EEOC Pregnant Workers Fairness Act Regulations
RIN 3046-AB30
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Comment by The Stanley M. Herzog Foundation

Thank you for the opportunity to provide comments on the proposed rulemaking by the Equal Employment Opportunity Commission ("EEOC," or "the Commission"), titled the "Pregnant Workers Fairness Act Regulations."

For the reasons outlined below, The Stanley M. Herzog Foundation ("Herzog Foundation") opposes the EEOC's construction of the PWFA, which would mandate employers to provide accommodations to employees seeking abortions. This interpretation is inappropriate and erroneous, given the absence of a clear congressional manifest purpose that such an important social, political, and economic question be delegated to the EEOC's regulatory power. Moreover, the Foundation respectfully requests that the Commission clarify with specificity whether it considers the ministerial exception applicable to PWFA coercion claims.

I. Background of Herzog Foundation

The Herzog Foundation is a faith-based nonprofit, nonpartisan organization headquartered in Smithville, Missouri, and exists to catalyze and accelerate the development of quality Christ-centered K-12 education. The Foundation is a faith-based employer covered by—and therefore impacted by—the proposed regulations. It staffs based on its Christian beliefs.

The Foundation's vision is for families and culture to flourish through quality Christian education. In support of this purpose, the Foundation provides programs and resources, including publications and trainings, for Christians schools, educators, and families. It therefore has adopted a mission of advocating for Christian schools across the nation, including in the regulatory space.

Christian schools, as employers covered by the EEOC's proposed regulations, face violations of conscience and religious freedom under the regulations. And those Christian employers in the education sphere strongly oppose being forced to provide abortions, which many such employers consider to be the intentional killing of a human life. The freedom of those faith-based institutions to serve in the scholastic sphere without the government's violative mandates is of paramount concern to the Foundation.

II. Congress did not want the EEOC to become the arbiter of the abortion question.

The PWFA states that the EEOC must issue regulations that "shall provide examples of reasonable accommodations addressing known limitations related to pregnancy, childbirth, or related medical conditions." 42 U.S.C. § 2000gg-3(1). The Commission's new regulations are an

attempt to make it the arbiter of one of the most controversial and important issues in the Country. It has done so by requiring covered organizations, including faith-based organizations of all kinds, to provide abortion leave to employees. This is in contravention of the text and the purpose of PWFA's Senate sponsors. Abortion is an elephant in the mousehole of "related medical conditions."

A. The Supreme Court has made clear that, in federal law, abortion is a question of vast economic and political significance.

The major questions doctrine is a presumption that Congress would not entrust to an agency regulatory power over a "question of deep economic and political significance . . . without a clear statement to that effect."[1]

The Supreme Court in *Dobbs* made it clear: abortion issues present some of the most intense and vital questions in our culture, and therefore the question of abortion leave meets the threshold of "deep political significance," triggering the major questions doctrine. First, abortion is a "question of profound moral and social importance that the Constitution unequivocally leaves for the people" to address through legislation.[2] Second, abortion is also "difficult question[] of American social and economic policy," as Justice Kavanaugh noted.[3] Dicta or not, a majority of the Supreme Court has expressed that it views abortion as a major issue in American life. If Congress wanted to put such a massively important political and social concern like paid abortion leave into PWFA, it would have done so explicitly. For that reason, the Commission's assumption of this question violates the major questions doctrine in the absence of manifest congressional intent.

B. The Commission has not yet specified how the traditional tools of statutory interpretation would lead a reasonable reader to conclude that the PWFA covers abortion leave.

Because the Supreme Court has made it inescapably clear that abortion is a major question, it is the responsibility of this Commission to point to "clear congressional authorization" for the program it is proposing, using the ordinary tools of statutory construction.[4] At this point, the Commission has done no such thing.

In a footnote, the Commission has cited to certain federal court opinions—not by the Supreme Court—suggesting that "related medical conditions" refers to abortion in Title VII. The Commission wishes to incorporate these readings of Title VII into PWFA. The Commission also makes the conclusory statement—without supporting evidence—that the "canons of statutory interpretation" defend an interpretation of the statute that includes abortion leave.

As we understand it, the Commission is staking its construction of the statute on a kind of hybrid canon of construction, a combination of the presumption of consistent usage syntactic

[1] Biden v. Nebraska, 143 S. Ct. 2355, 2375 (2023).
[2] Dobbs v. Jackson Women's Health Org., 142 S. Ct. 2228, 2265 (2022).
[3] *Id*. at 2305 (Kavanaugh, J., concurring).
[4] Biden v. Nebraska, 143 S. Ct. at 2375.

canon (that same phrases in the same statute have the same meaning) with an intertextual reading (incorporating Title VII into PWFA), along with the claim that inferior courts have given a "uniform interpretation" of "related medical conditions" in Title VII to include abortion, and that interpretation should be imputed to the PWFA.

This intertextual and borderline Frankenstein's-monstrous reading is fallacious. Contrary to the Commission's implication, only two Circuit courts have read "related medical conditions" to cover abortion, hardly a "uniform" pronouncement.[5] On its own terms, the Commission's invocation of the rule about the uniform application of lower courts simply fails.

The Commission should state which "canons of statutory interpretation" specifically defend its reading of *this* statute, not Title VII. The following is a list of traditional tools of construction the Commission should consider and respond to:

(i) *Contemporary Historical Context*: Courts should assume Congress is aware of major political questions.[6] Though it should go without saying, Congress was aware of *Dobbs* and its implications. Congress passed no bills promoting abortion or abortion leave after *Dobbs*, though it tried to do so. That the Supreme Court returned the question of abortion to the legislative process creates an assumption in the mind of the reasonable reader that, if Congress had decided to respond to *Dobbs*, it would do so unambiguously.

(ii) *Expressio Unius Canon*: Sometimes called the negative implication canon, this interpretive tool assumes that an author excludes some members of a class of things by specifically listing other members of the same class of things. The Commission should explain how this canon applies, or why it shouldn't. Here, Congress has expressly listed "pregnancy" and "childbirth." Abortion, as noted above, is a widely known and discussed procedure that terminates a pregnancy. The major questions doctrine, when read in concert with this canon, should mean that, when Congress expressly lists some things of immense significance—pregnancy and childbirth—it is excluding through its silence a significant procedure that results not in childbirth but in the death of the fetus.

(iii) *Legislative History*: Although legislative history has become more and more a disfavored tool, a tool it still remains. The Commission should address whether a single sponsor or even voting member of Congress that passed the PWFA thought it would apply to abortions. On the contrary, the sponsors thought the opposite.[7]

[5] See Doe v. C.A.R.S. Protection Plus, 527 F.3d 358 (3d Cir. 2008); Turic v. Holland Hospitality, 85 F.3d 1211 (6th Cir. 1996).
[6] Biden v. Nebraska, 143 S. Ct. at 2373.
[7] See, e.g., Sen. Casey, Pregnancy Workers Fairness Act, Congressional record Vol. 168, No. 200 (Senate – December 08, 2022) ("I want to say for the record, however, that under the act, under the Pregnant Workers Fairness Act, the Equal Opportunity Employment Commission, the EEOC, could not--could not--issue any regulation that requires abortion leave, nor does the act permit the EEOC to require employers to provide abortions in violation of State law.").

We request that the Commission explain what canons of statutory interpretation—besides the intertextual consistent usage theory seen in the regulations—work to show that an abortion mandate is present in the text of the PWFA.

III. The Commission should clarify that the ministerial exception is available as a defense of PWFA claims alleging "coercion," "harassment," or other intangible employment actions related to the supervision of ministerial employees.

In the proposed rulemaking, the Commission advises that faith-based employers "may" have a defense to a PWFA claim under the First Amendment's ministerial exception. The Commission correctly notes that the ministerial exception applies to discrimination claims "involving the selection, supervision, and removal by a religious institution of employees who perform vital religious duties." Regulations To Implement the Pregnancy Workers Fairness Act, 88 Fed. Reg. 54714, 54746 (proposed Aug. 11, 2023) (to be codified at 29 C.F.R. pt. 1636). Although the Foundation appreciates the Commission's accurate recital of the law, we respectfully request that the Commission specify whether "coercion" claims under the PWFA fall within the scope of the exception.

A. The ministerial exception covers *all* claims by ministerial employees that concern the institution's supervision of its ministers.

In a recent dyad of cases, the Supreme Court has confirmed that religious institutions exist in a sphere of autonomy to choose and control their own ministers free of government coercion.[8] This doctrine of church autonomy flows from both Religion Clauses of the First Amendment and manifests in federal employment as an "exception" to certain antidiscrimination provisions, such as those in Title VII and the Americans with Disability Act ("ADA").

However, while the Supreme Court has made it clear that the Exception's scope covers retaliation claims under the ADA and other tangible employment actions, the Court has not yet spoken on "intangible" employment actions, like harassment allegations, which are actionable under federal law in a variety of ways, such as in hostile work environment claims.

In an en banc decision in 2021, the Seventh Circuit held that the ministerial exception can apply to intangible employment actions as well as tangible, specifically employing the exception to "hostile work environment claims based on minister-on-minister harassment."[9] The reasoning was based on the very idea the Commission has noted—that the exception covers the "supervising" of a ministerial employee, and "[a]djudicating a minister's hostile work environment claims based on interaction between ministers would undermine this constitutionally protected relationship. It would also result in civil intrusion upon, and excessive entanglement with, the religious realm, departing from the teachings of *Hosanna-Tabor* and *Our Lady of Guadalupe*."[10]

[8] Hosanna-Tabor Evangelical Lutheran Church and School v. EEOC, 565 U. S. 171 (2012); Our Lady of Guadalupe Sch. v. Morrissey-Berru, 140 S. Ct. 2049 (2020).
[9] Demkovich v. St. Andrew the Apostle Par., 3 F.4th 968, 973 (7th Cir. 2021).
[10] *Id*. at 985.

That holding gets at the true core of the Exception—religious institutional autonomy. Secular courts have no business separating out federally actionable harassment from internal spiritual discipline. Only intrusive government inquiry and discovery can result from the federal courts' hearing such claims.

B. Coercion claims include harassment in the proposed regulations.

The PWFA includes a "Prohibition on Retaliation and Coercion."[11] The Commission states that "the scope of the PWFA coercion provision is broader than the anti-retaliation provision; it reaches those instances when conduct does not meet the materially adverse standard required for retaliation." In other words, less tangible (or intangible) employment actions may qualify. Accordingly, the Commission rules: "the PWFA's retaliation and coercion provisions prohibit harassment based on an individual's exercise or enjoyment of rights under the PWFA or aid or encouragement of any other individual in doing so."

C. The Commission must specify whether coercion claims are within the scope of the Exception.

The Foundation respectfully asks the Commission to clarify whether it accepts or rejects the holding of the *Demkovich* case. It is not difficult to see how the Commission's regulations would implicate the same concerns of the Seventh Circuit, which includes entanglement in litigation. For example, if a minister in an organization were to chastise another minister for encouraging an employee to seek abortion leave under the PWFA, that would arguably qualify as actionable coercion under the Commission's regulations, regardless even of whether the organization had to provide such abortion leave under the regulations. Adjudicating such a claim under the PWFA would undoubtedly require a federal court to figure out where spiritual disciplining among ministers ends and coercion begins. That violates the core function of the ministerial exception, which is to expel the government from that exact type of entanglement, in which it must render a secular verdict on the supervision of ministers.

Does the scope of the Exception cover coercion claims? This will give covered organizations needed clarity going forward on coercion claims.

Conclusion

For these reasons, Herzog Foundation respectfully and strongly asks the Commission to first reconsider its baseless construction of the PWFA to require paid abortion leave or, in the very least, provide some textual basis for doing so. Additionally, we request that the Commission be more specific in describing its view of the scope of the ministerial exception, namely, whether it covers harassment and coercion claims under the PWFA.

[11] 42 U.S.C. § 2000gg(f).

Sincerely,

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