



**Testimony of Johnathan Smith  
Assistant Counsel, Economic Justice Group  
NAACP Legal Defense & Educational Fund, Inc.**

**Hearing on  
House Bill 1350  
“Fair Employment Preservation Act of 2014”**

**Before the Health and Government Operations Committee  
Maryland House of Delegates  
General Assembly of Maryland**

**Wednesday, February 26, 2014  
1:00 p.m.  
House Office Building  
Room 240**

Good afternoon Chair Hammen, Vice Chair Pendergrass, and members of the Health and Government Operations Committee. My name is Johnathan Smith, and I serve as Assistant Counsel with the NAACP Legal Defense & Educational Fund, Inc. (LDF). I am pleased to testify today in support of House Bill 1350, the Fair Employment Preservation Act of 2014, which seeks to ensure that employees facing unlawful supervisor harassment in the workplace are adequately protected.

LDF, which was founded in 1940 by Baltimore native Thurgood Marshall, is the nation's oldest civil rights law firm.<sup>1</sup> 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. LDF's testimony here today continues our organization's long-standing commitment to equal opportunity for all Marylanders regardless of race. *See, e.g., Pearson v. Murray* (school desegregation);<sup>2</sup> *Fletcher v. Lamone* (political participation);<sup>3</sup> *Thompson v. HUD* (fair housing).<sup>4</sup> Nationally, LDF has represented people in a wide range of cases fighting race discrimination in general, and employment discrimination in particular. *See, e.g., Lewis v. City of Chicago*;<sup>5</sup> *Patterson v. McLean Credit Union*;<sup>6</sup> *Griggs v. Duke Power Co.*<sup>7</sup>

### **The Continued Prevalence of Workplace Harassment**

Despite the significant progress in recent decades to ensure equal opportunity in the workplace, both sexual and racial 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, over 7,000 involved allegations of sexual harassment.<sup>8</sup> 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. National surveys show that approximately one-quarter of all working women have experienced some form of harassment while on the job.<sup>9</sup> In industries that have been traditionally male-

---

<sup>1</sup> Since 1957 LDF has been a legally separate entity from the National Association for the Advancement of Colored People (NAACP) since 1957.

<sup>2</sup> 169 Md. 478 (Jan. 15, 1936).

<sup>3</sup> 831 F.Supp.2d (D. Md. 2011).

<sup>4</sup> No. 95-309, 2006 WL 581260 (D. Md. Jan. 10, 2006).

<sup>5</sup> 560 U.S. 205 (2010).

<sup>6</sup> 491 U.S. 164 (1989).

<sup>7</sup> 401 U.S. 424 (1971).

<sup>8</sup> Equal Emp't Opportunity Comm'n, Harassment Charges FY 2010-2013, *available at* [http://www.eeoc.gov/eeoc/statistics/enforcement/harassment\\_new.cfm](http://www.eeoc.gov/eeoc/statistics/enforcement/harassment_new.cfm) (last visited Feb. 24, 2014).

<sup>9</sup> American Association of University Women, Know Your Rights: Workplace Sexual Harassment, <http://www.aauw.org/what-we-do/legal-resources/know-your-rights-at-work/workplace-sexual-harassment/#stats> (last visited Feb. 25, 2014); Outten & Golden LLP Sexual Harassment Practice Group, Sexual Harassment in the Workplace, <http://www.workharassment.net/index.php/sexual-harassment-in-the-workplace.html> (last visited Feb. 25, 2014); Gary Langer, *One in Four U.S. Women Reports Workplace Harassment*, ABC NEWS, Nov. 16, 2011, <http://abcnews.go.com/blogs/politics/2011/11/one-in-four-u-s-women-reports-workplace-harassment/> (last visited Feb. 25, 2014).

dominated, such as construction or manufacturing, the rates of harassment of female workers is even higher.<sup>10</sup> Workers in low-wage jobs—and particularly women workers of color—are particularly vulnerable to harassment.<sup>11</sup>

Courts have long made clear that workplace harassment cannot be reconciled with the principle of equal employment opportunity. In 1986, the United States Supreme Court recognized that harassment that subjects a victim to a hostile work environment violates Title VII of the Civil Rights Act of 1964 (Title VII), the landmark legislation that prohibits employment discrimination on the basis of race, color, religion, sex, or national origin.<sup>12</sup> Just over a decade later in 1998, the United States Supreme Court, in two seminal cases—*Faragher v. Boca Raton*<sup>13</sup> and *Burlington Industries, Inc. v. Ellerth*<sup>14</sup>—held that employers can be vicariously liable under Title VII for harassment by an employee who has supervisory authority over subordinates. In reaching that decision, the Supreme Court acknowledged that a supervisor’s ability to harass a victim is often a direct result of the authority conferred on that supervisor by the employer, and as such, employers should have a heightened legal responsibility vis-à-vis their supervisors.<sup>15</sup> An employer’s vicarious liability is not automatic; the Supreme Court held that an employer will not be found liable in situations where the supervisor’s harassment does not culminate in a tangible employment action if the employer proves that: (a) it exercised reasonable care to prevent and promptly correct any harassing behavior, and (b) the plaintiff employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise.<sup>16</sup> By contrast, in cases involving co-worker harassment, the Supreme Court adopted a much tougher standard, holding that the employer can only be found liable if the harassed employee can prove that the employer was negligent in failing to prevent the harassment.<sup>17</sup>

Following those decisions, the EEOC issued enforcement guidance regarding employer liability for harassment by supervisors.<sup>18</sup> In its enforcement guidance, the

---

<sup>10</sup> See, e.g., Outten & Golden LLP Sexual Harassment Practice Group, Sexual Harassment in the Workplace, <http://www.workharassment.net/index.php/sexual-harassment-in-the-workplace.html> (last visited Feb. 25, 2014).

<sup>11</sup> See, e.g., Press Release, Equal Emp’t Opportunity Comm’n, EEOC Obtains \$1 Million for Low-Wage Workers Who Were Sexually Harassed at Food Processing Plant (June 6, 2000), available at <http://www.eeoc.gov/eeoc/newsroom/release/archive/6-1-00.html> (last visited Feb. 24, 2014) (stating that low-wage workers, especially those in the immigrant community, are among the most vulnerable segments of today’s workforce).

<sup>12</sup> *Meritor Savings Bank, FSB v. Vinson*, 477 U.S. 57, 66 (1986).

<sup>13</sup> 524 U.S. 775 (1998).

<sup>14</sup> 524 U.S. 742 (1998).

<sup>15</sup> *Ellerth*, 524 U.S. at 762-63; *Faragher*, 524 U.S. at 802-03.

<sup>16</sup> *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807. In situations where the harassment culminates in a tangible employment action, the Supreme Court has held that strict liability is appropriate. *Id.* at 808.

<sup>17</sup> See *Faragher*, 524 U.S. at 799 (explaining that employer liability for co-worker harassment has been uniformly held under a negligence standard, *i.e.*, that an employer is liable for co-worker harassment only if it “knows or should have known of the conduct); see also *Ellerth*, 524 U.S. at 760.

<sup>18</sup> EQUAL EMP’T OPPORTUNITY COMM’N, ENFORCEMENT GUIDANCE NO. 915.002, VICARIOUS EMPLOYER LIABILITY FOR UNLAWFUL HARASSMENT BY SUPERVISORS (June 18, 1999), available at <http://www.eeoc.gov/policy/docs/harassment.html> (last visited Feb. 25, 2014).

EEOC defined as a supervisor: (i) an individual who is authorized “to undertake or recommend tangible employment decisions affecting the employee,” including “hiring, firing, promoting, demoting, and reassigning the employee,” or (ii) an individual who is authorized “to direct the employee’s daily work activities.”<sup>19</sup> The standard articulated by the EEOC recognizes that it is not only supervisors who have authority to take tangible employment decisions that have the ability to use their authority to harass, intimidate, and threaten their employees. Even though low-level supervisors who oversee an employee’s day-to-day activities may not be empowered to make those employment decisions, the EEOC wisely realized that those individuals also have significant power over their subordinates, and that power can, if abused, lead to particularly pernicious forms of unlawful harassment and hostile work environments. The EEOC’s guidance also served as a reminder to employers that they have a duty to train all supervisors, no matter their level, on anti-discrimination laws and policies; the EEOC’s guidance also encourages employers to monitor the conduct of all supervisors and to take corrective action when harassment does occur.

### **The United States Supreme Court’s Decision in *Vance v. Ball State University***

Unfortunately, this past summer, the United States Supreme Court significantly undercut Title VII’s protections against workplace harassment in its decision in *Vance v. Ball State University*.<sup>20</sup> Maetta Vance is an African-American woman who began working with Ball State University (BSU) in 1989; since 2007, Ms. Vance worked as a substitute server and part-time catering assistant.<sup>21</sup> Sandra Davis, a white woman who also worked in the catering department, was responsible for giving Ms. Vance her daily work assignments, but also subjected Ms. Vance to racially-motivated taunts, threats and other kinds of harassment. Ms. Vance repeatedly complained about Ms. Davis’s racial slurs, about how Ms. Davis would often give her a “hard time,” and that Ms. Davis generally engaged in conduct designed to intimidate Ms. Vance, including slamming pots and pans.<sup>22</sup>

Ms. Vance filed several complaints with the EEOC, and eventually filed a lawsuit in 2006 in the United States District Court for the Southern District of Indiana, claiming that Ms. Davis was her supervisor, and that BSU was liable under Title VII for Davis’ creation of a racially hostile work environment.<sup>23</sup> The case eventually made its way to the United States Supreme Court, where, in a 5-4 decision, a narrow majority of the Court ruled in favor of BSU.<sup>24</sup> In an opinion authored by Justice Samuel Alito, the Supreme Court concluded that because Ms. Davis did not have authority to take tangible employment actions against Ms. Vance, Ms. Davis was not Ms. Vance’s supervisor.<sup>25</sup> In reaching that decision, the Supreme Court rejected that standard announced in the

---

<sup>19</sup> *Id.*

<sup>20</sup> *Vance v. Ball State University*, \_\_\_ U.S. \_\_\_, 133 S. Ct. 2434 (2013).

<sup>21</sup> *Id.* at 2439.

<sup>22</sup> *Id.*

<sup>23</sup> *Id.* at 2440.

<sup>24</sup> *Id.* at 2454.

<sup>25</sup> *Id.*

EEOC's guidance and applied by several federal circuit courts of appeal,<sup>26</sup> and held that employers cannot be vicariously liable for harassment conducted by individuals who oversee an employee's daily work activities but do not have the authority to make tangible employment decisions.

### **The Need for The Fair Employment Preservation Act of 2014**

The majority opinion in *Vance* is not only misguided, it also denies the workplace realities for millions of American workers. In many workplaces there are individuals who may not have the authority to hire, fire, or demote workers, but are responsible for directing their daily work activities. This is especially true in industries that employ low-wage workers. For example, a shift supervisor at a restaurant may not be able to terminate a waitress, but undoubtedly has tremendous authority over that waitress while she is working. As the EEOC has long recognized, such a low-level supervisor can dramatically alter the daily work experiences of that waitress 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. 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 unlawful discrimination continues in our nation's workplaces.

Justice Ruth Bader Ginsburg who, prior to joining the Supreme Court, was a tireless advocate for women's rights, issued a strongly-worded dissent in *Vance*, where she decried the real-life effects that the majority's cramped definition of "supervisor" would have on workers around the country. In her dissenting opinion, she provides examples of workers—all women—who have been subjected to harassment at the workplace by employees who did not have authority to make tangible employment decisions, but were "vested with authority to control the conditions of a subordinate's daily work life [and] used [their] position to aid [their] harassment."<sup>27</sup> Although in each

---

<sup>26</sup> See, e.g., *Whitten v. Fred's, Inc.*, 601 F.3d 231 (4th Cir. 2010); *Mack v. Otis Elevator Corp.*, 326 F.3d 116 (2d Cir. 2003).

<sup>27</sup> *Vance*, 133 S. Ct. at 2460. Justice Ginsburg offered several, real-life illustrations of "in-charge employees" that the majority's opinion would exclude from supervisory status:

- Yasharay Mack, an African-American woman who worked as an elevator mechanic's helper was frequently harassed (e.g., use of blatant sexual and racial epithets; touching her buttocks and attempting to kiss her) by the mechanic in charge who did not have the authority to take tangible employment actions but had the authority to assign her work, control her schedule, assign overtime hours, and direct the particulars of her workday. *Mack v. Otis Elevator Co.*, 326 F.3d 116 (2d Cir. 2003);
- Donna Rhodes, a seasonal highway worker, was verbally assaulted with sex-based invectives and subjected to undesirable work by the "lead worker" and a "technician," both of whom had the authority to assemble plow crews and manage the work assignment of employees in her position, but no authority to take tangible employment actions. *Rhodes v. Illinois Dept. of Transp.*, 359 F.3d 498 (7th Cir. 2004);
- Clara Whitten, a retail store worker, was told on her first day of work by the store manager to "give him what he wanted" to get approval for long weekends off. Because she ignored his order to join him in an isolated storeroom, the manager threatened to make her life a "living hell" and

of the instances highlighted by Justice Ginsburg, the harassers used their position of authority over the victim to carry out their unlawful conduct, under the majority's opinion in *Vance*, none of those individuals would qualify as a supervisor, and therefore the employer could only be held vicariously liable if the harassed worker can meet the onerous negligence standard. As Justice Ginsburg astutely observed:

The limitation [to the definition of supervisor] the Court decrees diminishes the force of *Faragher* and *Ellerth*, ignores the conditions under which members of the work force labor, and disserves the objectives of Title VII to prevent discrimination from infecting the Nation's workplaces.<sup>28</sup>

The Fair Employment Preservation Act of 2014—by adopting the definition of supervisor that the EEOC advanced in its enforcement guidance—will ensure that employees in the State of Maryland will have meaningful legal recourse under the Maryland Declaration of Rights in situations where they are being unlawfully harassed and abused by their low-level managers and supervisors. By reaffirming that employers, under Maryland laws, can be vicariously liable for harassment perpetrated by individuals who have authority to make tangible employment decisions of the victim as well as those individuals who direct, supervise, or evaluate the victim's work, The Fair Employment Preservation Act of 2014 will guarantee that employers in this State 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.<sup>29</sup>

### **Conclusion**

As Justice Ginsburg recognized in her dissent in *Vance*, legislative bodies have a responsibility to intervene when the courts adopt “wayward” interpretations of key statutory civil rights protections.<sup>30</sup> LDF applauds the Health and Government Operations Committee for taking the vital and necessary step of considering the Fair Employment Preservation Act of 2014. Not only is this legislation necessary to protect employees throughout the State of Maryland, but it also has the opportunity to serve as a model for other states around the country, and even for the United States Congress, as they begin to grapple with the *Vance* decision and how to ensure that our nation's workplaces are free from unlawful harassment, intimidation, and abuse.

---

made her work on weekends when she was not scheduled to work. The manager lacked authority to take tangible employment actions but was able to direct her work activities, provide her with tasks to complete, burden her with undesirable work, and control her schedule. *Whitten v. Fred's, Inc.*, 601 F.3d 231 (4th Cir. 2010);

- Monika Starke, a participant in a truck driver training program, was subjected to vulgar sexual remarks and forced into unwanted sex, believing it necessary to gain a passing grade, by her lead driver who exercised control over her work for the 28-day on-the-road program. *EEOC v. CRST Van Expedited, Inc.*, 679 F.3d 657 (8th Cir. 2012).

<sup>28</sup> *Vance*, 133 S. Ct. at 2455.

<sup>29</sup> It is worth noting that nothing in the Fair Employment Act of 2014 will undermine an employer's ability to avoid liability by establishing the affirmative defense that the United States Supreme Court recognized in *Faragher/Ellerth*.

<sup>30</sup> *Vance*, 133 S. Ct. at 2466.

In recent years, the State of Maryland has emerged as a national leader on a number of important civil rights matters, ranging from the death penalty to same-sex marriage. The Fair Employment Preservation Act of 2014 follows in that same proud tradition. For this, and all the other reasons discussed above, LDF wholeheartedly supports passage of House Bill 1350. Thank you for the opportunity to present this testimony today.