No. 11-556

In The
Supreme Court of the United States

MAETTA VANCE, *Petitioner,*
v.
BALL STATE UNIVERSITY, ET AL., *Respondents.*

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF OF *AMICI CURIAE* NATIONAL EMPLOYMENT LAWYERS ASSOCIATION AND AARP IN SUPPORT OF PETITIONER

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INTEREST OF *AMICI CURIAE*

The *Amici*[1] are committed to furthering the goals of Title VII of the Civil Rights Act of 1964 to eradicate employment discrimination and in that interest, to encourage employers to develop and implement policies prohibiting discrimination in employment, specifically policies aimed at protecting employees from harassment on the job.

The Court's decision as to what level of supervisory authority may impose liability on an employer for unlawful workplace harassment, consistent with the Court's decisions in *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) and *Burlington Indus., Inc., v. Ellerth*, 524 U.S. 742 (1998), will further clarify the scope of Title VII's power to combat illegal discrimination. The decision will directly affect the rights of employees who suffer harassment on their jobs based upon race, sex, religion, national origin, or ethnicity. *Amici* ask this Court to hold that the Equal Employment Opportunity Commission's definition of supervisor is the controlling one under Title VII.

The National Employment Lawyers Association (NELA) and AARP are organizations dedicated to ensuring Congress' goal that workers have both the right to a discrimination-free work environment, as well as effective procedures for the

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[1] Pursuant to Sup. Ct. R. 37.6, *Amici* submit that no counsel for any party participated in the authoring of this document, in whole or in part. In addition, no other person or entity, other than *Amici*, has made any monetary contribution to the preparation and submission of this document. Pursuant to Sup. Ct. R. 37.2, letters consenting to the filing of this Brief have been filed with the Clerk of the Court.

enforcement of this right. In furtherance of this goal and consistent with Congress' intent and this Court's prior interpretations, the *Amici* fulfill the role of private attorneys general by assisting in the enforcement of these laws. *EEOC v. Associated Dry Goods*, 449 U.S. 590, 602 (1980). *See N.Y. Gaslight Club, Inc. v. Carey*, 447 U.S. 54, 63 (1980) ("Congress has cast the Title VII plaintiff in the role of a 'private attorney general,' vindicating a policy 'of the highest priority' . . .").

NELA advances employee rights and serves lawyers who advocate for equality and justice in the American workplace. Founded in 1985, NELA is the country's largest professional organization comprised exclusively of lawyers who represent individual employees in cases involving labor, employment and civil rights disputes. NELA and its 68 circuit, state and local affiliates have more than 3,000 members nationwide committed to working for those who have been illegally mistreated in the workplace.

AARP is a nonpartisan, nonprofit organization with a membership. AARP helps people age 50+ have independence, choice and control in ways that are beneficial and affordable to them and society as a whole. A significant share of AARP's members are in the work force and are protected by Title VII of the Civil Rights Act of 1964, as well as by other civil rights laws at the federal, state, and municipal level in regard to which legislatures, courts, and enforcement agencies look to Title VII as a model. AARP supports the rights of older workers, including the right to be free from discriminatory harassment on grounds of sex, race, color, national origin, and religion, under Title VII, as well as on grounds of

age, under the Age Discrimination in Employment Act, and on grounds of disability, under the Americans with Disabilities Act and the Rehabilitation Act. By various means, including legal advocacy, AARP strives to preserve and enforce these rights, including those of older women, older persons of color, and other vulnerable groups of older persons.

SUMMARY OF ARGUMENT

Through a consistent line of cases, the Court has provided the analytical framework for determining when an employer can be held vicariously liable for harassment by one of its employees, and when that employee may be considered a supervisor. *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57 (1986); *Burlington Indus., Inc., v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998). This analysis applies general agency principles as directed by Congress, but balances these principles with Title VII's purpose. Congress intended Title VII to encourage employers to develop policies to prevent and address workplace harassment, and to promote employee use of these policies to address discrimination, rather than resorting to the federal courts.

The focal question in determining employer liability for employee harassment is what level of authority the harasser must possess to be considered a supervisor. If the employee is vested with supervisory power, and the use of that power results in a "tangible employment action," the employer is strictly liable. However, if the harassment does not

result in a "tangible employment action," the employer may be liable, but has an affirmative defense. *Pennsylvania State Police v. Suders*, 542 U.S. 129, 143 (2004) (citing *Faragher*, 524 U.S. at 807-08; *Ellerth*, 524 U.S. at 765). The Court understood that employer liability should be assessed by the power of an employee to control the activities of other employees, not necessarily just to take tangible employment actions.

The Guidance issued by the Equal Employment Opportunity Commission (EEOC), mirrors the Court's analysis, imputing liability to the employer when "the individual has authority to undertake or recommend tangible employment decisions affecting the employee; or . . . has authority to direct the employee's daily work activities." Equal Emp't Opportunity Comm'n, Enforcement Guidance: Vicarious Employer Liab. for Unlawful Harassment by Supervisors, pt. III.A. (1999) (1999 WL 33305874) [hereinafter the "EEOC Guidance"].[2] The circuit courts are split in their definition of "supervisor." Some courts, including the Seventh Circuit, unreasonably restrict the definition of "supervisor" as only those with the power to make tangible employment decisions.

The EEOC Guidance holds employers responsible for delegating power to employees to

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[2] While Vance is stating a claim pursuant to Title VII for race discrimination, the EEOC Guidance encompasses all statutory bases for protection against harassment within EEOC's jurisdiction, including age pursuant to the Age Discrimination in Employment Act (29 U.S.C. § 621, *et seq.*), and disabilities pursuant to the Americans with Disabilities Act (42 U.S.C. § 12101 *et seq.*). *See* EEOC Guidance, Purpose.

make tangible employment decisions, and also when the employer delegates to the employee the power to direct other employees' day-to-day activities. The EEOC Guidance is entitled to deference because this interpretation is driven by, and consistent with, the Court's decisions in *Meritor*, *Faragher*, *Ellerth*, *Suders,* and *Staub v. Proctor Hospital*, 131 S.Ct. 1186 (2011). Additionally, the EEOC Guidance recognizes and reflects workplace reality. Application of the EEOC Guidance will not increase employer liability, but will encourage employers to police workplace harassment, and provides an affirmative defense to liability if they do.

ARGUMENT

Building on *Meritor* as a "foundation," *Faragher* and *Ellerth* further refined legal standards for when an employer is liable for workplace harassment by a supervisor. *Faragher*, 524 U.S. at 992; *Ellerth*, 524 U.S. at 761-65. [3] While the Court did not define how much supervisory authority an employee must possess before the employer is liable for that employee's workplace harassment, the Court's analysis, which outlines the reach of vicarious liability, provides a roadmap for answering this question. The EEOC merely followed this roadmap when it issued guidance defining the appropriateness of imputing

[3] If the harassing party is a victim's co-worker, then the employer will be liable if it acts with negligence in that it knew of or should have known of the harassment and failed to take preventative measures. *Ellerth*, 524 U.S. at 758-59 (citing RESTATEMENT (SECOND) OF AGENCY § 219(2)(b)). *Faragher*, 524 U.S. at 789.

an employee's harassment to the employer under Title VII.

I. The EEOC Guidance Mirrors the Court's Analysis of this Issue and Adopts a Sound Definition of Supervisory Authority

In direct response to, and consistent with the Court's decisions in *Faragher* and *Ellerth*, the EEOC defined "supervisor" in its 1999 Enforcement Guidance. *See* the EEOC Guidance.[4] A mooring for the EEOC Guidance is the Court's recognition that imposing liability on the employer is appropriate because supervisors, even those acting outside the scope of their employment, are aided in their harassment by the authority that the employer has delegated to them. EEOC Guidance n.20 (citing *Faragher*, 524 U.S. at 801; *Ellerth*, 524 U.S. at 761-62*)*.

Significantly, the EEOC Guidance explains the nature of the power that must be given to an employee before he or she can effectively qualify as a supervisor and exercise supervisory authority sufficient to hold the employer liable. The employee's authority must be of "sufficient magnitude to assist the harasser explicitly or implicitly in carrying out the harassment." *Id.* at pt. III.A.

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[4] The Court in *Ellerth,* when referencing the 1990 EEOC Sexual Harassment Guidelines, noted that the EEOC "provide[d] little guidance on the issue of employer liability for supervisor harassment." *Ellerth* 524 U.S. at 755. The EEOC filled this void through their 1999 EEOC Guidance on vicarious liability.

The EEOC Guidance further explains that the status of "supervisor" depends on whether the alleged supervisor is "in [the employee's] supervisory chain of command." *Id.* at pt. III.B. This definition simply reiterates the Court's view that "[a]n employer is subject to vicarious liability for a victimized employee for an actionable hostile environment created by a supervisor with immediate (or successively higher) authority over the employee." *Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 765.

If the alleged supervisor is in the employee's chain of command, then he or she is a supervisor if either "the individual has authority to undertake or recommend tangible employment decisions affecting the employee" or "the individual has authority to direct the employee's daily work activities." EEOC Guidance at pt. III.A.1., A.2.[5] An individual who is "temporarily authorized" to direct an employee's activities is also a supervisor. *Id.* at pt. III.A.2.

Furthermore, the EEOC Guidance explains when power delegated to a co-worker does not reasonably make that person a supervisor. For example, an individual who "merely relays" work assignments from others or who "directs only a limited number of tasks or assignments" is not considered a supervisor. *Id.* at pt. III.A.2.

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[5] The EEOC Guidance provides that an individual outside the employee's chain of command will be deemed a supervisor only if the subordinate employee has a "reasonable belief" that that individual is a supervisor. *Id.* at pt. III.B.

Consistent with the EEOC Guidance, all circuit courts that have addressed this issue agree that if an individual has authority to make tangible employment decisions,[6] then the individual will be considered a supervisor for the purpose of imputing liability to the employer.[7] Although the legal basis for the "ability to direct" prong of the EEOC Guidance is the same as for the "tangible job benefit" prong, not all courts agree that an individual who has the authority to direct the employee's daily work activities should also be viewed as that employee's supervisor for purposes of imputing liability under Title VII.[8] This needlessly narrow view of when an

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[6] The EEOC Guidance applies *Ellerth* by defining a tangible employment decision as "a significant change in employment status." *See* EEOC Guidance at pt. IV.B. for the factors that characterize a tangible action. *See Ellerth*, 524 U.S. at 761 (A tangible employment action "constitutes a significant change in employment status, such as hiring, firing, failing to promote, reassignment with significantly different responsibilities, or a decision causing a significant change in benefits.") The Court elaborated that a tangible employment action is one "by which the supervisor brings the official power of the enterprise to bear on subordinates." *Accord* EEOC Guidance at pt. IV.B.1.

[7] *See Noviello v. City of Boston*, 398 F.3d 76 (1st Cir. 2005); *Mack v. Otis Elevator Co.*, 326 F.3d 116 (2d Cir. 2003); *Griffin v. Harrisburg Property Servs. Inc.*, 421 Fed.Appx. 204 (3d Cir. 2011) (unpublished); *Whitten v. Fred's Inc.*, 601 F.3d 231 (4th Cir. 2010); *Stevens v. U.S. Postal Serv.*, 21 Fed.Appx. 261 (6th Cir. 2001) (unpublished); *Hall v. Bodine Electric Co.*, 276 F.3d 345 (7th Cir. 2002); *Weyers v. Lear Operations Corp.*, 359 F.3d 1049 (8th Cir. 2004); *Dawson v. Entek Int'l*, 630 F.3d 928 (9th Cir. 2011); *Smith v. City of Oklahoma City*, 64 Fed.Appx. 122 (10th Cir. 2003) (unpublished).

[8] *See, e.g.*, *Parkins v. Civil Constructors of Ill., Inc.* 163 F.3d 1027 (7th Cir. 1998); *Hall v. Bodine Elec. Co.*, 276 F.3d 345 (7th Cir. 2002); *Griffin v. Harrisburg Prop. Servs., Inc.*, 421

individual acts as supervisor is inconsistent with the language of the statute and ignores how the Court has approached this issue.

A. The EEOC's Definition Of "Supervisor" Is Compelled By The Supreme Court's Rationale In *Faragher* and *Ellerth*

In *Faragher* and *Ellerth*, the Supreme Court analyzed whether, and to what extent, a corporate employer is liable for the sexual harassment of employees by their supervisors. These cases provide guidance on defining the term "supervisor" and discuss how much authority the employee must exercise before he or she would be viewed as a supervisor. The EEOC's definition simply builds upon the Court's consistent reasoning and policy behind *Faragher* and *Ellerth*.

Congress "left it to the courts to determine controlling agency law principles in a new and difficult area of federal law." *Ellerth*, 524 U.S. at 751. In keeping with this principle, the *Ellerth* Court balanced Title VII's directive, to "encourage the creation of anti-harassment policies and effective grievance mechanisms" with traditional agency principles. *Id.* at 764.

The Court began this analysis by discussing vicarious liability, citing the Second Restatement of Agency as persuasive. *Id.* at 755; *Faragher,* 524 U.S. at 791-92 (citing *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 72 (1986)). According to the

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Fed.Appx. 204 (3d Cir. 2011); *Stevens v. U.S. Postal Serv.*, 21 Fed.Appx. 261 (6th Cir. 2001).

Restatement, employers are generally liable for the harasser's action if that action serves the employer's purpose. *Ellerth*, 524 U.S. at 755 (citing RESTATEMENT (SECOND) OF AGENCY § 228(1)(c) (1957)). However, the Court observed that workplace harassment is normally not within the scope of anyone's employment, regardless of whether a supervisor or co-worker committed the harassment.[9] *Id.* at 757.

The Court then turned to Section 219(2) of the Restatement, which imputes liability to the corporation even when the agent is acting outside the scope of his or her employment. Section 219(2) provides that employers are liable for the torts of their servants when the servant "purport[s] to act or to speak on behalf of the principal and there [is] reliance upon apparent authority, or he [is] aided in accomplishing the tort by the existence of the agency relation." *Id.* at 758 (citing RESTATEMENT (SECOND)

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[9] *Faragher* was not as direct on this point, explaining that "a holding that conduct falls within the scope of employment ultimately expresses a conclusion not of fact but of law," which the Court noted has been described by "eminent authority" as a "highly indefinite phrase . . . devoid of meaning in itself" and "obviously no more than a bare formula to cover the unordered and unauthorized acts of the servant for which it is found to be expedient to charge the master with liability . . . ." *Faragher* at 796 (citing W. Keeton, D. Dobbs, R. Keeton, & Owen, Prosser and Keaton on Law of Torts 502 (5th ed. 1984)). *Faragher* did not directly answer whether sexual harassment was within the scope of employment, however, for the reasons discussed in detail in this brief, the Court found that liability for harassment by a supervisor, even if it did not result in "a tangible employment action" could be imputed to the employer subject to an affirmative defense.

OF AGENCY § 219(2)(d)); *Faragher*, 524 U.S. at 801-03.

The Court explained that "[w]hen a party seeks to impose vicarious liability based on an agent's misuse of delegated authority, the Restatement's aided in the agency relation rule, rather than the apparent authority rule, appears to be the appropriate form of analysis." *Ellerth*, 524 U.S. at 759. [10] *Faragher* reached a similar conclusion: "it makes sense to hold an employer vicariously liable for some tortious conduct of a supervisor made possible by abuse of his supervisory authority, and that the aided-by-agency relation principle embodied in section 219(d)(2) of the Restatement provides an appropriate starting point for determining liability . . . ." *Faragher*, 524 U.S. at 802-04.

The Court's analysis of the "aided by the agency relationship" test demonstrates both the reasonableness and legal soundness of the EEOC Guidance. While the Court did not undertake a fact-

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[10] As defined by the Restatement, "[a]pparent authority exists only to the extent it is reasonable for the third person dealing with the agent to believe that the agent is authorized." *Ellerth*, 524 U.S. at 759 (citing RESTATEMENT (SECOND) OF AGENCY § 8, cmt. c). Therefore, employees with supervisory authority include those who are expressly given supervisory powers and those reasonably perceived to be exercising supervisory power given to them by the principal. The EEOC Guidance addresses the apparent authority issue by providing that an alleged supervisor who is not in the employee's chain of command is still considered a supervisor when the employee "reasonably believe[s] that the harasser ha[s] such power." EEOC Guidance at pt. III.B.

intensive inquiry regarding the defendant-agents' roles in *Faragher* and *Ellerth*, the opinions did discuss certain supervisory traits that the harassers possessed and, more importantly, those that they did not. In *Faragher*, the Court treated both lifeguards who harassed Faragher as supervisors. One of the harassers, Terry, had the power "to supervise all aspects of the lifeguards' work assignments, to engage in counseling, to deliver oral reprimands and to make a record of any such discipline." *Faragher*, 524 U.S. at 781. However, Silverman, the other harasser, only had the power to make the lifeguards' daily assignments, and to supervise their work and fitness training. *See id.* There is no evidence that Silverman was able to make tangible employment decisions, yet the Court considered both to be supervisors, noting they were given "unchecked authority" and were "directly control[ing] and supervis[ing] all aspects of [Faragher's] day-to-day activities." *Id.* at 808.

Similarly, the supervisor in *Ellerth* was not upper-level management, nor did he hold "policy-making" power in the defendant corporation. *Ellerth*, 524 U.S. at 747. Although he interviewed the plaintiff for a promotion, he did not possess the power to promote her himself. *Id.* at 748. The plaintiff and the harassing supervisor also worked out of different offices, and the harasser was not the plaintiff's immediate supervisor. *Id.* at 747. The Court addressed the harasser's authority as perceived by the plaintiff, noting that the plaintiff saw the supervisor as "her boss" and felt compelled to acquiesce in certain matters and to forgo reporting certain misconduct. *Id.* at 748. The Court

recognized in both cases that the ability to direct day-to-day activities is an exercise of supervisory authority and that the employer can be held liable for its misuse. The Court's analysis is precisely the standard adopted by the EEOC.

Faragher and *Ellerth* ultimately decided that, in harassment cases involving a tangible employment action, employers are always liable under general agency principles, as "a tangible employment action taken by the supervisor becomes for Title VII purposes the act of the employer." *Faragher,* 524 U.S. at 802-03; *Ellerth,* 524 U.S. at 762. The Court conceded, "whether the agency relation aids in the commission of supervisor harassment which does not culminate in a tangible employment action is less obvious." *Ellerth,* 524 U.S. at 763.

The Court explained that the Restatement's "malleable terminology. . . can be read to either expand or limit liability in the context of supervisor harassment." *Id.* On this point, the Court struck a delicate balance regarding instances where liability could be imputed to the employer even in the absence of a tangible employment action, subject to an affirmative defense.[11] This balance applied the agency principles dictated by Congress, but also furthered Title VII's purpose to have employers

[11] An employer may assert an affirmative defense to liability by demonstrating that it exercised reasonable care to prevent or promptly remedy sexual harassment, and that the employee unreasonably failed to take advantage of any preventative measures offered by the employer. *Faragher*, 524 U.S. at 807; *Ellerth,* 524 U.S. at 765.

develop policies aimed at preventing and remedying workplace discrimination. The EEOC's definition of "supervisor" similarly serves both purposes.

An employee who is given the power to direct another employee's day-to-day activities and uses that authority to harass an employee is functionally the same as a supervisor with hiring and firing power who engages in sexual harassment but does not take a tangible employment action. Both employees are empowered by the employer to "[bring] the official power of the enterprise to bear" in forcing employees to endure the harassment. *Ellerth*, 524 U.S. at 762. In both situations the victim recognizes the real workplace risk of challenging this harassment. These employees are no longer ordinary co-workers because they have been given power by the employer to impact the work environment.

An employee is likely to view the person who assigns her work, oversees her progress, and evaluates her performance (essentially, the person who directs her daily work activities) as duly capable of altering the terms and conditions of her employment. This ability to direct someone's day-to-day activities, much more than the specific power to hire and fire, is the touchstone for determining who constitutes a "supervisor" under Title VII.

> A supervisor's responsibilities do not begin and end with the power to hire, fire, and discipline employees, or with the power to recommend such actions. Rather, a supervisor is charged with the day-to-day supervision of the work

> environment and with ensuring a safe, productive workplace.

Meritor, 477 U.S. at 76 (Marshall, J., concurring).

When an employer gives an employee the power to direct the day-to-day activities of others it is proper to impute the harassing employee's conduct to the employer. This analysis is consistent with the *Faragher* and *Ellerth* standards and is precisely what the EEOC's Guidance provides. A review of a number of cases highlights the functionality of the EEOC's Guidance and demonstrates how a limited focus on an employee's ability to make a tangible employment decision ignores the reality of today's workplace.

For example, in *Mack v. Otis Elevator Co.*, 326 F.3d 116 (2d Cir. 2003), a female elevator mechanic's helper, Mack, brought suit against her employer due to sustained sexual harassment by the union designated mechanic in charge, Connolly. Besides engaging in physical and verbal abuse, Connolly also denied overtime assignments to the plaintiff, even though he did not have the formal title of supervisor. The authority Connolly exerted over Mack "bestowed upon him by Otis, enabled him, or materially augmented his ability to impose a hostile work environment on her. Under the rules established by *Ellerth* and *Faragher*, [he] was therefore Mack's supervisor for purposes of Title VII analysis." *Mack,* 326 F.3d at 125. The court noted that his authority included "direct[ing] the particulars of each of Mack's work days" and he was "the senior employee on the work site." *Id.* Connolly had a "special dominance over other on-site employees, including Mack . . . ." *Id.*

In *Weyers v. Lear Operations, Inc.,* 359 F.3d 1049 (8th Cir. 2004), the 43 year-old plaintiff, Weyers, worked in the defendant's factory. Brosius, her team leader, was the only authority present in her vicinity except for rare visits from other supervisory personnel. The production line employees viewed Brosius as their supervisor as he assigned tasks and was paid more than other production line employees. Weyers was one of several older female employees treated poorly by this team leader. He failed to give Weyers the same station rotation opportunities as other employees and made derogatory remarks about her age. Station rotation allowed employees to receive on-the-job training for different types of tasks. Consequently, Weyers did not get the same skills training as her younger co-workers.

The district court found that the fact that the team leader could not hire, fire, promote, or take other tangible employment action did not necessarily mean that he was not a supervisor since the "real life working environment rather than artificial demarcations of authority" should control the analysis. *Weyers v. Lear Operations Corp.*, 232 F. Supp. 2d. 977, 994 (W.D. Mo. 2002). On review, the Eighth Circuit found that, despite Brosius' use of his authority to sabotage both Weyers' day-to-day life at the factory and her long-term employment prospects by denying her equal training opportunities, Brosius was not a supervisor for purposes of Title VII. *Weyers*, 359 F.3d at 1057. In doing so, however, the Eighth Circuit recognized that its "option of adopting the broader *Mack* definition of supervisory status," comporting with the EEOC Guidelines, "ha[d] been

foreclosed by the recent decision of another panel of" that court. *Id.* at 1056-57.

Finally, in *Whitten v. Fred's, Inc.*, 601 F.3d 231 (4th Cir. 2010), a female employee, Whitten, worked for the defendant for about 10 months before being transferred to a new location. She quit after one weekend at the new location due to unwelcome sexually-charged interactions with the store manager. Although the manager lacked the power to hire, fire, promote, or reassign, he considered Whitten to be his underling, and Whitten similarly believed he was her immediate supervisor. The manager assigned Whitten tasks and required her to keep a notebook of her assigned jobs. He informed Whitten that if she ever went over his head, he would make her life unpleasant. He oversaw Whitten's work throughout the day, critiqued her, and told her when to begin and end tasks. On most days, the manager was the highest authority present at the store. His "authority over Whitten thus aided his harassment of her and enabled him to create a hostile working environment," which the court took into consideration in concluding that a supervisory relationship had existed. *Whitten*, 601 F.3d at 246. Indeed, the court recounted Justice Souter's words from *Faragher*, noting that Whitten clearly "did *not* feel free to tell Green where to go." *Id.* These cases all demonstrate the wisdom of the EEOC's Guidance, reflecting workplace realities rather than attempting to focus narrowly on whether the employee was

given the power to make tangible employment decisions.[12]

In *Meritor*, Justice Marshall stressed an obvious yet important fact: that "it is precisely because the supervisor is understood to be clothed with the employer's authority that he is able to impose unwelcome sexual conduct on subordinates." *Meritor*, 477 U.S. at 77 (Marshall, J., concurring). The same is true when the employer gives an employee the power to direct the day-to-day activities of other employees and that power assists the harasser in carrying out the harassment. *See* EEOC Guidance at pt. III.A.

B. The Court's Public Policy Rationale In *Faragher* And *Ellerth* Further Supports The Adoption Of The EEOC's Definition Of "Supervisor"

In *Faragher* and *Ellerth*, the Court also determined that "tying the liability standard to the

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[12] *See also Mikels v. City of Durham*, 183 F.3d 323, 333 (4th Cir. 1999) (noting that "the determinant (of whether and employee is a supervisor) is whether as a practical matter his employment relation to the victim was such as to constitute a continuing threat to her employment conditions that made her vulnerable to and defenseless against the particular conduct in ways that comparable conduct by a mere co-worker would not"); and *Rhodes v. Ill. Dep't of Transp.*, 359 F.3d 498, 510 (7th Cir. 2004) (Rovner, J., concurring) (criticizing the Seventh Circuit definition of supervisor as too restrictive because "whatever formal employment authority [the harassers] lacked, a fact-finder reasonably might conclude that the power IDOT had given them to manage the Yard on a day-to-day basis enabled or facilitated their ability to create a hostile work environment for Rhodes").

employer's effort to install effective grievance procedures would advance Congress' purpose 'to promote conciliation rather than litigation'" and "could serve Title VII's deterrent purpose by 'encouraging employees to report before it becomes severe or pervasive.'" *Suders*, 542 U.S. at 145. The Court in *Faragher* further explained, "[a]lthough Title VII seeks 'to make persons whole for injuries suffered on account of unlawful employment discrimination' . . . its 'primary objective,' like that of any statute meant to influence primary conduct, is not to provide redress but to avoid harm." *Faragher*, 524 U.S. at 805-06 (quoting *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 417-18 (1975)).

Driven by these policies, the Court created an affirmative defense for employers when a supervisor's harassment, while not resulting in a tangible employment action, nevertheless creates a hostile work environment. The first prong of the affirmative defense—that the employer exercised reasonable care to prevent and promptly correct any harassing behavior—motivates employers to implement anti-harassment policies. *Faragher*, 524 U.S. at 806; *Ellerth*, 524 U.S. at 765. By defining "supervisor" to include those individuals who direct employees' daily work activities, the EEOC Guidance encourages employers to implement anti-harassment policies that apply to anyone who can be reasonably viewed as a supervisor.

Whether a person is considered a "supervisor" should be determined in a manner that encourages employers to take proactive steps to remedy existing workplace harassment and to prevent future harassment. The incentive to "avoid harm"—Title

VII's "primary objective"—is thus furthered by the EEOC's Guidance. This objective, expressed in the 1990 EEOC Policy Guidelines on Sexual Harassment, and relied on in *Faragher* and *Ellerth*, is a core part of the 1999 EEOC Guidance.

The 1999 EEOC Guidance also captures the second prong of the affirmative defense: insulating the employer from liability if the aggrieved employee unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to otherwise avoid harm. *Faragher*, 524 U.S. at 806-07; *Ellerth*, 524 U.S. at 765. The EEOC Guidance respects the Court's desire to encourage employees to address workplace harassment through the procedures adopted by employers to prevent workplace discrimination. *Faragher*, 524 U.S. at 806-07; *Ellerth*, 524 U.S. at 765. "The Supreme Court's rulings in *Faragher* and *Ellerth* create an incentive for employers to implement and enforce strong policies prohibiting harassment and effective complaint procedures [and] an incentive for employees to alert management about harassment before it becomes severe and pervasive." EEOC Guidance at Section VII. It is hard to envision federal guidance more in line with Supreme Court expectations. The *Faragher* and *Ellerth* decisions support an interpretation of "supervisor" consistent with the EEOC's definition, while at the same time protecting those employers who responsibly monitor their corporate climate for harassment.

II. The Court's Analysis In *Staub* Reinforces The EEOC's Definition Of "Supervisor"

The Court's recent decision in *Staub v. Proctor Hospital,* 131 S.Ct 1186 (2011) also supports a definition of "supervisor" that accounts for an employee's power to direct an individual's daily work activities. In *Staub*, the Court held that an employer's liability for a supervisor's actions extends to the actions of individuals without ultimate hiring or firing power in the decision-making chain, so long as they caused the ultimate decision in some manner. *Staub*, 131 S.Ct at 1192-94. The Court thus recognized the reality of the workplace: individuals who may lack the power to fire[13] an employee can still discriminate against an employee. In such circumstances, the employer is accountable for the discrimination.[14]

Staub reinforces the EEOC's definition of "supervisor." The actions of Staub's day-to-day supervisors, who apparently did not have the power to fire him, nevertheless created liability for the

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[13] It is unclear whether the lower ranked employees had the authority to fire Staub. Presumably, if either individual had that authority, the ultimate firing decision would not have been vested in the vice president of human resources who possessed more authority than either of the lower ranked employees. *See Staub*, 131 S.Ct 1186.

[14] Although *Staub* was brought pursuant to 38 U.S.C. § 4301 *et seq*., the analysis supports the EEOC's definition of supervisor because the Court recognized that individuals who do not take the ultimate adverse action against the employee can still discriminate against the employee. Additionally, the Court did not address the liability of co-workers, and *Staub* did not define "supervisor." This case provides the appropriate vehicle for doing so.

employer. *See id.* at 1191-92. Similarly, the EEOC's definition recognizes that an individual who directs the employee's daily work activities but does not have the ultimate authority to fire the employee, can and should be deemed that employee's supervisor. *See* EEOC Guidance at pt. III.A.2.

Further, the Court expressed concern about a result that would shield the employer from liability if the person who actually fired the employee did not act with discriminatory animus, but was influenced by others who did. *See Staub*, 131 S.Ct. at 1192-93. The Court noted that "[a]n employer's authority to reward, punish, or dismiss is often allocated among multiple agents." *Id.* at 1192. The Court explained that insulating the employer from liability simply because the lower level employee did not have the power to take "adverse employment actions" would "effectively shield" the employer from the "discriminatory acts and recommendations of supervisors . . . ." *Id.* at 1193. The Court concluded that such a result would be an "implausible meaning of the text." *Id.*

Similarly, the EEOC Guidance, by providing that individuals who direct the employee's daily work are "supervisors," helps to ensure that employers who delegate power to employees are held accountable for abuse of that power.

III. *Burlington Northern v. White* Also Reinforces The EEOC's Position That An Employee With The Authority To Direct Day-To-Day Activities Can Be Classified As A "Supervisor"

The focus of the EEOC Guidance on the employee's power to direct the day-to-day activities of other workers is the correct inquiry in determining whether to impute liability to the employer. A question underlying this analysis is: how much power must the employer delegate to conclude that the supervising employee has the authority to direct the day-to-day activities of others? The Court does not need to break new ground here because it has provided a workable test, the "material adversity" analysis, in *Burlington Northern & Santa Fe Ry. Co. v. White*, 548 U.S. 53 (2006). If the power delegated to an employee is sufficient to deter another employee from challenging workplace harassment, that delegation of authority should be enough to impute liability under the theory adopted by the Court in *Faragher* and *Ellerth*.

While *White* addressed this issue in the context of retaliation, the principles involved in the "material adversity" analysis are directly transferable to the harassment context. As in a retaliation analysis, it is appropriate to examine whether an employee's level of control can aid in creating a hostile work environment. In *Faragher* and *Ellerth*, the Court repeatedly recognized that a significant factor in holding employers liable for a supervisor's harassment, even absent a tangible employment action, is the ability of the harassing employee to exact punishment if the victim does not

submit to the harassing conduct. *See Faragher*, 524 U.S. at 805; *Ellerth*, 524 U.S. at 763-64. In *Faragher*, the Court expressed concern that the inherent power discrepancy between a supervisor and a subordinate employee may, itself, compel the employee to tolerate harassing conduct because of fear of reprisal. The Court explained that "[s]upervisors do not make speeches threatening sanctions whenever they make requests in the legitimate exercise of managerial authority, and yet every subordinate employee knows the sanctions exist." *Faragher*, 524 U.S. at 805.

This same fear of retaliation is present when the employer has given a co-worker the power to direct an employee's day-to-day activities even if that grant of power does not include the authority to take tangible employment actions. If a co-worker has the power to direct the day-to-day activities of another, there is little likelihood that the subordinate employee will simply ignore this direction or "walk away or tell the offender where to go" if they are subject to harassment by that employee. *Id.* at 803.

The Court made it clear that it is the quantum of control and authority that the supervisor exercises over an employee, and not a technicality such as job title that matters in imputing liability to the employer. In *Ellerth*, the Court explored the contours of supervisory power, recognizing that "there are acts of harassment a supervisor might commit which might be the same acts a co-employee would commit, and there may be some circumstances where the supervisor's status makes little difference." *Ellerth*, 524 U.S. at 763. The Court reasoned that the touchstone of corporate liability is

the supervisor's level of control, not his or her title or place in the chain of command. Later, in *White*, the Court expanded on these ideas when discussing an employee's well founded fears of reprisal. The Court recognized that an employee may well choose to ignore very serious harassment rather than risk a suspension, even when that suspension will likely be reversed. "That is to say, an indefinite suspension without pay could well act as a deterrent, even if the suspended employee eventually received backpay." *White*, 548 U.S. at 73.

For the same reasons that the Court in *Faragher* and *Ellerth* believed there needed to be a legal standard preventing retaliation in the harassment context—to ensure that employees would feel comfortable using anti-harassment policies and procedures—the Court in *White* was driven to adopt the "reasonably likely to deter" standard to help prevent retaliation. *Id.* at 66-67. The EEOC Guidance states: "[supervisory] authority must be of a sufficient magnitude so as to assist the harasser explicitly or implicitly in carrying out the harassment." EEOC Guidance at pt. III.A. The linchpin of the EEOC Guidance is consistent with the "reasonably likely to deter" standard already adopted by the Court in the retaliation context. It is both one that is understood by employers and employees and one that is currently used by the courts.

The EEOC's analysis, similar to what the Court recognized in *White*, "separate[s] significant from trivial harm." *White*, 548 U.S. at 68. The EEOC Guidance imputes liability for the employee's harassment only when the power given assists the

harasser in carrying out the harassment. This approach allows a fact-finder to determine what level of authority to direct is sufficient to hold the employer responsible for the harassing employee's actions.

IV. As The Court Has Recognized In The Area of Sexual Harassment, The EEOC Guidance Should Be Afforded Deference

There is no need for the Court to chart its own course in interpreting section 704(a). Because the EEOC's interpretation is permissible under the language of the statute, is reasonable, and furthers Title VII's purpose of protecting employees against unlawful harassment, the Court should defer to the EEOC's definition.

The Court has long acknowledged that EEOC guidelines are valuable persuasive tools reflecting a longstanding "body of experience and informed judgment to which courts and litigants may properly resort for guidance." *See, e.g.*, *Meritor Sav. Bank, FSB v. Vinson,* 477 U.S. 57, 65 (1986) (quoting *General Elec. Co. v. Gilbert*, 429 U.S. 125, 141-42 (1976)); *see also Crawford v. Metro. Gov't of Nashville & Davidson Cnty, Tenn.*, 555 U.S. 271, 276 (2009) (quoting *Bragdon v. Abbott*, 524 U.S. 624, 642 (1998)); *Federal Express Corp. v. Holowecki*, 552 U.S. 389, 399 (2008) (explaining that EEOC compliance manuals "reflect a 'body of experience and informed judgment to which courts and litigants may properly resort for guidance'") (quoting *Bragdon v. Abbott*, 524 U.S. 624, 642 (1998)).

Indeed, the Court has explained that EEOC interpretations are entitled to "great deference" when they are consistent with both the statutory language and purpose. *See Griggs v. Duke Power Co.*, 401 U.S. 424, 433-44 (1971) (finding that because "the Act and its legislative history support the Commission's construction, this affords good reason to treat the guidelines as expressing the will of Congress").

In the harassment context, the Court has often looked to EEOC policies, definitions, and other guidance to inform its jurisprudence. For instance, the Court in *Meritor* referred to the EEOC Guidelines on Discrimination Because of Sex when determining whether Title VII's prohibition of sex-based discrimination encompasses claims for "hostile environment"—that is, claims for sexual harassment not resulting in a tangible economic loss. *Meritor*, 477 U.S. at 65-73 (quoting 29 C.F.R. § 1604.11(a)).

While finding that the EEOC guidelines were "not controlling upon the courts by reason of their authority," the Court in *Meritor* nonetheless afforded great weight to the EEOC's position that Title VII encompasses sex-based harassment having the "purpose or effect of unreasonably interfering with an individual's work performance or creating an intimidating, hostile, or offensive working environment." *Id.* at 65. In line with this finding and utilizing the EEOC's position, the Court in *Meritor* expressly held that "a claim of 'hostile environment' sex discrimination is actionable under Title VII." *Id.* at 73.

Likewise, in *Suders*, the Court relied in part on the policy contained in an EEOC Compliance

Manual when holding that claims for constructive discharge caused by a sexually hostile work environment are actionable under Title VII. *Suders*, 542 at 142 (2004) (citing 2 EEOC Compliance Manual §612.9(a)) (stating that an employer is responsible for constructive discharge under Title VII). Similarly, in *Crawford,* the Court looked to EEOC guidelines in determining the standard of behavior to satisfy the opposition clause of Title VII in conversations between employees that are "sexually obnoxious." *Crawford v. Metro. Gov't of Nashville & Davidson Cnty, Tenn.*, 129 S.Ct. 846, 851 (2009). The Court again found the EEOC guidelines extremely persuasive. *Id.* at 852. Much like the EEOC guidelines at issue in *Meritor*, *Suders*, and *Crawford*, the EEOC Guidance regarding supervisory status is persuasive and should be afforded deference.

The definition of "supervisor" adopted by the EEOC is not only compelled by *Faragher* and *Ellerth,* but also comports with the common understanding and usage of the word. Most individuals, uneducated in the legal rhetoric of Title VII and the intricacy of corporate hierarchies, understand the term "supervisor" in its plainest and most commonsense meaning: the individual who manages the employee's workload, controls her assignments, and oversees her performance. In other words, a supervisor is the person who directs her work activities on a daily basis. It is unlikely that the typical worker instead understands the term "supervisor" to refer exclusively to the corporate officers who sign paychecks, directly influence

employees' compensation, and hand down final decisions regarding ultimate employment status.

This is consistent with the Oxford English Dictionary's definition of "supervisor": "[a] person who has charge of or responsibility for a business, institution, department, etc.; an overseer; a person who directs or oversees a task or activity." *Oxford English Dictionary Online,* www.oed.com (last visited on 8/30/2012). Because the protections imparted by Title VII should generally comport with common understanding, the Court should adopt a definition of "supervisor" that is familiar to American workers, such as that promulgated by the EEOC.

The EEOC Guidance should also be given deference because of important public policy considerations. If the Court were to restrict the definition of "supervisor" under Title VII to include only those employees with the power to directly affect the terms and conditions of employment, it would invite employers to concentrate all hiring and firing power into as few employees as possible. For example, an employer might require that only human resources, the company president, or the CEO make all personnel decisions. This would restrict those considered "supervisors" under Title VII to only a select few. Simply by limiting the number of corporate employees permitted to make or have a significant influence on ultimate employment decisions, large companies could easily insulate themselves from liability in nearly all hostile environment claims. The only viable cause of action would arise where the alleged harasser is in fact the company president, the head of human resources, or

some similarly high-ranking company officer. If encouraged, such insulation may ultimately render Title VII nearly toothless as a means of protecting employees from hostile or offensive environments.

The EEOC has also consistently advocated for this interpretation, taking this position both in cases it litigates and when participating as *amicus curiae*.[15] The EEOC's definition is a reasonable reading of the statute and reflects the realities of the workplace. It is consistent with both Congress' intent and the Court's view of Title VII's protections, particularly in the harassment area. The Court should defer to the EEOC Guidance.

CONCLUSION

For the foregoing reasons, the Court should reverse the decision below, clarify that the EEOC

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[15] *See*, *e.g.*, Petition of Appellant Equal Employment Opportunity Commission For Rehearing And Suggestion For Rehearing En Banc, *EEOC v. CRST Van Expedited, Inc.*, 679 F.3d 657 (2012) (Nos. 09–3764, 09–3765, 10–1682) 114 Fair Empl.Prac.Cas. (BNA) 1566; Brief Of The Equal Employment Opportunity Commission As *Amicus Curiae* In Support Of Plaintiff-Appellee For Affirmance, *Weyers v. Lear Operations Corp.*, 359 F.3d 1049, (2004) (No. 02-3732), 2004 WL 3300920; Brief Of The Equal Employment Opportunity Commission As *Amicus Curiae* In Support Of Plaintiff-Appellant, *Dulaney v. Packaging Corp. of America*, 673 F.3d 323 (2012) (No. 10-2316) 114 Fair Empl.Prac.Cas. (BNA) 980; Brief Of The Equal Employment Opportunity Commission As *Amicus Curiae* In Support Of Plaintiff-Appellant, *Whitten v. Fred's Inc.*, 601 F.3d 231 (2010) (No. 09-1265) 108 Fair Empl.Prac.Cas. (BNA) 1510; Brief Of The Equal Employment Opportunity Commission As *Amicus Curiae*, *Mack v. Otis Elevator Co.*, 326 F.3d 116 (2003) (No. 02-7056) 173 L.R.R.M. (BNA).

Guidance is the correct standard for determining vicarious liability of employers in the harassment context, and remand for action consistent with the Court's ruling.

Respectfully submitted on September 5, 2012.

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