in the workplace. The absence of guidance on these issues may increase the likelihood of unlawful SOGI discrimination by leading employers to correctly believe that they must tolerate hostility toward LGBT people in the workplace, if it is motivated by religious beliefs.

As the Commission is aware, the Supreme Court extended protections from SOGI employment discrimination nationwide in *Bostock v. Clayton County*.⁶¹ This decision affirmed the position long held by the Commission—that discrimination based on sexual orientation and gender identity are forms of, and inseparable from, discrimination based on sex.⁶² As the Commission notes, the Court did not directly address how “doctrines protecting religious liberty interact with Title VII.”⁶³ However, the Commission⁶⁴ and a number of lower courts—both

⁵⁸ M.V. LEE BADGETT ET AL., WILLIAMS INST., THE BUSINESS IMPACT OF LGBT-SUPPORTIVE WORKPLACE POLICIES (2013), <https://williamsinstitute.law.ucla.edu/wp-content/uploads/Impact-LGBT-Support-Workplace-May-2013.pdf>.

⁵⁹ *Id.*

⁶⁰ *Id.* at 4.

⁶¹ 140 S. Ct. 1731 (2020).

⁶² *See, e.g.*, *Macy v. Holder*, No. 0120120821, 2012 WL 1435995 at *7–8 (E.E.O.C. Apr. 20, 2012) (noting that gender identity discrimination in violation of Title VII occurs when an employer treats an employee differently “because the individual has expressed his or her gender in a non-stereotypical fashion, because the employer is uncomfortable with the fact that the person has transitioned or is in the process of transitioning from one gender to another, or because the employer simply does not like that the person is identifying as a transgender person.”)

⁶³ 140 S. Ct. at 1754.

⁶⁴ *See, e.g.*, *Hillier v. Lew*, No. 0120150248, 2016 WL 1729907, at *4 (E.E.O.C. Apr. 21, 2016) (holding that a religious employee organization could not claim that being required to acknowledge the transgender identity of an employee would impose a substantial burden on its religious exercise, as “an employer is not required to incur more than a de minimis burden to provide religious accommodation. An accommodation that subjects a coworker to a hostile work environment imposes more than a de minimis burden . . .”) (citations omitted).

before⁶⁵ and after *Bostock*⁶⁶ have consistently held that a balance must be struck between religious liberty and other employer obligations under Title VII.

The Proposed Manual should explicitly address this balance and provide guidance to employers to help them navigate situations where tensions between religious liberty and SOGI non-discrimination obligations arise. As part of this analysis, the Commission should consider the harms to LGBT people and others that can result from religious expression, such as when proselytizing becomes impermissible harassment, in the workplace. As demonstrated by research presented above, discrimination and harassment against LGBT people, including when motivated by religious beliefs, is widespread and pervasive and has long-term consequences for their health and well-being. The secondary effects of this discrimination include harm to employers in terms of lost productivity, lower morale, and increased dissatisfaction and disloyalty among employees.

The Proposed Manual could make several changes toward this end. For example, the Proposed Manual could acknowledge that LGBT people and others, such as religious minorities, often face discrimination and harassment, which has a negative impact on their health and well-being. The Proposed Manual could also clearly explain that employers can be held liable for anti-LGBT harassment and discrimination in the workplace, including when motivated by religious beliefs. Further, the Proposed Manual could specify that employers need not accommodate religious expression that demeans or creates an unwelcoming climate for LGBT people even if the behavior does not rise to the level of unlawful harassment or discrimination, because doing so would pose an undue burden.

We respectfully suggest that the Commission consider these and other amendments to the Proposed Manual, aimed at clarifying the balance between employers' sometimes competing duties to respect religious liberty and to ensure a harassment- and discrimination-free workplace. However, we recognize that the Commission may, consistent with this Notice of Availability, wish to provide the public with an opportunity to comment on any such revisions to the extent that they may substantively modify the Proposed Manual as currently written. We therefore respectfully offer the suggestion that the Commission specifically withdraw the Proposed Manual, consider comments received regarding same (including the body of research detailed herein), and issue a new Proposed Manual for a renewed period of public comment.

⁶⁵ See, e.g., *Peterson v. Hewlett-Packard Co.*, 358 F.3d 599, 603–04 (9th Cir. 2004) (holding that the employer's "efforts to eradicate discrimination against homosexuals in its workplace were entirely consistent with the goals and objectives of our civil rights statutes generally" and that it would "have inflicted undue hardship upon [the employer to allow a religious accommodation from same] because it would have infringed upon the company's right to promote diversity and encourage tolerance and good will among its workforce."); *Ervington v. LTD Commodities, LLC*, 555 F. App'x 615, 618 (7th Cir. 2014) (noting that an employee's religious discrimination claim would fail on a failure-to-accommodate theory because the employer "was not required to accommodate [plaintiff's] religion by permitting her to distribute pamphlets offensive to other employees.").

⁶⁶ See, e.g., *Tolle v. Rockwell Collins Control Techs., Inc.*, No. 120CV174LMBJFA, 2020 WL 3316984 at *4 (E.D. Va. June 18, 2020) (rejecting a hostile work environment claim on the grounds that advising a religious employee "that he could not harass others or use derogatory language to refer to someone due to their sexual orientation. . . . was not frequent, severe, or physically threatening or humiliating, nor did it unreasonably interfere with plaintiff's work performance.").

V. Conclusion

Thank you for your consideration. Please direct any correspondence to vasquezl@law.ucla.edu.

Respectfully Submitted,

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