**No. 11-556**

In the

**Supreme Court of the United States**

MAETTA VANCE,

*Petitioner*,

v.

BALL STATE UNIVERSITY,

*Respondent.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

# BRIEF OF AMICUS CURIAE NEW ENGLAND LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

*Counsel for Amicus Curiae*

Benjamin G. Robbins
*Counsel of Record*
Martin J. Newhouse, President
New England Legal Foundation
150 Lincoln Street
Boston, MA 02111-2504
Tel.: (617) 695-3660
benrobbins@nelfonline.org

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## INTEREST OF AMICUS CURIAE

New England Legal Foundation ("NELF") seeks to present its views, and the views of its supporters, on the issue of who is a supervisor under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e - 2000e-3, for purposes of imputing vicarious liability to an employer when an employee has created an actionable hostile work environment. While NELF does not in any way condone discrimination in the workplace, NELF nonetheless believes that justice requires clarity, uniformity, and predictability in determining the scope of an employer's liability under federal anti-discrimination law.[1]

NELF is a nonprofit, nonpartisan, public interest law firm, incorporated in Massachusetts in 1977 and headquartered in Boston. Its membership consists of corporations, law firms, individuals, and others who believe in NELF's mission of promoting balanced economic growth in New England, protecting the free enterprise system, and defending economic rights. NELF's members

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[1] Pursuant to Supreme Court Rule 37.6, counsel for amicus states that no counsel for a party authored this brief in whole or in part, and no person or entity, other than amicus, made a monetary contribution to the preparation or submission of the brief. Pursuant to Supreme Court Rule 37.3, amicus notes that on July 26, 2012, and on August 1, 2012, counsel for respondent and counsel for petitioner respectively filed a blanket consent to the filing of amicus curiae briefs, in support of either or neither party.

and supporters include both large and small businesses located primarily in the New England region.

NELF has long been committed to a reasonable and balanced interpretation of federal statutes regulating the conduct of businesses in their capacity as employers. In this case, NELF opposes an unduly expansive and open-ended definition of the term supervisor for purposes of imputing vicarious liability to the employer in Title VII hostile work environment claims. In NELF's view, this Court in *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998), already has effectively defined the term "supervisor" to include only those employees who are empowered to take "tangible employment action" against a subordinate employee. NELF believes that, under this Court's precedent and sound principles of agency law, the imposition of vicarious liability on the employer in a hostile work environment claim is justified only when the harassing employee has been delegated this official and weighty corporate power to change the economic status of a subordinate employee.

NELF has regularly appeared as amicus curiae in this Court in cases raising issues of general economic significance to both the New England and the national business communities.[2] This is such a case, and NELF

[2] *See, e.g.*, *Sorrell v. IMS Health Inc.*, 131 S. Ct. 2653 (2011); *AT&T Mobility LLC v. Concepcion*, 131 S. Ct.

believes that its brief would provide an additional perspective to aid this Court in deciding the issue presented herein.

## SUMMARY OF ARGUMENT

In *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), this Court held that an employer is vicariously liable under Title VII for a supervisor's actionable harassment of an employee under his or her authority. *Faragher*, 524 U.S. at 807; *Ellerth*, 524 U.S. at 765. This Court did not expressly define the operative term "supervisor" in those cases. Nevertheless, a careful reading of *Ellerth* strongly indicates that the Court intended the term to apply only to those employees who have been delegated the official corporate power to take "tangible employment action" against a subordinate employee, which entails "a

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1740 (2011); *Hall Street Assocs., L.L.C., v. Mattel, Inc.*, 552 U.S. 576 (2008); *Tellabs, Inc. v. Makor Issues & Rights, Ltd.,* 551 U.S. 308 (2007); *Watters v. Wachovia Bank, N.A.,* 550 U.S. 1 (2007); *Rapanos v. United States,* 547 U.S. 715 (2006); *S.D. Warren Co. v. Maine Bd. of Envtl. Prot.,* 547 U.S. 370 (2006); *Kelo v. City of New London,* 545 U.S. 469 (2005); *San Remo Hotel, L.P. v. City of San Francisco,* 545 U.S. 323 (2005); *Exxon Mobil Corp. v. Saudi Basic Indus. Corp.,* 544 U.S. 280 (2005); *Comm'r v. Banks,* 543 U.S. 426 (2005); *Green Tree Fin. Corp. v. Bazzle,* 539 U.S. 444 (2003); *EEOC v. Waffle House, Inc.,* 534 U.S. 279 (2002).

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." *Ellerth*, 524 U.S. at 761.

From the outset, the Court in *Ellerth* expressed concern about the potentially broad scope of the foundational "aided by the agency relation" standard of vicarious liability, *Restatement (Second) of Agency* § 219(2)(d), as applied to Title VII claims. To avoid creating an employer's potentially unlimited vicarious liability for hostile work environment claims, and to impose reasonable limits, the Court required additional indicia of the agency relation, beyond the mere fact of the employment relationship itself. Among other things, the Court in *Ellerth* limited instances of indefensible, *per-se* vicarious liability to supervisory harassment that culminates in a tangible employment action (often referred to as "quid pro quo" claims).

In its subsequent discussion of hostile work environment claims, the Court in *Ellerth* incorporated its discussion of tangible employment actions and recognized that the power and authority to take such official and weighty action is a uniquely coercive form of hierarchical power, and that it is the defining feature of all supervisors. That is, the Court in *Ellerth* recognized that the employer has

specially "deputized" all supervisors with the rare power to terminate or substantially change an employee's economic status or job responsibilities. Consequently, supervisory harassment derives its inherently intimidating character from the supervisor's potential abuse of this official power. Hence, because of this delegated power, all supervisors are potentially and uniquely aided by the agency relation in creating a hostile work environment. This defining power of all supervisors, in turn, provides the necessary basis for imposing *prima facie* vicarious liability on the employer for actionable supervisory harassment, subject to the employer's two-pronged affirmative defense that (a) it exercised reasonable care in generally preventing and correcting workplace harassment, and that (b) the plaintiff failed unreasonably to make use of any such preventive or corrective measures.

Conversely, *Ellerth* also established that an employee who *lacks* the official corporate power to take tangible employment action against another employee is a coworker for Title VII purposes. A coworker cannot threaten or intimidate another employee with his or her very job or inflict other similar economic deprivations. As *Ellerth* established, the employer should only be vicariously liable for the harassment committed by a supervisor, who is uniquely empowered to take a tangible employment action against the plaintiff employee.

## ARGUMENT

### I. THIS COURT ALREADY HAS EFFECTIVELY DECIDED THAT A SUPERVISOR FOR TITLE VII PURPOSES IS AN EMPLOYEE WHO IS EMPOWERED TO TAKE A TANGIBLE EMPLOYMENT ACTION AGAINST A SUBORDINATE EMPLOYEE.

At issue in this case is who is a supervisor under Title VII of the Civil Rights Act of 1964, 42 U.S.C. §§ 2000e *et seq*., for purposes of imputing vicarious liability to the employer for an employee's creation of an actionable hostile work environment.[3] In the twin cases of *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998), and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), this Court held that an employer is vicariously liable under Title VII for a supervisor's actionable harassment of an employee under his or her authority. *Faragher*, 524 U.S. at 807; *Ellerth*,

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[3] Title VII subjects employers to liability for the actionable discrimination of their agents. *See* 42 U.S.C. § 2000e(b) (defining "employer," in relevant part, as "a person engaged in an industry affecting commerce who has fifteen or more employees . . . , *and any agent* of such a person . . . .") (emphasis added); 42 U.S.C. § 2000e-2(a)(1) ("It shall be an unlawful employment practice for an *employer* to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual . . . .") (emphasis added).

524 U.S. at 765.[4]

This case arises because the Court did not expressly define the operative term "supervisor" in either opinion. However, a careful reading of *Ellerth* strongly indicates that the Court intended the term to apply only to those employees who have been delegated the official corporate power to take "tangible employment action" against a subordinate employee, which entails "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." *Ellerth*, 524 U.S. at 761. Under this definition of supervisor, the disputed employee in this case clearly cannot be the petitioner's supervisor for Title VII purposes because she had no such power and authority over the plaintiff's economic status. *See Vance v. Ball State Univ.*, 646 F.3d 461, 470 (7th Cir. 2011).

In *Ellerth*, this Court explained that, while an employee's act of discriminatory harassment is outside the scope of his or her employment, the employer can nevertheless be held vicariously liable based on the principle of

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[4] By contrast, when the harasser is the plaintiff's coworker, and not her supervisor, the employer is not vicariously liable for the coworker's harassment. Instead, the plaintiff must prove that the employer was independently negligent in its response to the alleged harassment. *See Faragher,* 524 U.S. at 799; *Ellerth,* 524 U.S. at 760.

agency law that the employee was "aided by the agency relation" in committing the harassment. *Ellerth*, 524 U.S. at 758 (quoting *Restatement (Second) of Agency* § 219(2)(d)) ("A master is not subject to liability for the torts of his servants acting outside the scope of their employment, unless . . . [the servant] was *aided in accomplishing the tort by the existence of the agency relation*.")) (emphasis added). *See also Faragher*, 524 U.S. at 801-02 (discussing same).

However, from the outset, the Court in *Ellerth* expressed concern about the potentially broad scope of the "aided by the agency relation" standard of vicarious liability as applied to Title VII claims. *See Ellerth*, 524 U.S. at 760 ("In a sense, most workplace tortfeasors are aided in accomplishing their tortious objective by the existence of the agency relation: Proximity and regular contact may afford a captive pool of potential victims."). To avoid creating an employer's potentially unlimited vicarious liability for hostile work environment claims, and to impose reasonable limits, the Court required additional indicia of the agency relation, beyond the mere fact of the employment relationship itself. *See id*. at 760 ("The aided in the agency relation standard, therefore, requires the existence of something more than the employment relation itself.").

First, the Court restricted application of the aided-by-the-agency-relation standard to instances of *supervisory* harassment only,

thereby excluding coworker harassment as a basis of vicarious liability. *See Ellerth*, 524 U.S. at 760. Second, the Court in *Ellerth* stated that precedent compelled it to interpret the scope of the aided-by-the-agency-relation standard narrowly when applied to supervisory harassment. *See id*. at 763 ("[W]e are bound by our holding in *Meritor* [*Sav. Bank, FSB v. Vinson,* 477 U.S. 57, 72 (1986),] that agency principles *constrain* the imposition of vicarious liability in cases of supervisory harassment.") (emphasis added). *See also Ellerth*, 524 U.S. at 763 ("'Congress' decision to define 'employer' to include any 'agent' of an employer, 42 U.S.C. § 2000e(b), surely evinces *an intent to place some limits* on the acts of employees for which employers under Title VII are to be held responsible'") (quoting *Meritor*, 477 U.S. at 72) (emphasis added). And finally, the Court in *Ellerth* further narrowed the scope of the aided-by-the-agency-relation standard by limiting instances of indefensible, *per-se* vicarious liability to supervisory harassment that culminates in a tangible employment action. *See Ellerth*, 524 U.S. at 760-61.[5]

[5] By contrast, when a supervisor creates a hostile work environment but takes no tangible employment action, the employer is *prima facie* vicariously liable but can avoid liability by proving the two-pronged affirmative defense that (a) it exercised reasonable care in generally preventing and correcting workplace harassment, and that (b) the plaintiff failed unreasonably to make use of

*Ellerth*'s thorough discussion of this last point--tangible employment actions--warrants close attention. As NELF discusses further below, this Court recognized that the power and authority to take such official action is the defining feature of all supervisors, and hence the necessary basis for an employer's vicarious liability under the aided-by-the-agency-relation standard. *See Ellerth*, 524 U.S. at 763.

In *Ellerth*, the Court observed that a tangible employment action is a uniquely coercive form of hierarchical power because "in most cases [it] inflicts *direct economic harm*." *Ellerth*, 524 U.S. at 762 (emphasis added). The Court also recognized that a tangible employment action is an official and weighty corporate act, and that the corporation generally delegates this formal power exclusively to its supervisors:

> Tangible employment actions fall within the special province of the supervisor, . . . [who has] been *empowered* by the company as *a distinct class of agent to make economic decisions* affecting other employees under his or her control. Tangible employment actions are the means by which the supervisor brings the *official power of the enterprise to bear on subordinates*. A

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any such preventive or corrective measures. *Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807.

> tangible employment decision requires an official act of the enterprise, a company act. The decision in most cases is documented in official company records, and may be subject to review by higher level supervisors.

*Ellerth*, 524 U.S. at 762 (emphasis added). *See also id*. ("As a general proposition, *only a supervisor*, or other person acting with the *authority of the company*, can cause this sort of injury.") (emphasis added).

To be sure, this discussion of tangible employment actions addressed "quid pro quo" claims, in which the supervisor has actually taken such extreme measures against the plaintiff employee. Nevertheless, the Court in *Ellerth* incorporated the substance of this discussion into its subsequent treatment of hostile work environment claims. There, the Court stated that "a supervisor's *power and authority* invests his or her harassing conduct with a particular threatening character, and in this sense, a supervisor *always* is aided by the agency relation [in creating a hostile work environment]." *Ellerth*, 524 U.S. at 763 (emphasis added). The immediate antecedent to a supervisor's "power and authority" in this key quotation from *Ellerth* is the Court's discussion, above, of a supervisor's power and authority to take tangible employment actions. *See id*. at 762. As one court has astutely

observed, in interpreting the same language from *Ellerth*, "[w]hat 'power and authority' was the Court [in *Ellerth*] referring to as investing the supervisor's harassment with 'a particularly threatening character,' if not the supervisor's 'power and authority' to take 'tangible employment action' against the harassed employee?" *Joens v. John Morrell & Co.*, 243 F. Supp.2d 920, 935 (N.D. Iowa 2003), *aff'd*, 354 F.3d 938, 940 (8th Cir. 2004) (adopting district court's analysis of *Ellerth*).

This interpretation of *Ellerth* is reinforced later in the opinion, when the Court announced its test for vicarious liability. There, the Court restated its goal "to accommodate the agency principles of vicarious liability for harm caused by *misuse of supervisory authority* . . . ." *Ellerth*, 524 U.S. at 764 (emphasis added). Again, the reference here must be to the supervisor's misuse of the uniquely supervisory authority to take tangible employment action against a subordinate employee.

The internal consistency of the Court's opinion therefore indicates that *Ellerth* defined a supervisor as one who always has the power and authority to take a tangible employment action against a subordinate employee. That is, *Ellerth* recognized that the employer has specially "deputized" all supervisors with the rare power to terminate or substantially change an employee's economic status or job

responsibilities. Consequently, supervisory harassment derives its inherently intimidating character from the supervisor's potential abuse of this official power. Hence, because of this delegated power, all supervisors are potentially and uniquely aided by the agency relation in creating a hostile work environment. This defining power of all supervisors, in turn, provides the necessary basis for imposing *prima facie* vicarious liability on the employer for actionable supervisory harassment, subject to the employer's two-pronged affirmative defense. *See Ellerth*, 524 U.S. at 765; *Faragher*, 524 U.S. at 807. *See also* n.5, above.

In sum, *Ellerth* established that the definition of a supervisor for Title VII claims is restricted to those employees who are empowered to take a tangible employment action against a subordinate employee. *See Ellerth*, 524 U.S. at 763. Conversely, *Ellerth* also established that an employee who *lacks* the official corporate power to take tangible employment action against another employee is a coworker for Title VII purposes. After all, a coworker cannot threaten or intimidate another employee with his or her very job or inflict other similar economic deprivations. The employer has not empowered the coworker with that uniquely supervisory authority. The employer has therefore not "invest[ed] his or her harassing conduct with a particular threatening character" that can satisfy the aided-by-the-agency-relation standard. *Id*. at

763.

While a coworker can inflict harm on another employee and can indeed make his or her work environment a trying experience,

> [w]hen [by contrast,] a person with supervisory authority discriminates in the terms and conditions of subordinates' employment, his actions necessarily draw upon his superior position . . . . [A]n employee generally cannot check a supervisor's abusive conduct the same way that she might deal with abuse from a co-worker.

*Faragher*, 524 U.S. at 803. A coworker may even have some degree of control over another employee, but the employer should only be vicariously liable for the harassment committed by a supervisor, who is uniquely empowered to take the most extreme, economic action against a subordinate employee--a tangible employment action.

## CONCLUSION

For the reasons stated above, NELF respectfully requests that this Court affirm the judgment of the Seventh Circuit.

Respectfully submitted,

NEW ENGLAND LEGAL FOUNDATION

By its attorneys,

Benjamin G. Robbins
*Counsel of Record*
Martin J. Newhouse,
President
New England Legal
Foundation
150 Lincoln Street
Boston, MA 02111-2504
Telephone: (617) 695-3660
benrobbins@nelfonline.org

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