NATIONAL WOMEN'S LAW CENTER
EXPANDING THE POSSIBILITIES

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Before the
Maryland House Health and Government Operations Committee

February 11, 2015

Thank you for the opportunity to submit this testimony on behalf of the National Women's Law Center in support of House Bill 42, the Fair Employment Preservation Act of 2015. The National Women's Law Center has been working since 1972 to secure and defend women's legal rights, including their rights to equal opportunity in the workplace. We believe that ending all forms of workplace discrimination, including harassment, is crucial to removing barriers to women's economic opportunity. The National Women's Law Center urges you to support the Fair Employment Preservation Act to restore strong protections from workplace harassment.

I. Harassment Remains a Serious and Widespread Problem in the Workplace

Workplace harassment on the basis of sex, race, ethnicity, color, national origin, religion, disability, age, marital status, sexual orientation, gender identity and genetic information is prohibited under Maryland's employment non-discrimination laws. However, despite being unlawful, workplace harassment remains a major problem. For example, in one recent national poll, a full twenty-five percent of women and nine percent of men said that they had experienced sexual harassment at work.[1]

In Fiscal Year 2013 alone, there were 152 complaints of workplace harassment made to Maryland's fair employment practices agencies, including 66 complaints of sexual harassment.[2] However, these numbers probably do not even come close to reflecting how frequently harassment occurs in Maryland workplaces. Most victims do not ever formally report their harassment – one recent survey found that a full 70 percent of those who said they had experienced sexual harassment never reported it.[3] It is therefore critical that victims of workplace harassment have effective remedies when they do come forward, and that employers have appropriate incentives to prevent harassment and take corrective action when it occurs.

[1] 60 Minutes/Vanity Fair Poll, Aug, 2010. Retrieved Nov-25-2013 from the iPOLL Databank, The Roper Center for Public Opinion Research, University of Connecticut, *available at* http://www.ropercenter.uconn.edu.proxy.lib.umich.edu/data_access/ipoll/ipoll.html. Survey conducted by CBS News August 3-5, 2010 and based on 847 telephone interviews from a national adult sample.
[2] Based on information received from U.S. Equal Employment Opportunity Commission, Feb. 25, 2014.
[3] Jillian Berman and Emily Swanson, *Workplace Sexual Harassment Poll Finds Large Share of Workers Suffer, Don't Report*, HUFFINGTON POST (Aug. 27, 2013), available at http://www.huffingtonpost.com/2013/08/27/workplace-sexual-harassment-poll_n_3823671.html?view=screen.

II. The Supreme Court's Recent Decision in *Vance v. Ball State University* Stripped Away Workplace Protections from Supervisor Harassment

Unlawful harassment can be committed by both supervisors and coworkers. However, supervisors who harass their subordinates are abusing the authority that was given to them by the employer. And the employer has a greater ability to prevent this type of harassment through careful selection and training of supervisory personnel. Recognizing this reality, the Supreme Court held over a decade ago that employers have a heightened legal obligation to protect against supervisor harassment.[4] As a result, employees in Maryland once had strong protections from supervisor harassment – whether committed by higher-level or lower-level supervisors.

In 2013, a bare majority of the U.S. Supreme Court held in *Vance v. Ball State University* that an employer's heightened legal obligations to prevent and remedy supervisor harassment only apply when the supervisor has the power to hire and fire and take other tangible employment actions against the victim.[5] The Court's decision in the *Vance* case created an artificial distinction between two categories of supervisors – the higher-level supervisors who can take actions like hiring and firing their subordinates, and the lower-level supervisors who are responsible for things like setting schedules, assigning work, and telling employees when they can take breaks, but who do not have the power to hire, fire and the like. The decision essentially reclassified lower-level supervisors as mere coworkers, with potentially disastrous consequences for victims of harassment at the hands of lower-level supervisors.

Before the *Vance* decision, whether employees were able to have their day in court often turned on whether the courts adopted a broad or narrow definition of supervisor. Clara Whitten's case, coming out of the Fourth Circuit, which includes Maryland, illustrates this point.

In 2006, Clara Whitten was working as an assistant manager of a Fred's Super Dollar store in South Carolina. She alleged that she was subjected to egregious harassment by Matt Green, the store manager who directed her daily activities and controlled her schedule. Green allegedly told Whitten 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 work matters "over [his] head." Green also pressed his genitals against Whitten's back, and called her dumb and stupid repeatedly. Finally, Green demanded that Whitten meet him in the storeroom in the back of the store, and when she refused because she was afraid of what would happen there, he ordered her to stay late to clean and told her that the store should be spotless and he did not care if it took her all night.

Whitten brought a lawsuit in federal court that was based on South Carolina's anti-discrimination law, and her employer did not even contend that Green did not commit unlawful harassment. Instead, it tried to escape liability by arguing that Green was not Whitten's supervisor. The trial court agreed, and held that because Green did not have the power to "hire, fire, demote" or take other actions that would have an economic impact on Whitten, he was not her supervisor. The lower court then threw out Whitten's harassment claim on the grounds that

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[4] *See Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998); *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998).
[5] 133 S.Ct. 2434 (2013).

Whitten presented insufficient evidence to find that her employer was negligent – the tougher standard for employer liability that applies in cases of harassment by a coworker. Fortunately, however, the Fourth Circuit Court of Appeals reversed, and held that Green was Whitten's supervisor because he exercised significant authority over Whitten, including the ability to change her schedule and impose unpleasant duties. Although Whitten brought her lawsuit based on the state's employment non-discrimination law, the appellate court explained that it was applying the principles of federal employment non-discrimination law from Title VII of the Civil Rights Act of 1964 in interpreting the state's similar law. Because the appellate court held that Green was Whitten's supervisor, Whitten no longer had to meet the more difficult negligence standard that applies in cases of coworker harassment, and was able to get a trial on her sexual harassment claim.[6]

Federal and state courts in Maryland also follow the principles of Title VII as laid out by the Fourth Circuit Court of Appeals in deciding cases brought both under Title VII and under Maryland's analogous employment non-discrimination protections in the State Government Article, Title 20, Subtitle 6 of the Annotated Code of Maryland.[7] Up until 2013, workers in Maryland who experienced harassment by a lower-level supervisor based on their sex, race, ethnicity, disability or other protected status benefitted from the broad understanding of the definition of supervisor that the Fourth Circuit applied in Clara Whitten's case. For example, in 2006 Lynette Harris sued the City of Baltimore in federal court based on sexual harassment she experienced while working for the Department of Public Works. She alleged that male coworkers and supervisors referred to her and other women as "bitches" and other derogatory terms on almost a daily basis, that she was repeatedly exposed to provocative photos of women in common areas at work, and that conversations of a sexual nature pervaded the workplace. The court applied a broad definition of supervisor and held that Harris was entitled to a trial on her claims of supervisor harassment because several of her harassers were able to exert control over her routine work assignments.[8]

But now workers in Maryland who experience harassment at the hands of a lower-level supervisor – someone who controls their daily work activities but does not have the power to hire or fire them – will have a harder time overcoming their employers' efforts to have their harassment claims dismissed and getting their day in court.

In total, since the *Vance* decision, there have been 43 sexual harassment cases in federal courts that have been dismissed on grounds that the harasser did not meet the *Vance* definition of supervisor and the victim could not establish employer negligence as required in coworker harassment claims.[9] (Note: while the *Vance* decision also impacts liability standards for other types of harassment—e.g., race or age—for purposes of this analysis, we only examined sexual harassment cases in the federal courts.)

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[6] *Whitten v. Fred's, Inc.*, 601 F.3d 231 (4th Cir. 2010).
[7] *See, e.g.*, *Butler v. Maryland Aviation Admin.*, No. MJG-11-2854, 2012 WL 3541985 (D. Md. Aug. 4, 2012); *Magee v. DanSources Technical Services, Inc.*, 137 Md.App. 527 (Md. Ct. Spec. App. 2001).
[8] *Harris v. Mayor and City Council of Baltimore*, 797 F.Supp.2d 671 (D. Md. 2011).
[9] Bryce Covert, *Exclusive: 43 Sexual Harassment Cases That Were Thrown Out Because of One Supreme Court Decision*, THINK PROGRESS (Nov. 24, 2014, 11:24 AM), http://thinkprogress.org/economy/2014/11/24/3596287/vance-sexual-harassment/ (citing analysis by the National Women's Law Center of 133 sexual harassment cases brought under Title VII that cited *Vance*, as of Nov. 24, 2014).

Kimberly McKinnish is among those whose claims were dismissed on these grounds. McKinnish was a fill-in mail carrier who endured ten months of sexually explicit text messages and pictures from her route supervisor. Although the supervisor could not fire or demote McKinnish, he did determine which routes McKinnish was assigned to, and the number of hours she worked each week. Despite the harasser's ability to decide how many hours she would get and thus how much she would be paid, the trial court held that he was not a supervisor. And because McKinnish didn't report the harassment, she could not hold her employer liable under the negligence standard that applies to coworker harassment. [10] The court threw out her case. McKinnish was denied her day in court simply because the court narrowly construed the definition of supervisor.

If more courts adopt this narrower definition of supervisor, many victims of harassment by lower-level supervisors will likely be left without an effective remedy. This is because the standards that apply to coworker harassment are much harder for employees to meet – employees have a double burden of proving not only that harassment occurred, but also that the employer was negligent in controlling working conditions. And some courts have imposed an overly restrictive interpretation of negligence, refusing to find employers liable even when their efforts to prevent and remedy harassment were weak to nonexistent. In contrast, when courts prior to *Vance* applied a broader definition of supervisor, this proved crucial to employee's ability to have their day in court – as happened in Clara Whitten's case when the Fourth Circuit Court of Appeals stepped in and corrected the trial court.

III. The Fair Employment Preservation Act (HB 1350) Would Address the Mismatch Between the Law and the Realities of the Workplace

Lower-level supervisors have become a fixture of the workplace. Workers in low-wage jobs are especially vulnerable to harassment, and in Maryland virtually all low-wage workers (98 percent) work in fields that have both substantial low-wage worker populations (at least 10 percent of workers in the field) and lower-level supervisors. In these fields, there are nearly 51,000 lower-level supervisors for 347,000 low-wage workers – which means that there are almost 15 lower-level supervisors for every hundred of these low-wage workers. And these 51,000 lower-level supervisors of low-wage workers represent 40 percent of all lower-level supervisors in Maryland.[11] These lower-level supervisors typically do not have the power to hire and fire and the like, and so would not be considered supervisors according to the *Vance* definition. But they do have significant power to direct daily work activities, such as by setting schedules, telling employees when they can take breaks, assigning employees to last-minute overtime, and assigning job duties.

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[10] *McKinnish v. Donohoe*, No. 1:13–cv–00087–MOC–DLH, 2014 WL 4053519 (W.D. S.C. Aug. 15, 2014).

[11] National Women's Law Center calculations based on U.S. Department of Labor Bureau of Labor Statistics May 2012 State Occupational Employment and Wage Estimates, available at http://www.bls.gov/oes/current/oessrcst.htm. Workers are in major occupation groups, or fields, which include a first-line supervisor and for which low-wage occupations account for at least ten percent of the workforce. Data only include first-line supervisors (described here as lower-level supervisors) who are responsible for low-wage workers.

After *Vance*, those workers harassed by lower-level supervisors will have a much steeper hill to climb to be able to have their day in court. The Fair Employment Preservation Act provides these employees with the same protections under Maryland employment non-discrimination law as other victims of supervisor harassment, and addresses the mismatch that the Supreme Court opened up between the law and the realities of the workplace.

The Fair Employment Preservation Act is good for employees and it is good for business. This is because harassment is costly for employers and employees alike. Research has shown that victims of sexual harassment often experience negative effects like anxiety, depression, post-traumatic stress disorder, poorer health, and job loss.[12] For employers, harassment results in absenteeism, lower productivity, higher turnover, and of course the costs of the litigation.[13] Harassment also harms employer reputations, which reduces customer approval and hinders efforts to attract new employees.[14]

The best way to prevent harassment from occurring in the first place is to have strong incentives for employers to train their supervisors. However, the *Vance* decision has instead created a perverse incentive for employers to concentrate hire and fire power in the hands of a few, while still delegating significant day-to-day authority to lower-level supervisors, in an effort to avoid vicarious liability for supervisor harassment. This bill restores employer incentives to prevent harassment from occurring in the first place by being proactive in the selection and training of all supervisory employees, rather than burying their heads in the sand.

IV. Conclusion

We support the Fair Employment Preservation Act, which will amend the Title 20, Subtitle 6 of the State Government article of the Annotated Code of Maryland to fix the artificial distinction between higher-level and lower-level supervisors created by the Supreme Court in *Vance* and restore strong protections from workplace harassment by all supervisors. Hardworking Marylanders should be able to do their jobs without having their livelihoods threatened by unlawful harassment. The Fair Employment Preservation Act would bring us one giant step closer to that goal.

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[12] *See* Paula McDonald, *Workplace Sexual Harassment 30 Years On: A Review of the Literature*, 14 Int'l J. of Mgmt. Reviews 1 (2012); Chelsea R. Willness et al., *A Meta-Analysis of the Antecedents and Consequences of Workplace Sexual Harassment*, 60 Personnel Psychol. 127 (2007).

[13] *Id.*

[14] Jeremy J. Sierra, Nina Compton, & Kellilynn M. Frias-Gutierrez, *Brand Response-Effects of Perceived Sexual Harassment in the Workplace*, 14.2 J. Bus. Mgmt. 175,197 (2008).