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 IN OPPOSITION

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QUESTION PRESENTED

Whether the unanimous courts below erred in holding that, on the particular facts of this case, the employer was not liable under Title VII for an alleged hostile work environment, where, among other things, the co-employee on which petitioner focuses her challenge in this Court bore none of the hallmarks of a supervisor under any criteria recognized by the courts of appeals or the Equal Employment Opportunity Commission and the undisputed facts showed that the employer promptly investigated each complaint and took disciplinary action where appropriate.

RULE 29.6 STATEMENT

Ball State University is a State supported institution of higher education.

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INTRODUCTION

Petitioner, an African-American employee of Ball State University (BSU) who worked in the dining services division of BSU during the period at issue, sued BSU and certain other employees alleging, *inter alia*, a hostile work environment on account of her race in violation of Title VII of the Civil Rights Act of 1964 (Title VII), 42 U.S.C. §§ 2000e *et seq*. After carefully reviewing the undisputed facts, the district court granted summary judgment to BSU and the individual defendants. The Seventh Circuit unanimously affirmed in an opinion written by Judge Wood. The court's opinion meticulously discusses petitioner's allegations from the view of the alleged facts "that favors [petitioner]." Pet. App. 17a. Among other things, the court held that petitioner had failed to show that defendant Saundra Davis was a "supervisor." The court explained that Davis lacked the power to "'hire, fire, demote, promote, transfer, or discipline'" petitioner. *Id.* at 12a-13a (citation omitted). Indeed, as the district court observed, in arguing that Davis was a supervisor, petitioner had contended "only that [Davis] is 'part of management because she doesn't clock in.'" *Id.* at 54a. Both courts held that that was insufficient to make Davis a supervisor under Title VII.

Although other circuits and the Equal Opportunity Employment Commission (EEOC) have stated that an employee may be a supervisor for purposes of Title VII if the employee has the authority to "direct the employee's daily work activities" (*id.* at 90a), in applying that test they have focused on whether the employee had the authority to impose additional duties, controlled employees' schedules, was a senior employee at the work place, and actually exercised "dominance"

over other employees. *See supra* at 26-27. The evidence in this case does not show that Davis had or exercised such authority vis-à-vis petitioner or anyone else. And given the absence of any evidence that Davis had such authority, this case does not actually conflict with any other circuit decision holding that an employee was a supervisor under the EEOC standard.

The Court has previously denied a petition for certiorari presenting the same asserted circuit split and the basic question presented here. There is no need, and certainly no pressing need, for this Court to intervene in this case. There is ample evidence that Title VII plaintiffs are able to sustain suits against their employers on hostile work environment claims where the facts actually support such claims. And this case is an unattractive vehicle to address the question presented in any event. Not only do the undisputed facts refute petitioner's contention that Davis was a "supervisor" under any recognized standard (including the EEOC guidelines), but the record overwhelmingly shows—as both the court of appeals and district court emphasized—that BSU promptly investigated each of petitioner's reports of alleged harassment and took appropriate action when warranted. *Id.* at 15a-19a. Accordingly, the courts below properly—and unanimously—concluded "that the undisputed facts demonstrate that there is no basis for employer liability" in this case. *Id.* at 19a.

The petition should be denied.[1]

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[1] The petition seeks review only of the court of appeals' disposition of petitioner's Title VII hostile work environment claim against BSU. Pet. i. The grant of summary judgment thus is final—and not challenged here—as to the individual defendants.

STATEMENT OF THE CASE

The question presented concerns the standard for determining whether an employee is a "supervisor" for purposes of evaluating a Title VII claim that an individual has been subjected to a hostile work environment. Pet. i. That question is relevant here only as to one employee—Saundra Davis. It is undisputed that Bill Kimes and Karen Adkins supervised petitioner, and the courts below analyzed petitioner's claim on the premise that Kimes and Adkins were supervisors. *See* Pet. App. 13a-14a, 55a-59a. Petitioner claims that Davis was "a salaried employee whom [BSU] designated as a 'supervisor,'" Pet. 6, and premises its question presented on these allegations, *id.* at i. Both assertions are inaccurate. The evidence demonstrates that Davis was an hourly employee, not a salaried employee. *See* Melissa Rubrecht Aff. ¶9, *Vance v. Ball State Univ.*, No. 1:06-CV-1452 SEB/JMS (S.D. Ind. filed Nov. 1, 2007) ("*Vance* S.D. Ind."), Dkt. 56-1. Moreover, petitioner's assertion that BSU deemed Davis a supervisor is contradicted by the very page of the appendix (at 54a) that petitioner cites to support this proposition. As that page states, BSU's position always has been "that Ms. Davis is not currently, nor has she ever been, a supervisor." Pet. App. 54a n.17 (citing affidavit). As explained below, that position is consistent with the standard petitioner herself argues should govern.[2]

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[2] In the court of appeals, petitioner referred to a directory of dining staff personnel in suggesting that BSU designated Davis as a supervisor. Brief of Plaintiff-Appellant Maetta Vance at 8, *Vance v. Ball State Univ.*, No. 08-3568 (7th Cir. filed July 8, 2010) ("Pet. C.A. Br.") (citing *Vance* S.D. Ind. Dkt. 62-8). That

A. Statutory Background

Title VII of the Civil Rights Act of 1964 prohibits an employer from "fail[ing] or refus[ing] to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment because of such individual's race" or other factors. 42 U.S.C. § 2000e-2(a). Hostile work environment claims are actionable under that prohibition. *See, e.g.*, *Meritor Sav. Bank, FSB v. Vinson*, 477 U.S. 57, 66 (1986). To sustain a hostile work environment claim, a plaintiff must show (1) that harassment based on a proscribed factor such as race was "severe or pervasive;" (2) that a reasonable person in the plaintiff's position would find the environment either hostile or abusive; and (3) that the plaintiff perceived it as such. *Oncale v. Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 78-82 (1998); *Harris v. Forklift Sys., Inc.*, 510 U.S. 17, 21-22 (1993).

In *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998), and *Burlington Industries, Inc. v. Ellerth*, 524 U.S. 742 (1998), this Court considered the circumstances under which an employer could be held vicariously liable under Title VII for the harassment of its employees. The Court held that it is only when a "supervisor with immediate (or successively higher) authority over the employee" has engaged in the complained of conduct, that the "employer [may be] subject to vicarious liability." *Ellerth*, 524 U.S. at 765;

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directory, however, simply lists Davis as a "Catering Specialist." By contrast, those employees who were supervisors are referred to in the directory *as* "supervisors." *Vance* S.D. Ind. Dkt. 62-8; Add. 1a.

Faragher, 524 U.S. at 807. The Court rested its decision in part on agency law. *Ellerth* acknowledged that harassment by one employee of another ordinarily is not within the harasser's scope of employment, and that the employer is therefore not ordinarily vicariously liable for the creation of a hostile work environment on that basis. But liability may arise for actions outside of the scope of employment when the employee "'was aided in accomplishing the tort by the existence of the agency relation.'" 524 U.S. at 758 (citation omitted).

In *Ellerth*, the Court noted that "'[i]t is precisely because the supervisor is understood to be clothed with the employer's authority that he is able to impose unwelcome … conduct on subordinates.'" *Id.* at 763 (citation omitted). The Court added 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." *Id.* In *Faragher*, the Court similarly observed that a victim "may well be reluctant to accept the risks of blowing the whistle on a superior." 524 U.S. at 803.

Ellerth established two types of situations in which an employer may be held vicariously liable where a supervisor harasses an employee. First, if a supervisor makes a tangible employment decision like the firing or demotion of the alleged victim, the employer is automatically held vicariously liable for its employee's conduct. *Ellerth*, 524 U.S. at 761. Second, if a supervisor's harassment does not culminate in a tangible employment action, the employer may avoid liability by establishing an affirmative defense. *Id.* at 765. To prevail on the affirmative defense, the

employer must show a) that it "exercised reasonable care to prevent and correct promptly any … harassing behavior," and (b) that the plaintiff employee "unreasonably failed to take advantage of any preventive or corrective opportunities provided by the employer or to avoid harm otherwise." *Id.*

Employers may also be held liable for co-worker harassment. If a victim suffers harassment at the hands of a coworker with no supervisory authority, a plaintiff may still hold her employer liable for the actions of that coworker if she can demonstrate that the employer was "negligent either in discovering or remedying the harassment." *Perry v. Harris Chernin, Inc.*, 126 F.3d 1010, 1013 (7th Cir. 1997); *cf. Ellerth*, 524 U.S. at 759; *Faragher*, 524 U.S. at 807–08. Akin to the affirmative defense available to an employer for supervisory harassment absent a tangible employment action, once aware of workplace harassment, "'the employer can avoid liability for [a coworker's] harassment if it takes prompt and appropriate corrective action reasonably likely to prevent the harassment from recurring.'" *Wyninger v. New Venture Gear, Inc.*, 361 F.3d 965, 978 (7th Cir. 2004) (quoting *Tutman v. WBBM-TV, Inc./CBS, Inc.*, 209 F.3d 1044, 1048 (7th Cir. 2000)).

Neither *Faragher* nor *Ellerth* directly defined a "supervisor" for Title VII purposes. The EEOC has promulgated guidelines that define a "supervisor" as an individual who (1) "has authority to undertake or recommend tangible employment decisions affecting the employee," such as "hiring, firing, promoting, demoting, and reassigning the employee"; or (2) "has authority to direct the employee's daily work activities." Pet. App. 90a. The guidelines make clear,

however, that "someone who directs only a limited number of tasks or assignments would *not* qualify as a 'supervisor.'" *Id.* at 92a (emphasis added).

B. Factual Background

Respondent BSU is a state-supported institution of higher education in Muncie, Indiana. It employs approximately 6,900 individuals of whom around 850 work in some capacity for Dining Services, which serves thousands of meals every day across the BSU campus. Pet. App. 27a. University Banquet and Catering (UBC) is one division of Dining Services that employs approximately 140 employees. *Id.* During the time frame relevant to this case, Jon Lewis was the Director of Dining Services and headed the entire operation. *Id.* He was assisted by the Assistant Director of Personnel, Training, and Administration, Karen Adkins, who directly reported to Lewis. *Id.* Both Lewis and Adkins supervised Bill Kimes, who served as the General Manager of UBC. *Id.*

Petitioner, an African-American woman, began working for BSU in 1989 as a substitute server in the UBC. *Id.* In 1991, BSU promoted petitioner to a part-time catering assistant position, and in January 2007 petitioner was promoted to a full-time catering assistant. *Id.* at 2a, 7a. Kimes was petitioner's direct supervisor during the relevant periods. *Id.* at 27a.

In 2005, petitioner began filing complaints with BSU alleging that her coworkers' conduct subjected her to discrimination and harassment on the basis of her race. *Id.* at 2a. In November 2005, petitioner submitted a written complaint that described an altercation that she had with Saundra Davis, a coworker in the UBC. *Id.* at 3a-4a. Petitioner alleged

that Davis stood in petitioner's way as she tried to get off an elevator and said, "I'll do it again," which petitioner believed to be a reference to an incident that had occurred four years prior in which Davis allegedly hit petitioner on the back of the head. *Id.* at 3a. Petitioner also alleged that a third employee had told her that another coworker, Connie McVicker, had used the racial epithet "n*gger" (outside of petitioner's presence) and that she had stated that her family had ties to the Ku Klux Klan (KKK). *Id.*

BSU "immediately" launched an investigation into petitioner's complaint. *Id.* at 4a. The investigation revealed conflicting accounts of what had occurred on the elevator between petitioner and Davis. *Id.* at 6a. Before petitioner filed her complaint about the elevator incident, Davis had filed a complaint about the same incident, alleging that petitioner had said to her "Move bitch … you are an evil f------ bitch." *Id.* at 6a. Kimes discussed the situation with his supervisor, and they decided to counsel both employees about respect in the workplace. *Id.* Neither Davis nor petitioner was disciplined for the incident. *Id.*

Although she never contemporaneously told BSU or complained about the alleged incident, petitioner alleged years later (during a deposition related to the instant litigation) that around this time, in 2005, she heard Davis speaking with another individual and refer to "Sambo" and "Buckwheat." *Id.*; *see also Vance* S.D. Ind. Dkt. 58-3 (Vance Dep. at 50).

In response to petitioner's allegations about McVicker, two supervisors—Kimes and Gloria Courtright—met to discuss the matter. *Id.* at 4a. They also sent petitioner a letter informing her that they were investigating the allegations. *Id.* Employee

Relations was involved in the investigation as well. *Id.* Kimes's investigation corroborated petitioner's complaint regarding what McVicker had said but the witnesses could not recall whether McVicker used the racial epithet generally or to refer to petitioner specifically. *Id.* Nevertheless, the Assistant Director of Employee Relations, Melissa Rubrecht, took prompt action.

Rubrecht sent an email to the Director of Employee Relations, stating: "I know we don't have the specifics on exactly what and when these utterances were … but we need to make a strong statement that we will NOT tolerate this kind of language or resulting actions in the workplace." *Id.* (BSU generally utilized a four-step process to handle employee discipline, beginning with a verbal warning for the first infraction, followed by a written warning for the second, with escalating consequences for further violations. *Id.*) The Assistant Director concluded, "I think we can justify going beyond our limited prior past history and issue a written warning … we should also strongly advise [McVicker] verbally when we issue this that it must stop NOW and if the words/behavior are repeated, we will move on to more serious discipline up to an[d] including discharge." *Id.* at 4a-5a.

On November 11, 2005, Kimes gave McVicker a written warning for "conduct inconsistent with proper behavior." *Id.* at 5a. The warning further explained that McVicker was being disciplined for using offensive racial epithets, discussing her family's relationship with the KKK, and also "looking intently" and "staring for prolonged periods at coworkers." *Id.* Courtright also met with McVicker and informed her that BSU would not tolerate racially offensive comments. She

suggested that McVicker avoid petitioner and consider transferring to another department. *Id.* at 5a.

Around the time that Courtright spoke with McVicker, petitioner complained to Courtright that McVicker had called petitioner a "porch monkey." *Id.* Kimes immediately investigated that complaint as well but witnesses did not corroborate Petitioner's allegation, and McVicker denied making the comment. *Id.* Kimes told petitioner that without corroboration he could not discipline McVicker because the incident would be a "she said-she said" situation. *Id.* Kimes did, however, attempt (unsuccessfully) to schedule McVicker and petitioner to work on alternating days. McVicker later transferred to another department. *Id.* at 5a-6a.

On December 22, 2005, petitioner informed Kimes that she felt threatened and intimidated by her coworkers. *Id.* at 6a. Petitioner alleged that Davis and McVicker were giving her a hard time at work by glaring at her, and slamming pots and pans around her. *Id.* The following week, petitioner filed a complaint with the EEOC alleging race-based discrimination. *Id.*

In 2006, petitioner filed additional complaints with BSU alleging additional harassing acts, including being "blocked" on the elevator by Davis who purportedly "stood there with her cart smiling"; being left alone in the kitchen with Davis, who purportedly smiled at her; and being around Davis and McVicker, who purportedly gave her "weird" looks. *Id.* at 6a-7a. She also filed a complaint alleging that Karen Adkins, a supervisor, "mean-mugged" her. *Id.* at 7a. BSU promptly investigated each of these incidents but found no basis to take disciplinary action. *Id.*

On May 10, 2006, petitioner filed another complaint—this time against Kimes—alleging that he forced her to work through breaks. *Id.* BSU again immediately investigated the complaint but again found no factual basis for Petitioner's allegation. *Id.*

In August 2006, Petitioner filed a second complaint with the EEOC alleging retaliation. *Id.*

On October 3, 2006, petitioner filed the instant lawsuit alleging a range of federal and state discrimination claims. *Id.* In particular, petitioner claimed that BSU subjected her to a hostile work environment in violation of Title VII due to her supervisors' direct behavior towards her as well as her supervisors' failure to take prompt remedial action to address the allegedly harassing behavior. *Id.* at 51a-52a.

In 2007, petitioner was promoted by BSU to a fulltime Catering Assistant position. *Id.* at 21a. The promotion included a pay raise, a benefits package worth an additional $9,492, and membership in the BSU bargaining unit, with the rights associated with collective bargaining. *Id.* at 21a, 71a.

While her lawsuit was pending in the district court, in April 2007, petitioner filed another complaint against McVicker alleging that she had said the word "payback" to petitioner. *Id.* at 7a. BSU investigated the incident but McVicker claimed that petitioner had threatened her by saying: "Just the beginning bitch—you better watch your house." *Id.* Because both petitioner and McVicker denied the allegations against them, BSU did not discipline either of them. *Id.*

In August 2007, petitioner alleged that Davis had asked her in a southern accent, "are you scared?" *Id.*

BSU investigated the incident and verbally warned Davis not to engage in such behavior. *Id.*

Later in August 2007, petitioner complained that Kimes had aggressively approached her while repeatedly yelling a question at her. *Id.* at 7a-8a. BSU investigated the incident but the witness identified by petitioner did not corroborate petitioner's account of the alleged incident. *Id.* at 8a. Instead, the witness corroborated Kimes's version of the event and told the investigators that Kimes frequently would ask the same question multiple times to be sure the other person had heard him. *Id.* The witness also stated that Kimes stood in the same place throughout the exchange, that he did not appear to be aggressive, and that he was not speaking in a loud voice. *Id.* at 39a.

In September 2007, Davis made a second complaint against petitioner. Davis alleged that petitioner had splattered gravy on her and slammed pots and pans around her in the kitchen. *Id.* at 8a. Petitioner denied the allegation. BSU investigated and issued a verbal warning to petitioner. *Id.*

C. Decisions Below

Both the district court and the court of appeals carefully considered petitioner's Title VII hostile work environment claim and produced lengthy and detailed opinions concluding that BSU was entitled to summary judgment on that claim based on the undisputed facts.

1. As noted, petitioner filed this action on October 3, 2006. On November 1, 2007, BSU moved for summary judgment on all of Petitioner's claims. *Vance* S.D. Ind. Dkt. 54. On November 30, 2007, Petitioner moved for partial summary judgment. *Vance* S.D. Ind. Dkt. 74. On March 12, 2008, after the summary

judgment motions had been fully briefed, petitioner filed a motion seeking to supplement the record with allegations of events that allegedly occurred long after petitioner had filed her complaint, after discovery had completed, and after all dispositive motions were due. *Id.* at 9a-11a; *Vance* S.D. Ind. Dkt. 124. BSU moved to strike petitioner's additional materials. Pet. App. at 9a; *Vance* S.D. Ind. Dkt. 125.

2. The district court granted in full BSU's motion for summary judgment and denied petitioner's motion for partial summary judgment. Pet. App. at 26a-27a. In a thorough and well-reasoned decision, the district court concluded that petitioner could not sustain her hostile work environment claim against BSU.

As a preliminary matter, the district court granted BSU's motion to strike petitioner's supplemental materials, finding that petitioner's "new allegations of additional harassment are not even attributable to [BSU]" and the few that could possibly be did not "reach the level of significance required to entitle [petitioner] to relief under Title VII." *Id.* at 51a. The court further concluded, however, that even if it considered petitioner's supplemental materials, "they would have no effect on our ultimate determination that she is unable to survive summary judgment on her hostile environment claim." *Id.*

The district court held that petitioner's hostile work environment claim failed as a matter of law on the undisputed facts because there was no basis for employer liability, *id.* at 60a-61a, and the conduct of which petitioner has complained that had a racial character was not sufficiently pervasive or severe to trigger liability under Title VII, *id.* at 53a. The court's decision—which is some 55 pages long as reprinted in

the petition appendix—analyzes petitioner's claim with great care.

The district court first determined that BSU could not be held liable for Davis's actions because under *Faragher*, she was a coworker and not a supervisor. *Id.* at 54a. The court held that Davis did not have the ability to "hire, fire, demote, promote, transfer or discipline" petitioner. *Id.* Under Seventh Circuit precedent, an employee authorized to oversee aspects of another employee's job performance does not establish a Title VII supervisory relationship. *Id.* The district court noted that petitioner "contends only that Ms. Davis is '"part of management because she d[idn't] clock in."'" *Id.* (quoting Vance Dep. at 35.17). Indeed, petitioner "concede[d] that she d[id] not actually know whether Ms. Davis was one of her managers," claiming that '"one day she's a supervisor; one day she's not. One day she's to tell people what to do, and one day she's not. It's inconsistent."'" *Id.* (quoting Vance Dep. at 84). Thus, the court determined that Davis was petitioner's coworker, not her supervisor.

The district court then assessed petitioner's complaints regarding Kimes and Adkins, who (it is undisputed) did supervise petitioner. *Id.* at 55a. The court held that the alleged harassment suffered by petitioner was not sufficiently severe or pervasive to be actionable under the standard for supervisor liability and that none of the alleged harassment was racial in character or purpose. As noted, the claimed harassment was that Adkins allegedly "mean-mugged" petitioner and Kimes reportedly asked her questions repeatedly. *Id.* at 56a-57a. After reviewing the evidence in detail, the court concluded that "there is no evidence allowing a jury to find that Ms. Adkin's [sic]

and Mr. Kimes's alleged behavior was based on race or sufficiently severe and pervasive to be considered objectively hostile." *Id.* at 58a.

Finally, the district court rejected petitioner's claim of harassment by her co-workers—Davis and McVicker. The court considered each alleged incident and alleged racially-based comment and concluded that the alleged incidents, even when taken together, were not "sufficiently severe or pervasive to have created an objectively hostile working environment." *Id.* at 63a. Moreover, the court added, "[u]nder these facts, there is but one conclusion: [BSU] properly investigated the incidents and, when possible and as necessary, took prompt and appropriate action reasonably calculated to prevent the harassment from occurring." *Id.* at 66a; *see id.* at 59a-66a (discussing evidence underlying allegations).

3. The Seventh Circuit affirmed. The court of appeals noted that a plaintiff bringing a hostile work environment claim is required to prove (1) that her work environment was both objectively and subjectively offensive; (2) that the harassment was based on her race; (3) that the conduct was either severe or pervasive; and (4) that there is a basis for employer liability. *Id.* at 11a. The court explained that the showing required for the fourth factor—whether there is a basis for employer liability—depends on whether the alleged harassment was perpetrated by supervisors or coworkers. *Id.* at 12a. An employer may be held liable in either case. But if only co-workers are responsible for the alleged hostile work environment, "the plaintiff must show that the employer has 'been negligent either in discovering or remedying the harassment.'" *Id.* (citation omitted).

The court of appeals explained that, "[u]nder Title VII, '[a] supervisor is someone with power to *directly* affect the terms and conditions of the plaintiffs employment,'" and that such "authority 'primarily consists of the power to hire, fire, demote, promote, transfer, or discipline an employee.'" *Id.* (alteration in original) (citation omitted). Applying that standard, the court concluded that petitioner "has not revealed a factual dispute regarding Davis's status by asserting that Davis had the authority to tell her what to do or that she did not clock-in like other hourly employees." *Id.* at 13a. As a result, the court held, "we must evaluate her claim against Davis under the framework for coworker conduct." *Id.*

Adkins and Kimes indisputably were petitioner's supervisors, but the court held that their alleged conduct was not sufficient to trigger liability. Petitioner's sole complaint against Adkins was that she stared at and "mean-mugged" Petitioner. The court found that "[m]aking an ugly face at someone and staring … fall short of the kind of conduct that might support a hostile work environment claim." *Id.*

The court of appeals gave the allegations concerning Kimes "a close[] look," but concluded that Kimes's alleged conduct did not have a racial character or purpose. *Id.* at 13a-14a. The court explained that "there is some indication in the record that Kimes was generally difficult to work with," but it concluded that—even viewing the evidence "favorably to [petitioner]"—petitioner's "allegations do not establish that Kimes's unkind or aggressive conduct was motivated by [petitioner's] race." *Id.* at 13a. Indeed, the court explained that petitioner has "not put forth *any* facts to establish that *any* of Kimes's conduct was

motivated by, or *had anything* to do with, race." *Id.* at 14a (emphasis added). The court also noted that petitioner conceded that "she never heard Kimes say anything suggesting ill will towards her because of her race." *Id.*

Finally, the court of appeals also carefully assessed petitioner's alleged treatment by coworkers Davis and McVicker and—like the district court—determined that BSU "promptly" and thoroughly investigated each of the alleged incidents and comments and took "disciplinary action when appropriate." *Id.* at 15a.[3] The court explained that in response to petitioner's complaint that McVicker used the racial epithet "n*gger," BSU immediately began an investigation, involved all the appropriate supervisory personnel, and issued a written reprimand to McVicker. *Id.* at 16a. The court emphasized the fact that under the BSU policy, McVicker technically should have received only an oral warning but BSU concluded that a more serious measure was in order. *Id.* The court also emphasized the fact that the written warning conveyed to McVicker said that her racially offensive language would not be tolerated, and that two supervisors met with McVicker separately to discuss her conduct. *Id.* The court also noted that BSU also kept in contact with petitioner during the entire investigation. *Id.*

The court of appeals further explained that, in response to petitioner's complaints that McVicker reportedly called her a "porch monkey" and said "payback," BSU again investigated. *Id.* Although the

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[3] The court assumed, *arguendo*, that petitioner's allegations against her coworkers satisfied the first three elements of a Title VII hostile work environment claim. Pet. App. 15a.

investigation revealed competing versions of events, the court approvingly noted BSU "did what it could and did not stop by accepting a simple denial." *Id.* at 17a. The court noted that the record "d[id] not reflect a situation in which all ties went to the discriminator" and explained that BSU "calibrated its responses depending on the situation." *Id.*

Regarding Davis's alleged conduct, the court of appeals focused on the alleged "elevator incident in 2005" and the "'are you scared' comment in 2007." *Id.* Regarding the "elevator incident," the court noted that Davis had filed a complaint first alleging that petitioner had said "[m]ove, bitch … you are an evil f------ bitch." *Id.* at 18a. Petitioner's complaint alleged that Davis had said "I'll do it again." *Id.* The court noted that BSU investigated this incident but that both individuals denied saying anything offensive to each other. The court determined that BSU's response in counseling both employees was entirely reasonable, observing that Title VII "'is not … a general civility code and we will not find liability based on the sporadic use of abusive language.'" *Id.* (alteration in original) (internal quotation marks and citations omitted). Regarding the "are you scared" comment, the court noted that BSU once again investigated petitioner's complaint. And despite Davis's denial of the allegations, BSU formally warned her to refrain from such behavior. *Id.* The court found that this "response was reasonable." *Id.* at 18a-19a.

The court of appeals noted Davis's alleged use of the terms "Buckwheat" and "Sambo." *Id.* at 17a. But the court explained that petitioner herself conceded that she never informed BSU about Davis's alleged use of those terms, and that under Title VII "an employer's

liability for coworker harassment is not triggered unless the employee notifies the employer about an instance of racial harassment." *Id.* at 17a-18a.

The court of appeals summed up its analysis by noting that, although the catering department may have been "an unpleasant place" for petitioner, "the record reflects that [BSU] promptly investigated each complaint that she filed, calibrating its response to the results of the investigation and the severity of the alleged conduct." *Id.* at 19a. Such action, the court explained, is the "'hallmark of reasonable corrective action.'" *Id.* (citation omitted). Moreover, the court stressed that "[t]his is not a case where the employer began to ignore an employee's complaints as time went on." *Id.* To the contrary, the court found, "[BSU] investigated [petitioner's] complaint against Davis in 2007 with the same vigor as it did her complaint in 2005." *Id.* These facts, the court held, "demonstrate that there is no basis for employer liability." *Id.*[4]

Petitioner did not seek rehearing *en banc*.

REASONS FOR DENYING THE WRIT

The petition should be denied. Although circuits have articulated different standards for determining when an employee is a "supervisor" for purposes of Title VII, no circuit has concluded that an employee was a supervisor under anything resembling the circumstances here. There is, accordingly, no genuine conflict of authority and, at a minimum, there is no

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[4] The court of appeals also concluded that the district court did not abuse its discretion in excluding petitioner's supplemental evidence. Pet. App. 10a-11a. Petitioner has not sought review of that evidentiary ruling in this Court.

outcome-determinative conflict. Petitioner cannot demonstrate that the employee at issue—Saundra Davis—was a supervisor under *any* standard recognized by the courts of appeals or the EEOC.

Nor is there any compelling need for this Court's review. Eight years ago, the Court denied a petition raising the same asserted conflict on when an employee is a supervisor for purposes of assessing an employer's liability under Title VII. The landscape in the circuits has not materially changed since then. There is no evidence that Title VII plaintiffs have experienced any difficulty maintaining hostile work environment claims where actual discrimination occurred—even in the circuits that apply the Seventh Circuit "supervisor" test. And the problem with petitioner's action here is not that courts declined to view Davis as a supervisor; it is that petitioner failed to present evidence that she suffered harassment of a racial character that was severe or pervasive, and that the evidence that *was* presented shows that BSU promptly investigated and took swift disciplinary action where appropriate.

Both the court of appeals and the district court carefully considered petitioner's Title VII claim, and her serial allegations of discriminatory conduct, and concluded that BSU could not be held liable under petitioner's hostile work environment theory. Judge Wood's opinion for the Seventh Circuit in this case is a model for careful judging in a discrimination case. If the Court believes it may be appropriate to devote its scarce resources to deciding the question presented, it should wait for a case in which the court of appeals decision actually conflicts with the decision of another circuit and in which there is reason to believe that the

question presented would actually make a difference to the outcome. Neither element is presented here.

I. THE ASSERTED CIRCUIT CONFLICT DOES NOT NECESSITATE REVIEW

Like the First and Eighth Circuits, the Seventh Circuit has declined to hold "that the authority to direct an employee's daily activities establishes supervisory status under Title VII." Pet. App. 13a; *see Noviello v. City of Boston*, 398 F.3d 76, 96 n.5 (1st Cir. 2005); *Joens v. John Morrell & Co.*, 354 F.3d 938, 940 (8th Cir. 2004). These circuits instead look to whether the employee is "'someone with power to *directly* affect the terms and conditions of the plaintiff's employment,'" such as the authority to "'hire, fire, demote, promote, transfer, or discipline'" the employee. Pet. App. 12a (citation omitted). Petitioner argues that this Court's intervention is necessary—here and now—to resolve that asserted circuit conflict. That contention cannot withstand scrutiny.[5]

There certainly is no urgent need for this Court's intervention. Despite petitioner's assertions about the need for this Court's review, there is ample evidence that Title VII plaintiffs are able to maintain—and prevail upon—legitimate lawsuits against employers for hostile work environments created by coworkers. Numerous cases demonstrate that plaintiffs are able to prevail in Title VII suits seeking to hold employers vicariously liable for harassing behavior by coworkers.

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[5] In describing the asserted conflict, petitioner cites a number of unpublished decisions. *See* Pet. 13-20. Those non-precedential decisions of course do not contribute to any actual conflict.

Many of these cases are from the circuits that have adopted the Seventh Circuit's supervisor test.[6]

In addition, this Court has previously denied a petition for certiorari presenting the same issue and alleged circuit split identified here. *See Mack v. Otis Elevator Co.*, 326 F.3d 116 (2d Cir.), *cert. denied*, 540 U.S. 1016 (2003). Respondent is not aware of any other petitions for certiorari presenting this issue to the Court since *Mack*. At the least, the absence of such petitions suggests that the issue does not have the practical significance that petitioner hypothesizes. It

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[6] *See, e.g.*, *Bailey v. USF Holland, Inc.*, 526 F.3d 880, 887-88 (6th Cir. 2008) (affirming a judgment in favor of two African American employees who were the target of their coworkers' racial hostilities); *Erickson v. Wisconsin Dep't of Corr.*, 469 F.3d 600, 609 (7th Cir. 2006) (concluding that a reasonable jury could have found that the employer failed to take reasonable precautions to prevent sexual harassment by a coworker from occurring); *Southerland v. Sycamore Cmty. Sch. Dist. Bd. of Educ.*, 125 F. App'x 14, 16 (6th Cir. 2004) (rejecting the employer's challenge to a unfavorable hostile work environment verdict based on coworker harassment); *Henderson v. Simmons Foods, Inc.*, 217 F.3d 612, 617 (8th Cir. 2000) (upholding a jury verdict awarding damages for coworker sexual harassment that created a hostile work environment); *Moore v. Kuka Welding Sys. + Robot Corp.*, 171 F.3d 1073, 1079 (6th Cir. 1999) (upholding, inter alia, a jury verdict for plaintiff based on the existence of a racially hostile work environment created by coworkers); *Hathaway v. Runyon*, 132 F.3d 1214, 1225 (8th Cir. 1997) (reversing the district court's grant of employer's motion for judgment as a matter of law in coworker harassment suit and reinstating a jury verdict in favor of the plaintiff victim); *Hall v. Gus Constr. Co.*, 842 F.2d 1010, 1011 (8th Cir. 1988) (affirming a judgment in favor of a trio of women who were sexually harassed by coworkers). Plaintiffs likewise frequently prevail on such claims in the district court and are able to defeat summary judgment motions by employers seeking to dismiss such actions.

has been more than 13 years since this Court decided *Faragher* and *Ellerth*. And particularly given the volume of employment discrimination cases filed each year (*see* Pet. 28), the absence of any direct evidence that the asserted conflict necessitates this Court's review is telling. As petitioner notes (*id.*), the *Mack* petition asserted that the issue was "'important and recurring.'" But that contention is belied by the fact that the issue apparently has not been presented to the Court—by Title VII plaintiffs or employers—in the eight years since the Court denied certiorari in *Mack*.

In any event, although circuits have articulated different tests for determining when an employee is a supervisor, no circuit has ever held that an employee is a supervisor in the circumstances at issue here. For that reason, there is no actual conflict between the Seventh Circuit decision in this case and the decision of any other court of appeals. And for similar reasons, the resolution of the asserted circuit conflict would not be outcome determinative here, because (as explained next) Davis would not qualify as a supervisor even under the legal standard that petitioner advances. Accordingly, the petition should be denied.

II. THE SEVENTH CIRCUIT'S CONCLUSION THAT DAVIS WAS NOT A SUPERVISOR DOES NOT CONFLICT WITH THE DECISION OF ANY OTHER CIRCUIT

No circuit has ever held that an employee qualified as a supervisor under factual circumstances resembling those with respect to Davis here. And that is because Davis does not qualify as a supervisor under *any* test adopted by a court of appeals or the EEOC.

The approach followed by the circuits that have rejected the Seventh Circuit position is embodied by the EEOC guidelines. Under those guidelines, a supervisor's authority "must be of a sufficient magnitude so as to assist the harasser explicitly or implicitly in carrying out the harassment." Pet. App. 89a. An individual qualifies as a supervisor—according to the EEOC—if 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." *Id.* at 90a. But "someone who directs only a limited number of tasks or assignments" is not a supervisor for Title VII purposes. *Id.* at 92a.[7]; *see Mack*, 326 F.3d at 126-27 (following EEOC guidelines); *Whitten v. Fred's, Inc.*, 601 F.3d 231, 246 (4th Cir. 2010) (citing *Mack*, 326 F.3d at 125); *cf. McGinest v. GTE Serv. Corp.*, 360 F.3d 1103, 1119 n.13 (9th Cir. 2004) (observing that court should look to whether employee

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[7] In adopting that standard, the EEOC has asserted that one of the lifeguards in *Faragher* (Silverman) "was responsible for making the lifeguards' daily work assignments and supervising their work and fitness training." Pet. App. 91a. In fact, "Silverman had supervisory responsibility over the lifeguards' daily duties, including designation of the lifeguards' work assignments, staffing of shifts and supervision of their physical fitness routines"; Silverman "made supervisory and disciplinary decisions and had input on the evaluations as well"; and other lifeguards, including Faragher, received a memo explaining that "Lieutenants [Silverman's position] were their immediate supervisors in the chain of command." Brief for Petitioner at 9-10, *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998) (No. 97-282), 1997 WL 793076. Silverman's responsibilities, authority, and position therefore differ in several fundamental respects from those possessed by Davis here. *See supra* at 25-27.

"has the authority to demand obedience from an employee").[8]

The facts in this case do not come close to establishing that Davis was a supervisor even under the EEOC guidelines. As the district court observed, petitioner's "only" contention was that Davis was "'part of management because she doesn't clock in.'" Pet. App. 54a (quoting Vance Dep. at 35.17). Beyond that sole assertion, petitioner conceded that she did not actually know whether Davis was one of her managers because "'one day she's a supervisor; one day she's not. One day she's to tell people what to do, and one day she's not. It's inconsistent.'" *Id.* (quoting Vance Dep. at 84). And it is undisputed that after petitioner's first complaint against Davis after the elevator incident, Kimes prohibited Davis from directing petitioner at all. *Vance* S.D. Ind. Dkt. 56-6 at 93. There is no evidence that Davis had any authority to make regular, daily work assignments. In fact, daily work assignments were made by the Banquet Chef, Shannon Fultz, or Kimes—not Davis. *Vance* S.D. Ind. Dkt. 87-3.[9]

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[8] *Whitten* is not a Title VII case. The claims at issue in that case were brought under state law. 601 F.3d at 236.

[9] Petitioner has alleged that "Davis *periodically* had authority to direct the work of other employees." Pet. App. 54a (emphasis added). In the court of appeals, she cited the deposition testimony of Kimes in making a similar contention. Pet. C.A. Br. 7 (citing Kimes Dep. at 93 (*Vance* S.D. Ind. Dkt. 56-6)). Kimes, however, testified that Davis was not a supervisor and, among other things, lacked the "authority to discipline" or "direct the day-to-day operations" or "events going out." Kimes Dep. at 93-94 (*Vance* S.D. Ind. Dkt. 56-6). In any event, even the EEOC guidelines recognize that such intermittent authority (even when it actually exists) is not sufficient. *See* Pet. App. 92a ("someone who directs only a limited number of tasks or assignments would not qualify as

These facts stand in sharp contrast to the facts from cases in which the lower courts have applied the EEOC test (or equivalent test) to determine whether an employee possessed supervisory authority despite the absence of authority to take tangible employment actions. For example, in *Mack*, the Court applied the EEOC's test and concluded that the harassing employee was a "supervisor for purposes of Title VII analysis." 326 F.3d at 125, 127. The court noted that the harassing employee not only "direct[ed] the particulars of each of [the plaintiff's] work days, including her work assignments," but "he was the senior employee on the work site." *Id.* at 125. Because of that position, "[h]e therefore possessed a special dominance over other on-site employees, including [the plaintiff], arising out of their remoteness from others with authority to exercise power on behalf of" other supervisors. *Id.* The court took pains to note that "[t]here was no one superior" to the harassing employee at the work site "whose continuing presence might have acted as a check on [the harassing

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a 'supervisor'"). And even if Davis could be deemed a supervisor under the EEOC test (which she cannot based on this record), the EEOC Guidelines require that that the allegedly harassing activity occur while Davis was acting in a supervisory capacity. Petitioner has not shown that Davis was acting in a supervisory capacity when she made the two comments that arguably had a racial character. Davis's references to "Buckwheat" and "Sambo" (about which petitioner did not complain to BSU) were not made during any period of alleged intermittent supervision. Rather, petitioner merely overheard the references when she walked past Davis conversing with a third party. Similarly, Davis allegedly made the "[a]re you scared" comment in August 2007—after petitioner was promoted so that Davis no longer had even the arguable intermittent authority alleged.

employee's] coercive misbehavior toward" the plaintiff. *Id.*

Likewise, in *Whitten*, the evidence "establishe[d] that Green [the employee whose status was in question] directed [plaintiff]'s activities, giving her a list of tasks he expected her to accomplish; that Green controlled [plaintiff]'s schedule; and that Green possessed and actually exercised the authority to discipline [plaintiff] by giving her undesirable assignments and work schedules." 601 F.3d at 246; *see id.* ("Unlike a mere co-worker, Green could change [plaintiff]'s schedule and impose unpleasant duties on a whim," and "he in fact did so, making her stay late to clean the store and directing her to work on a Sunday that was supposed to be her day off").[10]

By comparison to the asserted supervisors in *Mack* and *Whitten*, Davis did not direct petitioner's daily work activities, did not provide her with work assignments, did not control her schedule, lacked the authority to discipline her, and was not the senior employee at the work place. Indeed, the evidence of supervisor status presented by petitioner falls well below that presented in *Mikels v. City of Durham*, 183 F.3d 323, 334 (4th Cir. 1999), which the Fourth Circuit held was *insufficient* to make the employee at issue (Acker) a supervisor. According to the Fourth Circuit, "any authority possessed by Acker over [plaintiff] was

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[10] Similarly, in *Smith v. City of Oklahoma City*, 64 F. App'x 122 (10th Cir.), *cert. denied*, 540 U.S. 948 (2003), an unpublished decision, the Tenth Circuit determined that a jury could find that a police sergeant trainer in a K-9 unit was the victim's supervisor because he directed her daily tasks, assigned the victim her dog, provided her with daily one-on-one training, and was the ultimate arbiter of whether she and her dog were "qualified." *Id.* at 126-27.

at best minimal." *Id.* "At most," Acker had "the occasional authority to direct [plaintiff's] operational conduct while on duty." *Id.* Yet, as discussed, there is no evidence in this case that Davis possessed even that "minimal" authority over petitioner.

The record in this case also establishes that petitioner did not hesitate to confront Davis and tell her "'where to go.'" *Id.* (quoting *Faragher*, 524 U.S. at 803). According to the Fourth Circuit in *Mikels*, the fact that the alleged victim does not exhibit "any sense of special vulnerability or defenselessness deriving from whatever [alleged] authority" the coworker possessed, is the "clincher." *Id.* Indeed, petitioner's own conduct towards Davis caused Davis to file complaints *against her*. In the first complaint, Davis reported that petitioner called Davis a "f------ bitch" during the "elevator incident." Pet. App. 6a. In the second complaint, Davis reported that petitioner had splattered gravy on her and slammed pots and pans around her. *Id.* at 8a. Petitioner's demonstrated willingness to stand up to Davis underscores that Davis was not a supervisor—even under the alternative test that petitioner relies on.

In short, the Seventh Circuit's conclusion that Davis was not a supervisor on the facts here does not actually conflict with the decision of any other circuit.[11]

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[11] In both of the Ninth Circuit cases cited by petitioner (at 17), the court of appeals simply concluded that the test for whether an employee is a supervisor depends on whether the employee "has the authority to demand obedience from an employee." *See McGinest*, 360 F.3d at 1119 n.13; *Dawson v. Entek Int'l*, 630 F.3d 928, 940 (9th Cir. 2011). In neither case did the court apply that standard in finding that an employee *was* a supervisor; rather, in

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In sum, despite the alleged circuit conflict, this case is an unattractive vehicle for certiorari. Because Davis would not qualify as a supervisor under any circuit's test (or the EEOC's), the Seventh Circuit's decision in this case does not conflict with the decision of any other circuit (or the EEOC guidance). Moreover, the courts below carefully considered and correctly rejected her Title VII claim. As the courts below recognized, BSU took every step and made every reasonable effort to investigate and address all of petitioner's numerous complaints. BSU "promptly investigated each complaint that [petitioner] filed, calibrating its response to the results of the investigation and the severity of the alleged conduct." Pet. App. 19a. And BSU "investigated [petitioner's] complaint against Davis in 2007 with the same vigor as it did her complaint in 2005." *Id.* Further, it is undisputed that BSU did not take any negative tangible employment action against petitioner. To the contrary, petitioner was *promoted* in 2007—and given a pay raise, a more lucrative benefits package, and collective bargaining rights. *Id.* at 21a.[12] BSU's actions were those of a

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both cases the court simply remanded for further consideration on "a more extensive factual record." *Id.*

[12] Petitioner asserts that review is warranted because "the affirmative defense under *Ellerth* and *Faragher* will be unavailable to" BSU if Davis is determined to be a supervisor. Pet. 29. That is incorrect. Even if Davis were determined to be a supervisor, BSU would still be able to establish an affirmative defense because petitioner suffered no negative tangible employment action as a result of the alleged harassment. To the contrary, she was eventually promoted. *See Ellerth*, 524 U.S. at 765.

conscientious and vigilant employer—precisely the response that this Court's precedents call for.

As all four Judges concluded after carefully detailing and considering each of the allegedly actionable incidents and comments raised by petitioner, "the undisputed facts demonstrate that there is no basis for employer liability." *Id.* at 19a. Nor is there any basis for further review in this Court.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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JANUARY 17, 2012

ADDENDUM

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Jon Lewis

Assistant Director of Personnel, Training and Administration
Karen Adkins

Assistant Director of Operations
Elizabeth Poore

Facilities Manager and Microcomputer/Network Manager
John Hostetler

Manager of Training
Deborah Hutton

Coordinator of Communication, Publications, Research, And Student Retention for Housing and Residence Life And
Cynthia Miller

Manager of Menu Development and Test Kitchen
Lucas Miller

Plaintiff's
Exhibit
22
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[URL illegible] 10/10/2007

Manager of Food Service Purchasing
Avanelle Reed

Business Administrator
Kelley Rose

Cbord Computer Systems Coordinator
Amy Wagner

Meal and Access Card Systems Coordinator
Teresa Banter

Receptionist/Processing Clerk
Susie Burt

Financial Data Coordinator
Robert Cope

Rhds Office Supervisor
Kyle Green

Assistant to Purchasing Manager
Marguerite Mader

Assistant Facilities Manager
William Reed

Test Kitchen Specialist
Jeraldine Richardson

Office Assistant
Christina Skaggs

Stock Clerk
Dannie Campbell

Food Stores Clerk
David Craig

Food Stores Clerk
Danny Gunter

Food Stores Clerk
Gerald Mason

The Atrium Management

General Manager
Rodney Brooks

University Food Court Assistant Manager
Linda Garcia

Sous Chef
Jason Reynolds

University Food Court Supervisor
Barbara Dorton

University Food Court Supervisor
Andrea Stuffel

University Food Court Supervisor
Jill Thomas

Bookkeeper/Auditor
Josephine Turner

Cardinal Crossing Management

General Manager of University Banquet and Catering
William Kimes

Cardinal Crossing Assistant Manager
Tina Swift

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Edward Landreth

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Anna Arison

Food Service Supervisor
Angela Canarecci

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Sous Chef
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Food Service Supervisor
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Food Service Supervisor
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Food Service Supervisor
Kanda Winfield

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Debra Worster

University Banquet and Catering

General Manager of University Banquet and Catering
William Kimes

Banquet and Catering Chef/Supervisor
Shannon Fultz

Catering Specialist
Saundra Davis

University Banquet and Catering Sales and Service Supervisor
Lisa Fordyce

Banquet and Catering Sales and Service Supervisor
Ana Lisa Padron

Banquet and Catering Secretary
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