

March 20, 2014

Dear Member of Congress:

As organizations dedicated to promoting fairness in the workplace and preventing and combating all forms of discrimination, including sexual harassment, we write to urge you to support the Fair Employment Protection Act. The Supreme Court's June 2013 decision in *Vance v. Ball State University* weakened protections for individuals who face illegal harassment at work. The Fair Employment Protection Act is needed to restore protections for employees who are harassed on the basis of sex, race, national origin, age, religion, disability and genetic information by someone who has the authority to direct their daily work activities but does not have the authority to take tangible employment actions against them.

Although discrimination against women is prohibited under Title VII of the Civil Rights Act of 1964, sexual harassment in the workplace remains a persistent problem that disproportionately affects women. In a national survey by ABC News and the Washington Post, one in four women and one in ten men reported experiencing sexual harassment.<sup>1</sup> More than 80 percent of sexual harassment charges filed with the Equal Employment Opportunity Commission (EEOC) are filed by women.<sup>2</sup>

Recognizing the potential for those in positions of authority to abuse their power over their subordinates, more than fifteen years ago the Supreme Court put in place strong protections from this form of harassment. But the *Vance* decision watered down these protections by holding that an employer can only be held vicariously liable for a hostile work environment if the harasser has the power to take "tangible employment actions" such as hiring, firing and promoting, but not if the harasser directs the employee on a day-to-day basis without the authority to take tangible employment actions. The Court's decision ignored its own precedent, the EEOC's guidance and a common sense understanding of today's workplace realities where a worker may not have any regular interactions with someone empowered to take tangible employment actions.

The *Vance* decision will seriously damage the ability of women and other victims of harassment to seek a remedy. *Vance* says that workers who are harassed by someone who has authority to direct daily work activities, but not to take tangible employment actions, will now have to meet the tougher negligence standard that courts apply to claims of coworker harassment. Because some courts have applied an overly narrow definition of negligence – refusing to find employers negligent even when their efforts to prevent and remedy harassment were weak to nonexistent – many employees who are harassed by an individual with authority to direct work activities but not to hire and fire are likely to be left without an effective remedy as a result of *Vance*.

The *Vance* decision also ignores the power dynamic between an employee and the person who directs her daily work activities. Individuals who harass their subordinates at work are in large part able to do so because of the power vested in them by the employer – not only the power to hire, fire and promote – but also the power to alter an employee's day-to-day work. The EEOC recognized this reality when it issued enforcement guidance providing that employers should be vicariously liable for harassment by individuals with authority to take tangible employment actions or to direct an employee's daily work activities.

The decision will have a particularly severe impact on women in low-wage jobs, many of whom are women of color. Women are more than three-quarters of workers in the 10 largest low-wage occupations (those that typically pay less than \$10.10 an hour),<sup>3</sup> and 37 percent of workers in these occupations are women of color. Women are also two-thirds of workers paid the minimum wage. These workers are among the most vulnerable to harassment and often have the most to lose when their livelihoods are threatened by harassment.

Courts have already begun denying justice to workers as a result of *Vance*. The United States Court of Appeals for the Tenth Circuit dismissed the case of a female employee who alleged sexual harassment by her shift manager. Even though the alleged harasser was often the most senior person on duty and had the power to assign job duties, schedule breaks, authorize overtime and send employees home for the day, the court held that the employer could not be vicariously liable according to the *Vance* standard because the alleged harasser lacked the power to hire, fire or promote employees.<sup>4</sup> More employees who have been harassed are likely to have their cases thrown out for failing to meet the narrow standard created in *Vance*.

The Fair Employment Protection Act would restore pre-*Vance* employee protections and provide clarity for employers. The bill would amend Title VII and other federal nondiscrimination laws to restore protections for victims of harassment on the basis of sex, race, national origin, religion, age, disability or genetic information. The bill would make employers vicariously liable in harassment cases in which the harasser has the power to hire and fire or to direct daily work activities. This bill is a narrow fix that would encourage employers to hold employees they entrust with authority accountable.

Unless Congress steps in, the *Vance* decision will be yet another barrier to justice for the most vulnerable workers. No employee should have to face harassment at work, whether by an individual who can take a tangible employment action or an individual who directs the employee's daily work activities. That is why we urge you to support the Fair Employment Protection Act.

Sincerely,

National Partnership for Women & Families  
National Women's Law Center

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1 Langer, G. (2011, November). *One in Four U.S. Women Reports Workplace Harassment*. ABC News Publication. Retrieved 28 February 2014, from <http://abcnews.go.com/blogs/politics/2011/11/one-in-four-u-s-women-reports-workplace-harassment/>

2 U.S. Equal Employment Opportunity Commission (2014, February). *Sexual Harassment Charges FY 2010 - FY 2013*. Retrieved 28 February 2014, from [http://www.eeoc.gov/eeoc/statistics/enforcement/sexual\\_harassment\\_new.cfm](http://www.eeoc.gov/eeoc/statistics/enforcement/sexual_harassment_new.cfm)

3 National Women's Law Center (2013, July). *60 Percent of Women's Job Gains in the Recovery Are in the 10 Largest Low-Wage Jobs*. National Women's Law Center Publication. Retrieved 7 March 2014, from <http://www.nwlc.org/sites/default/files/pdfs/60percentfactsheet.pdf>.

4 *McCafferty v. Preiss Enterprises, Inc.*, 534 Fed.Appx. 726 (10th Cir. 2013).