

March 20, 2024

Clerk of the Commission
Massachusetts Commission Against Discrimination
One Ashburton Place, Suite 601
Boston, MA 02108
Mcadguidelinescomment@mass.gov

Re: Public Comment on the Massachusetts Commission Against Discrimination's
Proposed "Harassment Guidelines In The Workplace"

Dear Clerk of the Commission:

Lawyers for Civil Rights ("LCR") respectfully submits this comment on the Massachusetts Commission Against Discrimination's ("MCAD") draft guidelines titled: "Guidelines On Harassment In The Workplace," dated January 18, 2024.

LCR is a non-profit organization that provides free legal services to individuals and families in Massachusetts. For over 50 years, LCR has fought against discrimination and sought equal opportunity for immigrants and people of color through creative and courageous legal action, education, and economic empowerment in collaboration with law firms and community partners. As a critical resource for immigrants and communities of color facing discrimination in the workplace, LCR submits these comments to advocate for workplace equity, irrespective of an individual's race, income, or immigration status.

LCR applauds the MCAD for undertaking the important and necessary task of developing guidelines to address the many types of discriminatory harassment that occur in the workplace across the Commonwealth. This is especially meaningful given that MCAD's previous guidelines only addressed sexual harassment in the workplace.¹

As detailed below, we believe there are several ways in which the draft guidelines can be improved even further. First, to provide a more comprehensive context, the final guidelines should acknowledge the inherent power dynamics in our society resulting from systemic racism. Second, the MCAD can further address how other forms of identity-based harassment may intersect due to an employee's multifaceted identity, acknowledging the lived experience of many in the Commonwealth. Third, the MCAD should provide comprehensive guidance on training, including considerations for remote work environment. Fourth, the MCAD must affirm that diversity, equity, and inclusion ("DEI") initiatives remain lawful and necessary. This will empower employers to proactively protect themselves from potential liability.

¹ MCAD, *Guidelines on 151B: Sexual Harassment in the Workplace* (Sept. 1, 2017), <https://www.mass.gov/doc/mcad-guidelines-on-sexual-harassment-laws-in-employment/download>.

I. Systematic Racism

The draft guidelines rightly emphasize the significance of acknowledging "systemic power imbalances" that may lead to an employee's reluctance to report unwelcomed behavior, specifically in cases of sexual harassment in the workplace.² The draft guidelines, however, should go further and recognize that this dynamic extends beyond sexual harassment. This incomplete portrayal fails to capture the full reality that employees face in today's workplace environment. The concept of systemic power imbalances similarly pertains to the problem of pervasive racism in the workplace, which may also lead to employees of color hesitating to report racist behavior.³ Indeed, in 2023, only about half of employees reported negative behaviors they encountered or witnessed in the workplace to their employer.⁴ This underscores a pressing issue of undisclosed incidents within workplaces. This experience is further exacerbated by race, as research shows a great trust deficit between Black employees and their employers.⁵

By addressing only one aspect of this broader issue, the draft guidelines miss an opportunity to highlight a critical component of workplace dynamics and provide comprehensive solutions to combat all forms of harassment and discrimination.⁶ It is imperative that the final guidelines fully acknowledge and address power imbalances to create a truly inclusive and equitable workplace for all employees. Social science research supports that discrimination and a history of racial injustice in the U.S. have resulted in white workers gaining a disproportionate edge in employment opportunities.⁷ For example, during economic crises, Black and Latinx workers are disproportionately impacted, often experiencing higher rates of job loss compared to their white counterparts.⁸ White workers are also more likely than Black and Latinx workers to obtain a good job⁹ at every level of educational attainment.¹⁰ Economists have consistently noted

² MCAD, *Draft Guidelines on Harassment in the Workplace*, 5-6, (Jan.18, 2024), <https://www.mass.gov/doc/draft-mcad-guidelines-on-harassment-in-the-workplace/download>.

³ HRacuity, *Workplace Harassment and Employee Misconduct Insights*, 8-9, <https://www.hracity.com/workplace-harassment-and-employee-misconduct-insights/> (last visited Mar. 16, 2024).

⁴ *Id.* at 11. The data also indicate that this trend has worsened in the recent past.

⁵ The trust deficit includes Black employees' perception that fairness and respect across different backgrounds are less likely to be observed in the workplace—among various factors. See Bryan Hancock et al., *The Black Experience at Work in Charts*, McKinsey & Company (Apr. 2021), <https://www.mckinsey.com/featured-insights/diversity-and-inclusion/the-black-experience-at-work-in-charts>.

⁶ See *Stonehill Coll. v. Massachusetts Comm'n Against Discrimination*, 441 Mass. 549, 563 (2004). See also *Brown v. Off. of Com'r of Prob.*, 475 Mass. 675, 680 (2016) (discussing that M.G.L. c.151B "indicates a strong legislative interest in both vindicating individual rights and eradicating systemic discrimination").

⁷ See Anthony P. Carnevale et al., *The Unequal Race for Good Jobs*, Geo. U. Ctr. on Educ. & the Workforce (2019), https://cew.georgetown.edu/wp-content/uploads/Full_Report-The_Unequal_Race_for_Good_Jobs.pdf.

⁸ A recent example of this is the impact of the COVID-19 pandemic. The unemployment rate for Black workers reached 15.2%, while for Latinx workers, it stood at 14.3%, compared to their white counterparts (7%). These effects were particularly acute in communities of color, such as Lawrence, Brockton, and Revere, where unemployment rates soared to 20%, 15%, and 16%, respectively. See Peter Ciurczak, *A Profile of Unemployed Workers in Massachusetts*, Boston Indicators (Oct. 2020), https://www.bostonindicators.org/reports/report-website-pages/covid_indicators-x2/2020/october/unemployment-deep-dive.

⁹ Good jobs are those providing family-sustaining earnings based on the educational attainment of the employee (e.g., high school diploma, certifications, bachelor's degree or higher), with median earnings for all such jobs set at \$65,000. *Id.* at 2.

¹⁰ In 2016, racial disparities in median earnings for good jobs were evident across pathways: (1) for high school pathway: \$56,000 (white), \$50,000 (Black and Latinx); (2) for middle-skills pathway: \$60,000 (white), \$53,000

that differences in employees' industry, occupation, location, and education contribute to variations in earnings. However, the unexplained aspects of wage disparities are often linked to discrimination—as implicit and explicit biases influence these factors to varying degrees.¹¹

It is crucial that the final guidelines acknowledge and confront the pervasive impact of systemic racism.¹² Understanding power dynamics rooted in race is critical for fostering workplace equality and for establishing an inclusive and supportive work environment. Failing to address these dynamics can leave employers vulnerable to legal repercussions related to harassment or to creating a hostile work environment. Employers should prioritize integrating these considerations into their hiring and retention practices. Notably, research reveals that over one-third of Black employees express intentions to leave their companies within the initial two years of employment.¹³ Employers must be cognizant that workplace bias and harassment often manifest as microaggressions, particularly affecting employees of color, and regrettably, drive them to seek employment elsewhere.¹⁴ Employers will not only open themselves to liability but also risk losing talented employees if these practices are not addressed comprehensively.

II. Intersectionality

The complexity of power dynamics intensifies when considering the intersection of multiple protected characteristics within an employee's identity. An individual can experience discrimination and harassment based on more than one protected characteristic (*i.e.*, gender and disability,¹⁵ religion and race,¹⁶ race and gender,¹⁷ or any variation of protected characteristics.) While we commend the MCAD for acknowledging the nuanced, intersectional nature of harassment,¹⁸ it is imperative that the final guidelines further accentuate the concept of intersectionality in addressing workplace harassment.

(Black), \$55,000 (Latinx); (3) for bachelor's degree pathway: \$75,000 (white), \$65,000 (Black and Latinx). *Id.* at 27-28.

¹¹ *Id.*

¹² See *MCAD & Jeffrey May v. The Parish Cafe, Inc. et al.*, No. 16BPA01670, 2023 WL 4346840 (MCAD June 20, 2023), at *11 (MCAD is "empowered to fashion equitable remedies designed chiefly to protect and promote the broader public interest in eradicating systemic discrimination."); *Chief Justice for Admin. & Mgt. of the Trial Court v. MCAD*, 439 Mass. 729, 736-737 (2003).

¹³ See Erica Pandey, *Corporate America's Revolving Door for Black Employees*, Axios (Nov. 2020), <https://www.axios.com/2020/11/17/corporate-america-black-employee-turnover-rate>.

¹⁴ Employees of color report higher rates of experiencing prejudice at work than white employees (Black employees, 58%; Latinx, 41%; Asian, 38%; white, 15%). Prejudice and microaggressions carry consequence as it increases the risk of attrition among Black employees. See Center for Talent Innovation, *Key Findings: Being Black in Corporate America* (2019), <https://www.talentinnovation.org/private/assets/BeingBlack-KeyFindings-CTI.pdf>.

¹⁵ See *Madeline Serrano v. Cataldo Ambulance Service, Inc.*, No. 14-BEM-02913, 2019 WL 3065920 (MCAD June 27, 2019) (finding prima facie case for sex and disability discrimination).

¹⁶ See *MCAD et al., v. 2 Belsub Corp. et al.*, No. 15 BPA 01141, 2018 WL 4002079, at *11 (MCAD Aug. 8, 2018) (preliminary injunction granted directing respondents to cease and desist from engaging in acts of discrimination based on nationality, race, religion, and ethnicity).

¹⁷ See *Jefferies v. Harris Cnty. Cmty. Action Ass'n*, 615 F.2d 1025, 1034 (5th Cir. 1980) (holding that when a "Title VII plaintiff alleges that an employer discriminates against black females, the fact that black males and white females are not subject to discrimination is irrelevant and must not form any part of the basis for a finding that the employer did not discriminate against the black female plaintiff.").

¹⁸ MCAD, *supra* note 2, at 22.

Intersectional bias claims have been on the rise. For example, between 2012 and 2016, Black women and Latinx women filed EEOC sexual harassment charges at a higher rate than their white counterparts.¹⁹ According to a TIME'S Up Legal Defense Fund report, nearly one in five individuals reported facing discrimination or harassment based on sex and other facets of their identity.²⁰ Indeed, research indicates that employers often hold preconceived notions about which race and gender combinations are preferred and tend to hire according to those stereotypes.²¹ This points to the urgent need for employers and courts to understand the lived realities of individuals experiencing various forms of discrimination due to the overlap of their identities.²²

The final guidelines should provide guidance on recognizing and addressing these intersecting identities when investigating and responding to harassment complaints. The final guidelines should also address how employers can incorporate intersectionality in other employment practices, such as hiring, retention, and training.²³ One potential avenue to accomplish this is by incorporating more case studies or scenarios that depict how individuals from marginalized groups may experience harassment differently due to intersecting identities of protected characteristics. This helps align the guidance with the lived experience of people in our communities.

III. Training

Addressing various forms of discrimination and harassment, such as microaggressions and implicit bias, requires significant attention and concerted action. Training is low-hanging fruit for employers to comply with anti-discrimination laws. It also helps to minimize legal liability. The previous guidelines and the draft guidelines highlight that sexual harassment training is encouraged by M.G.L. c. 151B, Sec. 3A(e).²⁴ However, the final guidelines should extend the focus to other form of harassment. Both versions of the guidelines merely suggest that employers indicate in their existing sexual harassment trainings that harassment based on other protected classes is also unlawful.²⁵ Instead, the MCAD should adopt a proactive approach on training guidance, urging employers to go beyond the bare minimum to provide separate,

¹⁹ Jasmine Tucker & Jennifer Mondino, *Coming Forward*, TIME'S UP Legal Defense Fund, 16, (Oct. 2020), https://nwlc.org/wp-content/uploads/2020/10/NWLC-Intake-Report_FINAL_2020-10-13.pdf.

²⁰ *Id.*

²¹ Rachel Kahn Best et al., *Multiple Disadvantages: An Empirical Test of Intersectionality Theory in EEO Litigation*, 45 Law & Soc'y Rev. 991, 994 (2011).

²² See *Lam v. Univ. of Hawai'i*, 40 F.3d 1551, 1562 (9th Cir. 1994), as amended (Nov. 21, 1994), as amended (Dec. 14, 1994) ("At least equally significant is the error committed by the court in its separate treatment of race and sex discrimination. As other courts have recognized, where two bases for discrimination exist, they cannot be neatly reduced to distinct components.") (collecting cases).

²³ Indeed, overlooking intersectionality undermines employment practices' effectiveness in improving workplace diversity. This stems from their generic training content. For instance, encouraging women to "lean in" without acknowledging the unique challenges faced by Black women in self-advocacy can hinder their career progression. See Marlette Johnson & Peria Rajai, *Intersectional Approach To Talent Management*, Harvard Business Review (Feb. 08, 2024), <https://hbr.org/2024/02/how-to-build-an-intersectional-approach-to-talent-management>.

²⁴ See MCAD, Guidelines on 151B: Sexual Harassment in the Workplace, at 8-9 (Sept. 1, 2017); See also MCAD, *supra* note 2, at 42.

²⁵ *Id.*

comprehensive trainings on identity-based harassment.²⁶ Such training should offer practical examples and strategies for identifying and rectifying nuanced instances of discrimination and harassment. This approach will strengthen organizational cultures and bolster their resilience against systemic inequities and legal repercussions.

It is well-documented that training, in conjunction with strong anti-harassment policies, can bring significant benefits to employers.²⁷ First, training educates the workforce on identifying the different manifestations of discrimination and harassment, fostering a more inclusive environment.²⁸ Second, training demystifies the reporting process and potential consequences²⁹—for example, by dismantling the common misconception that reporting harassment will result in retaliation.³⁰ Third, training actively promotes and reinforces an employer’s stance against harassment, thereby deterring unlawful behavior and empowering employees to confidently report misconduct.³¹ For all of these reasons, training is highly beneficial for employers, as investing in comprehensive training is financially prudent and mitigates the risk of costly litigation down the line.³² It also helps preserve MCAD resources.

Currently, the MCAD offers training sessions to employers covering various subjects, including bystander interventions. Nevertheless, these courses lack coverage of the nuanced forms of discrimination that may arise in professional settings. Beyond compliance trainings, the MCAD should also encourage new training modules that address issues such as intersectionality and online harassment. With the increasing prevalence of remote work arrangements, addressing harassment in virtual environments is also essential.³³ The final guidelines should offer more detailed guidance on adapting harassment prevention and response strategies to remote work settings, such as establishing clear communication channels for reporting harassment incidents, providing resources and support for remote employees, and addressing online harassment effectively when it occurs.

²⁶ We use “identity-based harassment” synonymously with “protected class harassment.” See MCAD, *supra* note 2, at 3.

²⁷ See Chai R. Feldblum & Victoria A. Lipnic, *Select Task Force on the Study of Harassment in the Workplace*, EEOC (2016), <https://www.eeoc.gov/select-task-force-study-harassment-workplace> (concluding that anti-harassment training is an essential component of an anti-harassment effort).

²⁸ See Carolyn Grace, *Why Anti-harassment, Bullying, and Discrimination Training is Important*, LRN (Nov. 2023), <https://blog.lrn.com/why-effective-anti-harassment-bullying-discrimination-training-is-important#:~:text=Delivering%20ongoing%20harassment%20prevention%20training,witness%20a%20colleague%20being%20bullied.>

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

³² Workplace harassment has numerous costs to employers, from loss of productivity, increased turnover, and reputational harm. *Id.* In 2021, U.S. businesses incurred a staggering \$20.2 billion in rehiring and recruitment expenses following employee departures due to workplace misconduct. Additionally, the period from 2019 to 2021, employers witnessed an alarming 18% surge in workplace-related litigation costs. Vault Platform, *The Trust Gap: Expectations Vs. Reality in Workplace Misconduct & Speak Up Culture*, 9-10, (Dec. 2021), <https://resources.vaultplatform.com/hubfs/Whitepapers/The%20Trust%20Gap%20Report.pdf>.

³³ “H.R. in most workplaces still has not caught up to what virtual forms of misconduct and harassment look and feel like, and there’s a lack of policies and procedures around what is acceptable. . . . Without standards about how to communicate or behave on Slack, Zoom, email or any other remote platform, it’s difficult for employees to know what to do when they feel uncomfortable.” Leah Fessler, *Workplace Harassment in the Age of Remote Work*, New York Times (June 2021), <https://www.nytimes.com/2021/06/08/us/workplace-harassment-remote-work.html>.

Moreover, the MCAD should provide clear recommendations on the frequency, content, and format of training programs. Employers should also be encouraged to conduct periodic assessments of their workplace culture, policies, and training practices to identify and address potential gaps.³⁴

IV. Diversity, Equity, and Inclusion Efforts

Attacks and criticism of DEI efforts continue to grow in the aftermath of the U.S. Supreme Court’s decision in *Students for Fair Admissions, Inc. v. President and Fellows of Harvard College*, Case Nos. 20-1199, 21-707 (June 29, 2023) (“SFFA”).³⁵ In light of those increasing attacks, we commend the MCAD for releasing a statement on workplace DEI programs and positions.³⁶ Similar to the DEI statement, the final guidelines should make unequivocally clear that the *SFFA* decision has no bearing in the employment context.³⁷

Indeed, while the *SFFA* limited universities’ and colleges’ ability to consider race in their admissions process, it does not hinder an employer’s ability to employ DEI programs and practices.³⁸ As 21 state attorney generals stated, “it is irresponsible and misleading to suggest that *SFFA* imposes additional prohibitions on [DEI] initiatives of private employers.”³⁹ Employers continue to be subject to the same federal and state laws, such as M.G.L.c.151B, that they have been subject to for over half a century.⁴⁰ Courts across the nation have consistently rejected the premise that an employer’s commitment to diversity constitutes discrimination.⁴¹ Massachusetts

³⁴ Tucker, *supra* note 19.

³⁵ “Seizing on the U.S. Supreme Court’s [*SFFA*] on affirmative action in higher education, unfounded assaults have emerged against DEI programs — a transparent move intended to intimidate DEI supporters into rolling back corporate DEI programs.” Ivan Espinoza, et al., *Don’t Conflate Affirmative Action and DEI*, Medium (Jan. 2024), <https://medium.com/@iem207/dont-conflate-affirmative-action-and-dei-fbffc93ff45>. See also Nicholas Condessore, ‘America Is Under Attack’: Inside the Anti-DEI Crusade,” New York Times (Jan. 2024), <https://www.nytimes.com/interactive/2024/01/20/us/dei-woke-claremont-institute.html?searchResultPosition=1>.

³⁶ Press Release, MCAD, MCAD Commissioners Issue a Statement on Workplace DEI Programs & Positions (Jan. 26, 2024), <https://www.mass.gov/doc/mcad-commissioners-meeting-policy-question-03-a-statement-from-the-commissioners-of-the-massachusetts-commission-against-discrimination-on-workplace-diversity-equity-and-inclusion-programs-and-positions/download>.

³⁷ *Id.* at 1.

³⁸ “To be clear, *SFFA* does not directly address or govern the behavior or the initiatives of private sector businesses. *SFFA* held that two universities’ admissions systems, which the Court characterized as “race-based,” violated the Equal Protection Clause and Title VI...” Letter from Nev. Att’y Gen. et al. to Fortune 100 CEOs, 2 (July 19, 2023), <https://lawyersforcivilrights.org/wp-content/uploads/2023/11/Fortune-100-Letter-FINAL-3.pdf>.

³⁹ *Id.*

⁴⁰ MCAD, *Andrew Harris & Spencer Tatum v. City of Worcester Police Department*, No. 94-SEM-0589, 2011 WL 5822245 (MCAD Nov. 9, 2011), at *9 (affirming appropriateness of long-standing affirmative action measures based on race for promotion determinations). MCAD, *Shirley J. Eslinger v. Massachusetts Department of Transportation*, No. 10-BEM-02076, 2017 WL 913641 (MCAD Feb. 24, 2017), at *15 (dismissing gender discrimination case where employer “undertook significant efforts to enhance diversity in the industry and to promote women’s careers”).

⁴¹ *Reed v. Agilent Techs., Inc.*, 174 F. Supp. 2d 176, 186 (D. Del. 2001) (“For the court to sanction the idea that such [DEI initiatives] could be used against a company as evidence of discrimination on bare facts such as these would seem irresponsible. . . . Such diversity awareness programs are necessary to remedy past discrimination against minorities and women.”). See also *Lutes v. Goldin*, No. CIV. A. 96-2794(GK), 1999 WL 689303, at *11 (D.D.C. Aug. 30, 1999); *McHenry v. Pennsylvania State Sys. of Higher Ed.*, 50 F.Supp.2d 401, 412 (E.D.Pa.1999); *Jones v.*

must not lag behind. It should be leading the way. The MCAD should further elaborate on its position regarding DEI programs and positions in the final guidelines. The MCAD should encourage employers to double-down on their commitment to creating and maintaining an inclusive workplace—that is free from unlawful discrimination—as they have an affirmative duty to do so. Proactive steps taken by employers to ensure equal opportunity in employment serve as the best shield against violating anti-discrimination laws.

V. Conclusion

For most individuals, work consumes a substantial portion of their daily lives, significantly shaping their overall quality of life. It is widely acknowledged that experiencing harassment or discrimination in the workplace can profoundly impact a victim’s mental health.⁴² This is why LCR commends the MCAD for introducing new additions to the harassment guidelines, especially the incorporation of identity-based harassment.

Aligned with LCR’s mission, we offer the above recommendations to ensure that the final guidelines accurately reflect the lived experiences of our clients—those from low-income backgrounds, immigrants, and communities of color—so that the MCAD can effectively uphold the rights of victims of discrimination.

Respectfully submitted,

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Bernanke, 493 F. Supp. 2d 18 (D.D.C. 2007), aff’d on other grounds, 557 F.3d 670 (D.C. Cir. 2009); *Bernstein v. St. Paul Cos., Inc.*, 134 F.Supp.2d 730, 739 n. 12 (D.Md.2001); *Wright v. City of Ithaca, N.Y.*, No. 5:12-CV-378 GLS/TWD, 2015 WL 1285754, at *6 (N.D.N.Y. Mar. 20, 2015), aff’d sub nom. *Wright v. City of Ithaca*, 633 F. App’x 63 (2d Cir. 2016).

⁴² See Dr. Douglas Jacobs, *We’re Sick of Racism, Literally*, New York Times (Nov. 2017), <https://www.nytimes.com/2017/11/11/opinion/sunday/sick-of-racism-literally.html> (featuring the experience of an LCR client).