No. 11-556

IN THE

Supreme Court of the United States

MAETTA VANCE

Petitioner,

v.

BALL STATE UNIVERSITY,

Respondent.

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

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BRIEF AS *AMICI CURIAE* OF THE NATIONAL FEDERATION OF INDEPENDENT BUSINESS SMALL BUSINESS LEGAL CENTER AND THE RETAIL LITIGATION CENTER IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

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 held that under Title VII, an employer is vicariously liable for severe or pervasive workplace harassment by a supervisor of the claimant. If the harasser was the claimant's co-employee, however, the employer is not liable absent proof of negligence. In the decision below, the Seventh Circuit held that actionable harassment by a person whom the employer deemed a "supervisor" and who had the authority to direct and oversee the claimant's daily work could not give rise to vicarious liability because the harasser did not also have the power to take formal employment actions against her. The question presented is:

Whether, as the Second, Fourth, and Ninth Circuits have held, the *Faragher* and *Ellerth* "supervisor" liability rule (i) applies to harassment by those whom the employer vests with authority to direct and oversee their claimant's daily work, or, as the First, Seventh, and Eighth Circuits have held (ii) is limited to those harassers who have the power to "hire, fire, promote, demote, transfer, or discipline" their claimant.

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INTEREST OF THE *AMICI CURIAE*

Two *amici curiae*, the National Federation of Independent Business Small Business Legal Center and the Retail Litigation Center, submit this brief.[1]

[1] Pursuant to Rule 37.6, *amici* state that this brief was authored in whole by counsel for the National Federation of Independent Business Small Business Legal Center and the Retail Litigation Center. This brief was not authored in any part by counsel for a party to this matter. No person or entity,

The National Federation of Independent Business ("NFIB") is the leading small business association representing small and independent businesses. A non-profit, non-partisan organization founded in 1943, NFIB represents the consensus views of its members in the District of Columbia and all 50 state capitals.

The mission of NFIB is to promote and protect the right of its members to own, operate, and grow their businesses. NFIB also gives its members a power in the marketplace. By pooling the purchasing power of its members, NFIB provides its members timely information designed to help small businesses grow and succeed.

The NFIB Small Business Legal Center is a 501(c)(3) public interest law firm whose goals are to advocate for small business in the courts and to serve as the legal resource for small business owners nationwide.

The issue presented in this case is of critical importance to small business. Small businesses need a clear standard that provides certainty and predictability as to when an employee's actions will be impugned to the employer. A clear standard is important to small businesses as they often lack the ability of larger organizations to parse the language of complicated legal standards before making decisions that could expose them to significant liability.

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other than the *amici curiae*, their members, and their counsel, made a monetary contribution to its preparation and submission. The written consents of the parties to the filing of this brief have been filed with the Clerk.

The Retail Litigation Center, Inc. ("RLC") is a public policy organization that identifies and engages in legal proceedings affecting the retail industry. The RLC was formed to provide courts with retail industry perspectives on significant legal issues and to highlight the potential industry-wide consequences of legal principles that may be determined in pending cases. The member entities whose interests RLC represents include diverse retailers operating throughout the nation and providing goods and services to tens of millions of people.

The impact of this decision is also critically important to the retail industry. By their nature, large retail stores have detailed organizational structures that allow for multiple levels of co-worker and manager positions that would benefit from a clear standard for imputed liability. For example, retail store employees work shifts under the supervision of various "managers on duty," but typically only the store manager has the power to hire, fire, promote, demote, transfer, and discipline.

NFIB represents 350,000 businesses nationwide, and the member entities whose interests the RLC represents employ millions of people throughout the United States. Therefore, this brief collectively represents a large segment of working Americans.

The instant case offers an opportunity for the Court to enunciate a judicial standard that provides clear guidance to employees, employers, and courts on the appropriate scope of vicarious employer liability in the Title VII context.

SUMMARY OF ARGUMENT

The Supreme Court decided two watershed employment discrimination cases in 1998: *Burlington Indus., Inc. v. Ellerth*, 524 U.S. 742 (1998) and *Faragher v. City of Boca Raton*, 524 U.S. 775 (1998). In doing so, the Court set forth clear lines for liability through an affirmative defense that has become a valuable tool for evaluating whether alleged unlawful harassment should be imputed to the employer—the appropriately named *Faragher/Ellerth* defense. The Petitioner and Respondent in this case both refer heavily to *Ellerth* and *Faragher* and thus appear to agree that these decisions reflect good law that should not be upset by the Court in this case.

In interpreting *Faragher* and *Ellerth*, the First, Seventh, and Eighth Circuits have elucidated a supervisor liability standard based on the power to hire, fire, promote, demote, transfer, and discipline. This standard was built on the facts found in those two cases, and courts have appropriately applied it to other real world workplace settings.

Notably, the *Faragher* Court focused on the fact that the supervisors in question "were granted virtually unchecked authority over their subordinates, directly controlling and supervising *all aspects* of Faragher's day-to-day activities." *Faragher*, 524 U.S. at 808 (emphasis added) (internal quotations omitted). That type of complete control—"unchecked" and relating to "all aspects" of work—allowed the Court to impute liability to the employer. Anything less than unchecked authority over all aspects of work defeats the *Faragher/Ellerth* defense.

The Court should adhere to the Seventh Circuit's standard. It properly describes a supervisory relationship because it is the only standard that comports with the principle of agency theory and also provides a bright-line standard. It is a pragmatic standard that offers employers clear directions. *Amici* submit that the Seventh Circuit's standard best reflects the reality of how businesses generally are structured.

If the Court is unable to adopt the Seventh Circuit's standard, then it should adopt a clear standard using the *Faragher/Ellerth* factors, aided by considerations of the extent to which the alleged supervisor exerted control and the availability of other supervisory oversight.

ARGUMENT

At the outset, Petitioner advances a standard for defining a supervisor in a manner that is unrealistic when applied to a large portion of the work world. Petitioner proposes that an individual should be deemed a supervisor merely on the basis of his or her ability to assign tasks to a co-worker. Nevertheless, this concept at best only fits with a classic notion of a large, clearly delineated, and hierarchical organization that may or may not ever appear in the real world.

Small businesses often lack the clearly hierarchical organizational structure that Petitioner contemplates. Retail stores with multiple functional leads and numerous employees, including many hourly employees serving as the "manager of the day" and giving instruction to other employees, frequently have a number of employees per store that would fit Petitioner's overbroad definition of a supervisor. However, these "supervisors" lack the authority to hire, fire, promote, demote, transfer, and discipline.

Any standard the Court adopts should objectively delineate the level of supervisory authority that an employee must demonstrate to create vicarious liability for his or her employer. An employee's allegation that he or she perceived a co-worker to have supervisory authority when in fact that co-worker could merely assign tasks, should not create employer liability *per se* because "[i]n the usual case, supervisory harassment cases involve misuse of actual power, not the false impression of its existence." *Ellerth*, 524 U.S. at 759.

Because "neat examples illustrating the line between the affirmative and merely implicit uses of power are not easy to come by in considering management behavior," *Faragher*, 524 U.S. at 805, the Court must provide unambiguous guidance to employees, employers, and the courts. For a clear delineation, the standard should be objectively apparent, capable of resolution as a matter of law, and rest upon facts that are concrete and immutable between the time of alleged events and the time that a claim is brought.

The Seventh Circuit's standard clearly delineates supervisory power based on the easily recognized power to hire, fire, promote, demote, transfer, and discipline. This standard properly describes supervisor liability in a way that realistically applies to today's businesses. Further, the Seventh Circuit's standard sets out a clear, bright-line test that allows employees and employers to know who qualifies as a supervisor and who does not.

This Court should affirm the Seventh Circuit's clear, bright-line standard. Any modification to the Seventh Circuit's standard should remain a clearly delineated standard that reflects the practical reali-

ties of, and the great variation within, different workplaces.

I. IN ORDER TO THRIVE, SMALL BUSINESSES OFTEN HAVE AMBIGUOUSLY DEFINED SUPERVISORY ROLES OR ONLY ONE PERSON WITH CLEAR SUPERVISORY AUTHORITY, RENDERING PETITIONER'S PROPOSED STANDARD INOPERABLE IN SMALL BUSINESSES

In evaluating the Seventh Circuit's standard, the Court should consider not only how such a standard would be applied at large employers like Ball State University but should also be mindful of the unique challenges that face small businesses. Often, courts and the Equal Employment Opportunity Commission ("EEOC" or "Agency") craft standards of law mainly with large employers in mind. But a one-size-fits-all mentality ignores the crucial differences between small and large employers.

Small businesses often have only one supervisor—the owner. In addition, small businesses often lack the formal organizational hierarchy that the Petitioner contemplates in asserting a broad definition of a supervisor. Instead, and for a number of laudable reasons within its prerogative, a small business may opt for a non-linear or ambiguous organizational structure.

Further, small businesses often allocate the authority to delegate tasks to persons who are in turn subject to the same delegation of authority from others in a bilateral manner. For example, an employee responsible for inventory may direct sales staff to place greater emphasis on sales of particular items; conversely, that same sales staff may direct inventory

personnel to deliver certain items or to purchase others. A small business may determine that a flat, collaborative organizational structure suits its needs better than a hierarchal structure. In such circumstances, Petitioner's proposed standard would render everyone at that organization a "supervisor" merely because they direct the work of others.

In another example, a restaurant may charge both a waitress and a bartender with responsibilities. To fulfill their duties, the waitress and bartender must direct one another on certain tasks. But their duties lead to a collaborative shift. In this example, as in the prior example, *amici* note that each of these collaborative employees must accept assignments from each other but are also in turn responsive to another, higher-level supervisor.

A standard that nominates everyone who has the power to assign tasks as a supervisor would prove inefficacious when applied to small businesses with these characteristics. In such small-business settings, the standard that Petitioner urges would overdiagnose staff as supervisors, when in fact the relationship would clearly be better described as co-workers. The Seventh Circuit's standard eliminates this problem.

According to an NFIB study, 62% of small businesses have employees who have occasional supervisory responsibilities but primarily perform other functions. NFIB National Small Business Poll, *Business Structure*, Vol. 4, Issue 7 (2004). Furthermore, in 65% of small businesses, the organization's owner is the only person whose primary job is to direct, manage, or supervise other employees' work. *Id*. And only 12% of small business employers have at least one employee whose exclusive task is person-

nel or human resources. *Id*. These figures reveal how different small businesses are from the large hierarchical organizations that Petitioner's standard envisions.

This type of problem arose in *Huston v. Proctor & Gamble Paper Prods. Corp.*, 568 F.3d 100 (3rd Cir. 2009). In *Huston*, Ms. Huston argued that although her alleged harassers were co-workers, Proctor & Gamble should have known about the hostile environment because two supervising technicians, Pete Romanchick and Jack Traver, were low-level managers and thus held supervisory positions. *Id*. at 104. Ms. Huston argued that because Messrs. Romanchick and Traver had the authority to report any employee that had violated company policies, they qualified as supervisors. *Id*. at 105.

After analyzing agency theory, the Third Circuit held that "the mere supervisory authority over the performance of work assignments of other co-workers is not, by itself, sufficient to establish an employee's status as a manager." *Id*. at 108. And although the employees oversaw work production, the company did not employ them to discover or act upon harassment. *Id*. at 108-09.

Moreover, in *Faragher*, the Court noted that one of the reasons supervisors should be held to a higher standard is because they have greater power to alter the environment than co-employees. 524 U.S. at 805. For this reason, "supervisor" should be limited to those with such "greater power," the power to hire, fire, promote, demote, transfer, and discipline.

In the examples provided above, where the organizational structure is flat or ambiguously defined or where employers bilaterally allocate the power to

assign tasks, the Petitioner's proposed standard would be overapplied. It would not just be limited to those who have a true ability to alter the working environment of another. Instead, virtually any employee in a small organization could be deemed an alter ego of the employer and impute liability to the employer.

II. PETITIONER'S PROPOSED STANDARD IS UNREALISTIC FOR EMPLOYERS IN RETAIL BUSINESSES BECAUSE MULTIPLE STORE EMPLOYEES MAY ASSIGN TASKS BUT OTHERWISE LACK THE AUTHORITY TO MANAGE THEIR CO-WORKERS, AND THEREFORE ARE NOT THE ALTER EGO OF THE EMPLOYER

Retail organizational structures vary from company to company and from store to store. Nonetheless, because of the large number of people that are needed to serve customers in most large retail stores, and the lengthy store hours involving two or more shifts per day, retailers have complex and layered hierarchies within store settings. Also, at times, a low-level manager, or even a non-manager, will be the highest level employee in the store, serving as the "manager on duty" with authority to assign tasks but without other attributes of a supervisor, such as the authority to hire, fire, promote, demote, transfer, or discipline. These companies would not consider a functional lead or an entry-level department manager, for example, to be the alter ego of the employer for *respondeat superior* purposes.

Courts have consistently distinguished employees who are supervisors "merely as a function of nomenclature from those who are entrusted with actual supervisory powers." *Parkins v. Civil Contrs. of Ill.*,

163 F.3d 1027, 1033 (7th Cir. 1998). In doing so, courts have recognized the impropriety of holding companies liable for the actions of low-level "supervisors" that have no agency power in large companies. *Saxton v. Am. Tel. & Tel. Co.*, 10 F.3d 526, 536 (7th Cir. 1993).

Retail stores often have multiple departments, each of which may have its own organizational structure. For example, a general merchandising store may have a departmental unit for clothing, another unit for kitchen products, a pharmacy unit, and likewise in all of its many departments. That employer may also have additional operational groups, such as cashiers, loaders, shelf stockers, and a customer service team.

In each of these units, a retailer may assign a lead for each shift, such as a lead cashier, who performs the same work as his peers but is additionally tasked with assigning his peers to various stations. Alternatively, or additionally, there may be an entry-level supervisor for these units who performs the same tasks as his peers but receives slightly more compensation than the rest of the employees in the unit and who has minimal, if any, additional training in comparison to the rest of his departmental unit. These leads or entry-level supervisors lack any authority to hire, fire, promote, demote, transfer, discipline, or even schedule shifts for other employees.

For example, some retailers have team leaders, plus at least one additional hourly employee who serves as manager on duty for a shift when the team leaders are not in the store. However, only one manager per store, the Store Team Leader, has the power to hire, fire, promote, demote, transfer, or discipline. Expanding the supervisor definition to cover all

persons with any oversight responsibility would allow the courts to impute liability to the employer through each and every one of these employees, including functional leads and entry-level supervisors.

Further, this overbroad application would offend the agency analysis offered in *Faragher*. In applying agency theory, the Court noted that it was the supervisor's special authority that enhanced the supervisor's ability to harass. *Faragher*, 524 U.S. at 800. But this is not necessarily true for mere leads or entry-level supervisors. One feature that these functional leads or entry-level employees lack is the ability to "implicitly threaten to misuse their supervisory powers to deter any resistance or complaint." *Id.* at 801.

The fact that an employer "authorized one employee to oversee aspects of another employee's job performance" does not by itself establish a Title VII supervisory relationship. *Hall v. Bodine Elec. Co.*, 276 F.3d 345, 355 (7th Cir. 2002). In *Hall*, Louvenia Hall worked in Bodine Electric's gearing/hobbing department. *Id*. at 350. Ms. Hall argued that her harasser, Samuel Lopez, qualified as a Title VII supervisor because he possessed the authority to direct her work operations (i.e., which machines she operated), provided input into her performance evaluations, and trained her and other less experienced employees. *Id*. at 355.

The court held that an employer could only be vicariously liable for the acts of those who can be considered the employer's proxy—an individual holding a sufficiently high position in the management hierarchy of the company. *Id*. The type of marginal discretion Mr. Lopez had over Ms. Hall's work operations was not sufficient to impute Title VII vicarious

liability to Bodine Electric. *Id*. This is a reasonable and appropriate interpretation of how businesses with a hierarchal chain of command might work.

The EEOC Enforcement Guidance also attempts to clarify the supervisor definition. But the EEOC guidelines interpret this Court's views in *Ellerth* and *Faragher;* they do not interpret Title VII. Significantly, the EEOC Guidance concedes that "someone who directs only a limited number of tasks or assignments would not qualify as a 'supervisor.'" U.S. EEOC, Enforcement Guidance: Vicarious Emp'r Liab. for Unlawful Harassment by Supervisors, pt. III.A.2. (1999) (1999 WL 3305874).

Thus, it seems that the Commission would not view the entry-level supervisor or a functional lead as a "supervisor" for purposes of this analysis. The EEOC appears to appreciate that the quality of a functional lead's or an entry-level supervisor's authority is not complete, but rather limited to the power to assign certain tasks within a narrow range. This limited authority should not impute liability to the employer.

III. THE COURT SHOULD INTERPRET "SUPERVISOR LIABILITY" IN A MANNER THAT CREATES A CLEAR STANDARD THAT GIVES FAIR NOTICE TO EMPLOYERS AND EMPLOYEES AND THAT CAN BE OBJECTIVELY APPLIED BY COURTS AS A MATTER OF LAW

This Court held that an employer is subject to vicarious liability for a "hostile environment created by a supervisor with *immediate* (or successively higher) authority over the employee." *Faragher*, 524 U.S. at 807 (emphasis added). While the Petitioner attempts to convince the Court that "immediate"

authority means directing day-to-day activity, she is overlooking a more common interpretation of the word "immediate."

"Immediate" is more properly defined as "acting or being without the intervention of another object, cause, or agency; direct." Merriam-Webster's Collegiate Dictionary (11th ed. 2003). Thus, merely directing day-to-day activities would not rise to the level of "immediate" authority because a higher-level supervisor would have to intervene in more material employment decisions. By definition, however, one with immediate authority could make employment decisions without the intervention of another. This more common and plain reading of "immediate" authority comports with the Seventh Circuit's standard.

This interpretation of "immediate" also corresponds with this Court's own view of an immediate supervisor when, in *Faragher*, the Court found critical that the harasser exercised "unchecked" authority. 524 U.S. at 807. Unchecked authority appears to be synonymous with the common understanding of "immediate" authority. While the Seventh Circuit did not specifically focus on "unchecked authority," it is clear that the court considered the concept and found Ms. Davis wanting precisely in that regard.

By contrast, adopting the Second, Fourth, and Ninth Circuit's view of supervisor liability based on the authority to direct and oversee a claimant's daily work will create a large cohort of employees that would bind the employer to unintended vicarious liability. Employers typically do not hire functional leads and entry-level supervisors with the intent that these persons enforce the employers' anti-harassment policies. Also, employers typically do not confer any

other types of powers to leads or entry-level supervisors that could result in liability of this sort.

The Petitioner's broad definition of "supervisor" involves an examination of subjective and disputable facts for each claim, potentially depriving claimants and courts of more efficient resolution.

A. *Amici* Support the Seventh Circuit's Approach, but in the Event the Court Rejects that Approach, *Amici* Offer an Alternative Standard

The Court held the employer liable for an employee's harassing conduct in *Faragher* based upon specific facts which should guide trial courts when those facts appear in future cases. Specifically, in order to reach its holding, the Court relied upon the facts that the co-workers in question: (1) were granted virtually "unchecked authority" over their subordinates; and (2) were found to directly control and supervise "all aspects" of Faragher's day-to-day activities. *Faragher*, 524 U.S. at 808.

The Court should build on *Faragher's* facts as determinants in resolving future issues of *respondeat superior* in harassment cases. If the Court is unable to adopt the Seventh Circuit's standard, *amici* set forth the following alternative.

NFIB and RLC believe the following features, when taken in totality, rather than applied as a formula, provide employers, employees, and the courts with a better understanding of whether an employee had the capacity to bind an employer. Additionally, all of the determinant features described below have the virtue of being concrete, immutable, and objective. Thus, in the collective, they provide trial courts with a sound test to apply when determining whether

or not an alleged harasser qualifies as a supervisor that imputes liability to a company.

First, courts should consider whether the individual alleged harasser has unchecked authority over the claimant. This quality, that a co-worker's authority is "unchecked" or "immediate" in the sense that he or she does not need to consult with a higher authority before acting, indicates that a co-worker has true supervisory status. If a co-worker's supposed authority must be approved by another, then that co-worker appears more like those he or she oversees than like management.

Second, courts should evaluate whether the alleged harasser's authority is limited or extended to all or almost all of the claimant's activities. A co-worker who has authority, for example, to assign an employee to various stations or to one of a limited selection of tasks known to be within the range of an employee's job description, cannot be said to have authority over all or almost all of that employee's daily activities. The more restricted the list of tasks that lie within an employee's authority to assign, the more limited his or her authority appears, and thus, the co-worker does not exert true supervisory power.

Third, a supervisor should be shown to have constant versus temporary or intermittent authority over the claimant when evaluating whether the supervisor's conduct should be attributed to the employer. An employee who has authority at the beginning of a shift to assign tasks but then does not have further authority appears more like a co-worker than a true supervisor. Likewise, when the job of serving as a team lead is rotated on a periodic basis, the functional lead appears more like his co-workers than like management.

Fourth, a team lead is, by definition, a co-worker that is additionally tasked with administrative responsibilities. A team lead is characterized by the fact that his primary duties are the same as those to whom he assigns tasks, but he additionally has the administrative duty of assigning tasks to others. Thus, a team lead who fits this description should be eliminated from any *respondeat superior* analysis, *per se*.

Fifth, like team leads, entry-level supervisors should, *per se*, be eliminated from this analysis to the extent that the entry-level supervisor and the persons whom he supervises are collectively supervised by another manager. In those cases, the entry-level supervisor's conduct should not be construed as binding an employer.

Sixth, courts should disregard the *Faragher* Court's analysis of physical isolation but should nevertheless consider the reasoning the Court applied in that analysis. Courts should evaluate whether the claimant is hierarchally isolated rather than physically isolated. In *Faragher,* the Court held that the fact that an employee was physically isolated and had little resort to complain of harassing conduct to someone else in the organization was a determinant fact in the Court's holding. 524 U.S. at 808. By the same reasoning, if a claimant is directly supervised by both an entry-level supervisor and another manager who oversees both the claimant and the entry-level supervisor, then a court can fairly conclude that the claimant had direct access to other channels of resolution.

This Court issued its decision in *Faragher* in 1998, visiting upon facts that allegedly occurred between 1985 and 1990. NFIB and RLC note that *Faragher*

was decided before the use of mobile phones and Internet in the workplace. Accordingly, the mere fact of physical isolation ought not to present the same sense of futility to subordinate employees as it did twenty years ago. Thus, while the fact of physical isolation should be discounted as a factor in determining *respondeat superior* liability, the reasoning behind it should be applied to an employee's access to other channels of redress when dealing with functional leads and entry-level supervisors.

In the absence of these six elements, a court should not attribute the harassing conduct to the company. The virtue to this approach is that, like the Seventh Circuit's standard, it encompasses a person with the power to hire, fire, promote, demote, transfer, and discipline and recognizes that some managers may possess enough power to create a hostile environment in which the claimant feels like she cannot control the situation. Unlike the Petitioner's method, however, the alternative approach suggested by *amici* provides employers, employees, and trial courts with defined factors that courts can objectively evaluate and that are likely to remain immutable facts through the parties' discovery efforts. By the term "immutable facts," *amici* are referring to facts that are not easily altered by witnesses' changing testimonies.

B. *Amici* Seek a Standard That Conforms With, Rather Than Expands Upon or Violates, the Principles Set Forth In *Faragher* and *Ellerth*

The Seventh Circuit's standard supported by *amici* can be, and has been, applied by employers, by the Commission, and by courts prior to trial, thereby reducing litigation costs and resources for all

involved, including the courts. In addition, the standard conforms to the principles set forth by this Court in *Ellerth* and *Faragher*. By contrast, Petitioner offers an ambiguous and overbroad standard that contradicts this Court's holdings.

Petitioner justifies her approach by pointing to the rise in harassment claims filed with the EEOC, presumably since the advent of *Ellerth* and *Faragher*. The number of charges has increased; between 2006 and 2011, claims rose from 56,155 to 71,914. U.S. EEOC, *Title VII of the Civil Rights Act of 1964 Charges FY 1997 – FY 2011* (2012). Although claims volume has increased, so have the Agency's findings that there was no reasonable cause to believe that discrimination occurred. *Id*.

In 2005, the Agency found 48.4% of the claims had no reasonable cause; this number steadily increased, and by 2011, the Agency found that 76.9% of the claims had no reasonable cause. *Id*. Further, the EEOC filed less than half as many new lawsuits in Fiscal Year 2012 as the prior year, an indication that the EEOC has focused on pursuing meritorious claims over quantity. Abigail Rubenstein, *EEOC Lawsuit Filings Dip as Agency Focuses on Case Quality*, Law 360, Oct. 5, 2012.

A clear liability standard may not increase the inventory of harassment claims, the majority of which lack reasonable cause according to the EEOC; but a well-articulated standard will help employers' compliance with no-harassment policies, will aid agency investigations, and will assist courts with separating meritorious claims from frivolous claims.

C. The Court Should Affirm Based on the Seventh Circuit's Well-Reasoned Standard; In the Alternative, the Court Should Affirm Based on *Amici's* Alternative Standard

The Court should affirm the instant case on its facts instead of remanding for further fact-finding. If this case cannot be resolved at the summary judgment stage, then almost no case could. Given the costs of litigation, failure to adopt a standard susceptible to resolution at the summary judgment stage will force employers, particularly small businesses, to settle cases regardless of the merits of the claim.

The facts show that Ms. Davis was not Ms. Vance's supervisor. Ball State did not consider Ms. Davis to be a supervisor; the University listed her as a "Catering Specialist" in its Staff List for Dining Personnel. Respondent's Brief in Opposition to Certiorari, at 5a, *Vance v. Ball State Univ.,* No. 11-556 (Jan. 17, 2012). Ms. Vance even conceded that she did not actually know whether Ms. Davis was one of her supervisors. *Vance v. Ball State Univ.*, No. 1:06-cv-1452, 2008 WL 4247836 at *12 (S.D. Ind. Sept. 10, 2008). Ms. Vance acknowledged that "[o]ne day [Ms. Davis is] to tell people what to do, and one day she's not. It's inconsistent." *Id*. However, in a lengthy deposition, Ms. Vance was unable to name one instance where Ms. Davis actually directed her to do any work. *Vance v. Ball State Univ.*, No. 1:06-cv-01452 Docket Docs. 58-2 to 58-7 (S.D. Ind. Nov. 1, 2007). Even under the expansive EEOC Guidelines, in which only the lowest level employees are considered co-workers, Ms. Davis would not qualify as a supervisor.

Even if the Court rejects the Seventh Circuit's standard, the alternative six-factor standard proposed by *amici* eliminates the possibility of imputing supervisor liability to Ball State based on Ms. Davis. Ms. Davis did not have "unchecked authority" over Ms. Vance; Mr. Kimes, all parties agree, served as an authority in most aspects of Petitioner's day. *Vance*, 2008 WL 4247836 at *3. Ms. Davis did not control "all aspects" or even almost all aspects of Ms. Vance's day-to-day activities; she appears to have only told some temporary workers what tasks to perform. *Id*. at *28.

Ms. Davis had, at the most, only intermittent authority. In fact, Ms. Vance contended that Ms. Davis was management merely because she did not clock in. *Id*. at *27. Ms. Davis does not qualify as an entry-level manager and at best could be described as a functional lead whose primary tasks appear similar to Petitioner's. *Id*. Finally, Ms. Davis and Petitioner were both supervised by someone else. *Id*. at *3.

The Court should not leave a case this clear-cut to the lower courts to decipher. The Court should affirm the Seventh Circuit's standard and apply that standard, or the alternative standard proposed herein, to the facts in this case without the need for future review by the trial court.

CONCLUSION

The Court should affirm the judgment of the Court of Appeals for the Seventh Circuit.

Respectfully submitted,

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