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**Press Conference on the Fair Employment Protection Act**

**Excerpted Remarks**

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When superiors harass they are abusing the power given to them by their employers. It's very hard to say: "Back Off!", or to report harassment by a superior. That's because workers know that if they do, their superior can make them work last-minute overtime or in unsafe conditions, or forego lunch and bathroom breaks, and in some cases, fire them.

The Supreme Court has long recognized the potential for superiors to abuse their power and the obligation employers have to train them not to. Fifteen years ago in a landmark pair of cases, *Burlington v. Ellerth* and *Faragher v. Boca Raton*, the Supreme Court set out strong protections from harassment by a superior.

In *Faragher*, David Silverman who oversaw lifeguard Beth Ann Faragher's day to day work said: "Date me or clean the toilets for a year." And Silverman definitely had the power to make good on that threat.

He continued to abuse his power over Faragher by:

- Pantomiming sex acts to her
- Telling her he *would have* had sex with her but for one of her features that he found unattractive,
- And making vulgar and sexual comments about women and their bodies

The Supreme Court said in that case that employers have a heightened legal obligation to protect employees against such abuses by their superiors.

And in the harassment cases since, when courts have recognized that this heightened legal obligation extends to harassment by superiors who direct daily work, but do not have the power to hire and fire, this has proven critical to workers' ability to have their day in court.

Take Clara Whitten. Whitten was the assistant store manager at Fred's Super Dollar store in Greenville, South Carolina. She alleged that on her first day in his store, Matt Green, the store manager told her she needed to "be good to him and give him what he wanted" if she wanted long weekends off from work, and that he would make her life a "living hell" if she ever took matters "over [his] head." Green repeatedly pressed his genitals against Whitten's back, and called her dumb and stupid. He demanded that Whitten meet him in the storeroom in the back of the store.

When she refused because she was afraid of what would happen there, he used his authority to punish her: he ordered her to stay late to clean. He told her to leave the store spotless even if it took all night. When she reported the harassment, the district manager told her she was overreacting and to go on with her day as if nothing had happened.

Whitten brought a lawsuit for harassment. In response, her employer tried to avoid liability by arguing that the court should dismiss her case because Green did not have the power to hire, fire or demote her. Fortunately, the Fourth Circuit recognized what should be obvious.

Green had *substantial* authority over Whitten. He set her schedule, directed her daily work, and had the power to punish her with extremely difficult assignments. The court said she deserved heightened protections from his harassment. And as a result, she got her day in court.

But if her case had been decided after *Vance*, the outcome would likely have been very different.

That's because in *Vance* the Court said that employees no longer deserve these heightened protections from harassment by those who direct their daily work, but don't have the power to hire and fire. This is despite longstanding EEOC guidance making clear that employers' heightened responsibility to protect against harassment extends to harassment by both harassers with the power to hire and fire and those who direct daily work.

The decision weakens workers' ability to hold their employers responsible for harassment, and it simultaneously waters down employers' incentives to train those in positions of authority not to harass and address harassment when it happens.

The question here is: When does a superior have enough power over a subordinate to warrant heightened protections from harassment?

In the words of store manager Matt Green, the answer is: when that person has the power to "make your life a living hell."

With *Vance*, the Supreme Court got the answer dead wrong. With the Fair Employment Protection Act, Congress has the opportunity to get it right.