



March 14, 2014

The Honorable Tom Harkin, Chair  
The Honorable Lamar Alexander, Ranking Member  
United States Senate  
Committee on Health, Education, Labor, and Pensions  
428 Senate Dirksen Office Building  
Washington, D.C. 20510

The Honorable John Klein, Chair  
The Honorable George Miller, Ranking Member  
United States House of Representatives  
Committee on Education and the Workforce  
2181 Rayburn House Office Building  
Washington, D.C. 20515

Dear Chairman Harkin, Chairman Klein, Ranking Member Alexander, and Ranking Member Miller:

The NAACP Legal Defense & Educational Fund, Inc. (LDF) writes to strongly encourage you to support “The Fair Employment Protection Act,” S. 2133 and H.R. 4227, which has been introduced in the Senate by Senators Tammy Baldwin (D-WI) and Tom Harkin (D-IA), and in the House of Representatives by Representatives George Miller (D-CA) and Rosa DeLauro (D-CT). The Fair Employment Protection Act is critically important legislation because, if enacted, it will ensure that employees facing unlawful supervisor harassment in the workplace have meaningful legal protections.

Founded by Thurgood Marshall in 1940, LDF is the nation’s oldest civil rights law firm. LDF has worked for more than seventy years to eliminate racial bias so that all Americans, regardless of race, may live, work, and thrive on equal footing. In the fifty years since the passage of Title VII of the Civil Rights Act of 1964, which prohibits employment discrimination on the basis of race, color, religion, sex, or national origin, we have sought to ensure that this landmark legislation is interpreted by courts in the strongest possible terms. We have litigated seminal cases under this statute including *Griggs v. Duke Power Co.*, 401 U.S. 424 (1971); *Albermarle Paper Co. v. Moody*, 422 U.S. 405 (1975); *Brown v. General Services Administration*, 422 U.S. 405 (1975); *Bazemore v. Friday*, 478 U.S. 386 (1986); and *Patterson v. McLean Credit Union*, 491 U.S. 164 (1989). Through our decades-long litigation of employment discrimination cases, we are well aware of the grievous harms inflicted on persons of color who are subjected to harassment in the workplace.

Despite the significant progress in recent decades to ensure equal opportunity in the workplace, both racial and sexual harassment remain pervasive problems. In the last fiscal year, the Equal Employment Opportunity Commission (EEOC), the federal agency tasked with enforcing federal employment antidiscrimination laws, received over 21,000 harassment charges. More than 8,500 of those charges involved allegations of race-based harassment, and over 7,000 involved allegations of sexual harassment. While all workers can be subjected to harassment, evidence has repeatedly shown that women workers are much more likely to have to endure harassing behavior while at work. This is especially true in industries that have been traditionally male-dominated, such as construction or manufacturing. Workers in low-wage jobs—and especially women workers of color—are also particularly vulnerable to harassment.

The Fair Employment Protection Act is a welcomed legislative response to the United States Supreme Court's recent decision in *Vance v. Ball State University*, 133 S. Ct. 2434 (2013) where a narrow majority of the Court significantly undercut the protections against workplace harassment that are embodied in Title VII. Specifically, the Supreme Court held that employers can only be vicariously liable for unlawful harassment committed by supervisors with power to take certain "tangible" employment decisions (e.g., hiring, firing), and not harassment committed by the vast number of lower-level supervisors who are not authorized to make those employment decisions, but do direct the daily work activities of their subordinates (e.g., setting schedules, assigning work tasks). The Supreme Court's decision is at odds with the standard that the EEOC has been using for more than a decade, and that had been adopted by a number of courts around the country.

The Supreme Court's decision in *Vance* is not only misguided, it also denies the workplace realities for millions of American workers. In countless workplaces throughout the country, there are individuals who may not have the authority to hire, fire, or demote workers, but are almost entirely responsible for their daily work activities. As the EEOC has long recognized, a low-level supervisor can dramatically alter the daily work experiences of an employee by assigning her undesirable or difficult tasks. The unfortunate reality remains that in far too many situations, low-level supervisors abuse the authority they have been delegated by their employer to harass or intimidate their subordinates on the basis of race and/or sex. By effectively shielding employers from facing vicarious liability for harassment conducted by low-level supervisors, the majority's opinion will likely have the unintended consequence of guaranteeing that a pervasive form of discrimination continues in our nation's workplaces.

Justice Ginsburg issued a strongly worded dissent in *Vance*, where she decried the real-life effects that the decision would have on workers around the country. She provided examples of employees who suffered harassment at the workplace by supervisors who did not have the authority to make high-level employment decisions, but who did use their position of authority to facilitate their harassment. For example, she described the case of Ms. Yasharay Mack, an African-American woman who worked as an elevator mechanic's helper, and was subjected to both severe sexual and racial harassment by the mechanic in charge who had the authority to assign her work, control her schedule, and control the details of her workday. Yet, under the Supreme Court majority's cramped definition of "supervisor," this individual would not qualify as a supervisor, and the only way a victim of harassment such as Ms. Mack could hold her

employer vicariously liable for the discrimination is if she met the very onerous and demanding negligence standard of legal liability.

The Fair Employment Protection Act—by adopting the definition of supervisor that the EEOC has long advanced—will ensure that all employees throughout the country will have meaningful legal recourse under Title VII in situations where they are being harassed and abused by their low-level managers and supervisors. This timely legislation will guarantee that employers throughout the country will take the necessary steps in order to make sure that their workplaces are free from unlawful harassment, and when harassment does occur, it is quickly remedied.

As Justice Ginsburg recognized in her dissent in *Vance*, legislative bodies have a responsibility to intervene whenever courts adopt “wayward” interpretations of key statutory civil rights protections. We urge you to fulfill this responsibility by supporting quick passage of the Fair Employment Protection Act, which seeks to ensure that employees facing unlawful supervisor harassment in the workplace are adequately protected.

If you have any questions or if there is any more information we can provide please contact the undersigned at [jsmith@naacpldf.org](mailto:jsmith@naacpldf.org) or at (202) 216-5561.

Sincerely,

Johnathan Smith  
Assistant Counsel

Leslie Proll  
Director, Washington Office