

- U.S. Senator Tammy Baldwin -
The Fair Employment Protection Act

When Our Workers Have the Opportunity to Succeed, America Succeeds

In the 21st Century, harassment and hostile work environments should never impede economic success. Everyone who works hard and plays by the rules should have the opportunity to get ahead. Unfortunately, workplace harassment remains an unacceptable reality that threatens the economic security of far too many people, particularly women, working to build a better future for them and their families. In fact, surveys indicate that at least one-fourth of all working women have experienced some form of harassment on the job, which often prevents women from moving up the economic ladder.¹

Regrettably, the Supreme Court's June 2013 decision in ***Vance v. Ball State University*** significantly weakened the ability of workplace harassment victims to seek legal recourse.

The *Fair Employment Protection Act* restores workplace protections weakened by this decision to ensure that Americans harassed on the job by their supervisors are treated fairly and receive the justice they deserve.

Workplace Harassment Remains an Unacceptable Reality that Threatens Our Economic Security

On June 24, 2013, the U.S. Supreme Court handed down a 5-4 decision in ***Vance v. Ball State University*** that is making it harder for workers to receive justice when they are harassed by their supervisors at work. Workplace harassment on the basis of sex, race, national origin, religion, disability, age, and genetic information is currently prohibited under federal employment nondiscrimination law. Under the law, employers have a heightened legal obligation to protect against **supervisor harassment** because of the potential for supervisors to exploit their authority over their subordinates. As a result of this heightened obligation, employees enjoy real protections from harassment and employers are provided with compelling incentives to prevent and resolve harassment.

However, in *Vance*, five justices weakened these critical protections against supervisor harassment. They held that the heightened obligations on employers to prevent and remedy supervisor harassment apply **only when the supervisor has the power to hire, fire, or take other tangible employment actions against the victim employee**. This means that employers are not subject to heightened obligations when harassment occurs at the hands of an individual who directs a victim employee's daily work activities, but does not have the authority to hire or fire that employee. The court's narrow interpretation effectively creates two classes of supervisors.

The decision weakens remedies for victims harassed by these lower-level supervisors, where workplace harassment frequently occurs. Worse, *Vance* disproportionately affects workers in industries that pay low wages and employ a large numbers of women workers, as employees in these industries commonly are supervised by individuals who manage day-to-day work activities but lack the power to hire or fire employees. Workplace harassment is a significant obstacle to economic mobility as victims often don't receive promotions and move up in the workplace.

In the *Vance* dissent, Justice Ginsburg argued that the majority opinion "is blind to the realities of the workplace." Justice Ginsburg wrote that an employee who confronts her harassing supervisor risks receiving an undesirable or unsafe work assignment or an unwanted transfer. She may be saddled with an excessive workload or a shift that disrupts her family life. Asserting that the ruling undermines Congress's desire for "robust protection against workplace discrimination," Justice Ginsburg warned that the decision would relieve employers of responsibility for the behavior of many of their supervisors. **"The ball is once again in Congress' court to correct the error into which this Court has fallen,"** she wrote.

¹ Langer Research Associates, One in Four U.S. Women Reports Workplace Harassment, ABC News/Washington Post Poll, Nov. 16, 2011.

On other notable occasions, Congress has needed to step in to correct unduly restrictive Court interpretations of federal workplace protections. For example, Congress enacted the **Civil Rights Act of 1991** in response to a Supreme Court decisions that limited the rights of employees. More recently, in 2009, Congress passed the **Lily Ledbetter Fair Pay Act** to address a Court decision restricting remedies for individuals bringing pay discrimination lawsuits.

The Fair Employment Protection Act: Every American Deserves a Fair Shot at Getting Ahead

The Fair Employment Protection Act corrects the error in the Vance decision and clarifies under Title VII of the Civil Rights Act, as well as other federal antidiscrimination statutes, who counts as a “supervisor” for the purpose of holding employers responsible for unlawful harassment. The legislation would include not just those supervisors who can hire and fire, but also those who are in charge of an employee’s daily work activities, thus able to reassign an employee whom they are harassing. The *Fair Employment Protection Act* relies on the Equal Employment Opportunity Commission (EEOC) guidance employed prior to the Court’s decision as the basis for this expanded statutory definition. The bill is consistent with years of EEOC guidance on employer liability and has been endorsed by many of the nation’s largest civil rights and labor organizations.

Importantly, the legislation maintains the availability of affirmative defenses for employers who act responsibly to stamp out harassment and the victim fails to take advantage of the preventive or corrective opportunities that the employer provided.

The *Fair Employment Protection Act* applies equal treatment to supervisor harassment under our major federal antidiscrimination laws: Title VII of the *Civil Rights Act*, the *Age Discrimination in Employment Act*, the *Americans with Disabilities Act*, the *Rehabilitation Act, 42 U.S.C. 1981*, and the *Genetic Information Nondiscrimination Act*. It also extends equal treatment to staff of local and state elected officials, presidential appointees, and legislative branch offices.

Companion legislation has been introduced in the House of Representatives by Rep. George Miller (D-CA) and Rep. Rosa DeLauro (D-CT).

Fair Employment Protection Act Supporters

9to5, Adhikaar, African American Ministers in Action, American Association for Affirmative Action, American Association of University Women (AAUW), American Civil Liberties Union (ACLU), American Federation of Labor and Congress of Industrial Organizations (AFL-CIO), American Federation of State, County and Municipal Employees, American Federation of Teachers, CASA de Maryland, Coalition of Labor Union Women, Coalition on Human Needs, Communications Workers of America, Employment Justice Center, Equal Rights Advocates, Garment Worker Center, Gender Justice, Hadassah, The Women’s Zionist Organization of America, Inc., Institute for Science and Human Values, International Union, United Automobile, Aerospace & Agricultural Implement Workers of America (UAW), Labor Project for Working Families, Lawyers’ Committee for Civil Rights Under Law, Leadership Conference on Civil and Human Rights, Legal Momentum, MALDEF, Maryland Law Disability Center, MomsRising, NAACP, NAACP Legal Defense and Educational Fund, Inc., National Center for Lesbian Rights, National Consumers League, National Council of Jewish Women, National Council of La Raza (NCLR), National Domestic Workers Alliance, National Education Association (NEA), National Employment Law Project, National Fair Housing Alliance, National Organization for Women, National Partnership for Women & Families, National Women’s Law Center, National Women’s Health Network, New Jersey Citizen Action, Pathways PA, Restaurant Opportunity Centers United, Sikh American Legal Defense and Education Fund (SALDEF), UNITE HERE, United Food and Commercial Workers, UNITED SIKHS, Wider Opportunities for Women, Women’s Law Project, and Working America.