Who's the Boss: Personal Liability under Title VII and the ADEA

Henry P. Ting

Follow this and additional works at: http://scholarship.law.cornell.edu/cjlpp

Part of the Law Commons

Recommended Citation
Available at: http://scholarship.law.cornell.edu/cjlpp/vol5/iss3/6

This Note is brought to you for free and open access by the Journals at Scholarship@Cornell Law: A Digital Repository. It has been accepted for inclusion in Cornell Journal of Law and Public Policy by an authorized administrator of Scholarship@Cornell Law: A Digital Repository. For more information, please contact jmp8@cornell.edu.
WHO'S THE BOSS?: PERSONAL LIABILITY UNDER TITLE VII AND THE ADEA

I. INTRODUCTION ............................................................... 516

II. TITLE VII AND THE ADEA: THE BEST OF INTENTIONS ........................................... 518
   A. THE PURPOSES OF ANTIDISCRIMINATION STATUTES ........................................... 518
      1. Title VII of the Civil Rights Act of 1964 ................................................. 518
      2. Age Discrimination in Employment Act of 1967 .......................................... 519
   B. WHO IS THE "EMPLOYER?" — FRAMING THE ARGUMENTS ..................................... 520
      1. "Any Agent" ....................................................................................................... 521
      2. Respondeat Superior ......................................................................................... 522

III. THE FEDERAL CIRCUITS .................................................. 522
   A. INDIVIDUAL LIABILITY BARRED ................................................................. 523
      1. The Ninth Circuit — Miller v. Maxwell's Int'l, Inc ........................................... 523
      2. The Fourth Circuit — Birkbeck v. Marvel Lighting Corp .................................. 525
      3. The Fifth Circuit — Grant v. Lone Star Co ...................................................... 526
      4. The Second Circuit — Tomka v. Seiler Corp ................................................. 528
      5. The Seventh Circuit — EEOC v. AIC Security Investigations, Ltd .................. 530
      6. Other Circuits Disallowing Personal Liability ............................................. 533
   B. THE HOLDOUTS ......................................................................................... 535
      1. The Sixth Circuit — Jones v. Continental Corp .............................................. 535
      2. The First Circuit ............................................................................................ 536

IV. ANALYSIS OF INDIVIDUAL LIABILITY ARGUMENTS ............................................. 538
   A. THE PLAIN MEANING OF "AGENT" .............................................................. 538
   B. LEGISLATIVE INTENT ............................................................................... 540
      1. The Civil Rights Act of 1964 ......................................................................... 540
      2. The Civil Rights Act of 1991 ......................................................................... 541
   C. AGENCY THEORY ......................................................................................... 546
   D. DETERRENCE ............................................................................................... 548
   E. CHILLING EFFECT ....................................................................................... 549
   F. THE FAIR EMPLOYMENT STATUTES WERE NOT MEANT TO FULLY REMEDY ALL DISCRIMINATION ............................................. 549

V. CONCLUSION ......................................................................................... 550
I. INTRODUCTION

A recurring issue in the interpretation of federal employment laws is whether individual supervisors may be held personally liable\(^1\) for their acts of illegal employment discrimination.\(^2\) Although it seems reasonable that the actual perpetrators of discrimination should be held liable for their actions in order to punish them and to deter others, many federal courts have come to the opposite conclusion. By taking a serpentine path toward settling this issue, a majority of federal courts now hold that managers cannot be held liable for damages resulting from their own discriminatory conduct in violation of Title VII of the Civil Rights Act of 1964 ("Title VII")\(^3\) or the Age Discrimination in Employment Act of 1967 ("ADEA").\(^4\)

A typical situation giving rise to the issue of individual liability involves a supervisor who illegally discriminates against a plaintiff employee. For example, suppose a supervisor intentionally withholds an employment opportunity from the qualified plaintiff, such as a promotion with expanded responsibilities, simply because the plaintiff is over forty years old. In addition, the plaintiff's supervisor is frequently heard saying, "This company should retire everyone over forty so we can bring in some fresh blood." This is a clear violation of the ADEA,\(^5\) and victims of such discrimination often sue both their employers\(^6\) and the supervi-

---

1 "Individual liability," "personal liability," and "supervisor liability" are the terms generally used when referring to the accountability of the supervisor, who actually commits the unlawful discrimination, for damages in a resulting lawsuit. This Note uses these terms interchangeably.


5 See infra Part II.A.2. for a discussion of the history and purpose of the ADEA.

6 This Note uses the terms "employer" and "employer-entity" to denote the business or corporation employing the plaintiff who has suffered illegal employment discrimination. The legal meaning of "employer" as defined by Title VII and the ADEA is the central issue of this Note. See infra Part II.B. for a discussion of the competing definitions of "employer" under Title VII and the ADEA.
sors who had authority over the employment decisions which formed the basis of the discrimination. If the employer is bankrupt or is otherwise judgment proof, recovery for a plaintiff hinges on whether the court hearing the case interprets the antidiscrimination statutes to allow for the imposition of liability on individual supervisors. Though one might expect that an employee would be allowed to sue the very person who committed the discriminatory act, there is some confusion on this issue. If the court decides that the supervisor cannot be held personally liable, the plaintiff’s claims against the supervisor will be dismissed, and the employee will be left without a judicial remedy.

Title VII and the ADEA permit an aggrieved employee-plaintiff to sue the “employer” entity for damages resulting from illegal supervisory discrimination. The courts, however, have disagreed on whether the language of Title VII and the ADEA creates a basis for seeking relief from individuals in their personal capacities. This Note argues that the best way for courts to effectuate the intentions of fair employment statutes is for them to deny individual liability. Part II briefly examines the purposes and development of Title VII and the ADEA and closes by identifying the crux of the judicial conflict—the statutory construction of the word “employer.” Part III then surveys and analyzes the judicial decisions addressing the issue of individual liability under Title VII and the ADEA. Part IV offers several competing theories that may be used to support or deny individual liability. It argues that, under established doctrines of statutory interpretation, the language of the statutes requires a reading that precludes claims against supervisory personnel in their individual capacities.

7 Judicial decisions holding supervisors personally liable for unlawful employment discrimination have required that the supervisor have power over the hiring, firing, or employment conditions of the plaintiff such that he supervisor may be considered to be acting as an agent of the employer. See House v. Cannon Mills Co., 713 F. Supp. 159, 161 (M.D.N.C. 1988) (the key inquiry is whether a supervisor “had the authority and discretion over plaintiff’s discharge for allegedly discriminatory reasons”); Wanamaker v. Columbian Rope Co., 740 F. Supp. 127, 135 (N.D.N.Y. 1990) (personal liability claim under ADEA available where plaintiff alleges that the individual defendants “participated in the decision process that forms the basis of the discrimination”).

8 The issue of personal liability is only relevant in this situation because a plaintiff will normally be able to recover complete relief from the employer-entity.

9 In some jurisdictions it was possible to shop for a judge sympathetic to the issue of personal liability. For example, until recently, the district courts of the Second Circuit were in disarray. See infra note 97.

10 The issue of supervisor liability will most likely be relevant in the context of an individual defendant’s motion to dismiss an action for failure to state a claim, Fed. R. Civ. P. 12(b)(6), or on motion for summary judgment, Fed. R. Civ. P. 56.

11 See infra Part II.B. for the statutory definitions of “employer.”
II. TITLE VII AND THE ADEA: THE BEST OF INTENTIONS

Title VII\textsuperscript{12} and the ADEA\textsuperscript{13} prohibit employers from making certain employment decisions on the basis of race, color, religion, sex, national origin, or age.\textsuperscript{14} This Part briefly surveys\textsuperscript{15} the purposes of these two antidiscrimination statutes and highlights the language that courts have scrutinized in deciding the issue of individual liability under these laws.

A. THE PURPOSES OF ANTIDISCRIMINATION EMPLOYMENT STATUTES

1. \textit{Title VII of the Civil Rights Act of 1964}\textsuperscript{16}

By enacting Title VII, Congress created a national policy of nondiscrimination in the workplace\textsuperscript{17} by making it unlawful for those controlling employment decisions to discriminate on the basis of specified

\begin{itemize}
  \item \textsuperscript{14} The relevant sections in Title VII and the ADEA state:
    \begin{itemize}
      \item It shall be an unlawful employment practice for an employer—(1) to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to . . . compensation, terms, conditions, or privileges of employment, because of such individual’s race, color, religion, sex, or national origin; or (2) to limit, segregate, or classify . . . employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect [the individual’s] status as an employee, because of such an individual’s race, color, religion, sex, or national origin.
      \item It shall be unlawful for an employer—(1) to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual with respect to . . . compensation, terms, conditions, or privileges or employment, because of such individual’s age; (2) to limit segregate, or classify . . . employees in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual’s age . . . .
    \end{itemize}
\end{itemize}
The purposes of Title VII are simple: to help eliminate irrational discrimination, to achieve equality in employment opportunities and remove the barriers to advancement that have operated against certain groups, and "to make persons whole for injuries suffered on account of unlawful employment discrimination." Congress reaffirmed its commitment to these principles with subsequent amendments in 1972 and in 1991 that expanded the scope of Title VII.

As an antidiscrimination statute, Title VII is remedial in character and should be liberally construed to achieve its purposes. It is therefore the duty of the courts to make sure that Title VII works and that the intent of Congress is not hampered by a strict construction of the statute in a battle with semantics. Accordingly, the courts have rejected a multitude of procedural and technical defenses invoked to limit the effectiveness of court-ordered remedies in Title VII cases.

2. Age Discrimination in Employment Act of 1967

By passing the Age Discrimination in Employment Act of 1967, Congress further expanded the scope of employment discrimination laws and again demonstrated its commitment to ensuring equal opportu-

---

18 Namely, race, color, religion, sex, national origin. See supra note 14 and accompanying text.
20 Id. at 418. "[T]he removal of artificial, arbitrary, and unnecessary barriers to employment when the barriers operate invidiously to discriminate on the basis of racial or other impermissible classification is essential to achieve the Act's ultimate purpose of eliminating employment discrimination." Griggs v. Duke Power Co., 401 U.S. 424, 431 (1971).
21 In the early years of Title VII, the statute "in most respects, proved to be a cruel joke." S. Rep. No. 415, 92d Cong., 1st Sess. 8 (1971). "[T]he time has come for Congress to correct the defects of its own legislation. The promises of equal job opportunity made in 1964 must be made realities . . . ." Id.
24 Tart v. Hill Behan Lumber Co., 31 F.3d 668, 671 (8th Cir. 1994); Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971). "Title VII of the Civil Rights Act of 1964 is to be accorded a liberal construction in order to carry out the purpose of Congress to eliminate the inconvenience, unfairness, and humiliation of racial discrimination." Clayton v. White Hall Sch. Dist., 875 F.2d 676, 679 (8th Cir. 1989) (quoting Parham v. Southwestern Bell Tel. Co., 433 F.2d 421, 425 (8th Cir. 1970)).
nity in the workplace.\textsuperscript{28} The ADEA prohibits unqualified age discrimination against employees over forty years of age.\textsuperscript{29} The statute states: "It shall be unlawful for an employer . . . to fail or refuse to hire or to discharge any individual or otherwise discriminate against any individual . . . because of such individual's age."\textsuperscript{30} Thus, the ADEA forbids employers from predicating employment decisions on arbitrary age limits that ignore an employee's ability to perform a given job.\textsuperscript{31} To effectuate this goal,\textsuperscript{32} the ADEA authorizes courts to grant such legal and equitable relief\textsuperscript{33} as may be appropriate to rid the workplace of unlawful age discrimination, to return victims to the positions they would have occupied had the discrimination not occurred and to effectuate the purpose of the Act.\textsuperscript{34}

B. Who Is the "Employer?" — Framing the Arguments

Because the substantive prohibitions of Title VII and the ADEA run to the "employer,"\textsuperscript{35} courts analyzing the issue of individual liability

\begin{itemize}
  \item The ADEA was enacted "to promote employment of older persons based on their ability rather than age; to prohibit arbitrary age discrimination in employment; [and] to help employers and workers find ways of meeting problems arising from the impact of age on employment." 29 U.S.C. § 621(b) (1988).
  \item See Daniel B. Frier, Age Discrimination and the ADA: How the ADA May Be Used to Arm Older Americans Against Age Discrimination By Employers Who Would Otherwise Escape Liability Under the ADEA, 66 Temp. L. Rev. 173, 177 (1993).
  \item Congress stated that the ADEA's purpose, like that of Title VII, is to "eliminate discrimination from the workplace." House v. Cannon Mills Co., 713 F. Supp. 159, 162 (M.D.N.C. 1988).
  \item See 29 U.S.C. § 626(c) (1988).
  \item The FLSA was enacted in 1938 in order to improve the working conditions of the nation's workforce. Among other things, the statute created a minimum wage, 29 U.S.C. § 206 (1988), established a standard for full-time working hours, 29 U.S.C. § 207 (1988), and established child labor restrictions, 29 U.S.C. § 212 (1988). Under the FLSA, an employer "includes any person acting directly or indirectly in the interest of an employer in relation to an employee." 29 U.S.C. § 203(d) (1988). Courts have used this language to impose personal liability on individuals for employment actions violating the FLSA attributable to them as a consequence of their authority over employment decisions. See Fiedler v. Indianhead Truck Line, Inc., 670 F.2d 806, 810 (8th Cir. 1982) (citing Lorillard v. Pons, 434 U.S. 575, 582 (1978)). By extension, had Congress also adopted the FLSA's substantive definition of "employer," it would be conceivable to hold individuals liable under the ADEA.
\end{itemize}
have focused on the construction of this term as defined by the statutes to determine who may be held liable under this language.\textsuperscript{36} A Title VII employer is "a person engaged in an industry affecting commerce\textsuperscript{37} who has fifteen or more employees . . . and any agent of such a person."\textsuperscript{38} The statutory language of the ADEA\textsuperscript{39} defines the term "employer" almost identically.\textsuperscript{40}

1. "Any Agent"

Using the "plain meaning rule" of statutory interpretation,\textsuperscript{41} several courts have held that the phrase "and any agent of such a person" means just what it says—agents of the employer-entity are to be considered as "employers" for the purpose of enforcing Title VII and the ADEA. These courts have allowed actions under these laws against individuals who occupy supervisory positions or have an impact on employment decisions.\textsuperscript{42}

\begin{footnotesize}
\textsuperscript{36} For a relevant but outdated discussion and survey of the definition of the term "employer," see Annotation, Meaning of Term "Employer" as Defined in § 701(b) of Title VII of the Civil Rights Act of 1964, 69 A.L.R. Fed. 191 (1984).

\textsuperscript{37} Authority for the enactment of Title VII, as well as the rest of the Civil Rights Act of 1964, was derived from the Commerce Clause, U.S. Const. art. I, § 8, cl. 1. However, in 1972 Congress expanded the coverage of Title VII to include states under the authority of the Fourteenth Amendment, U.S. Const. amend XIV. The Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (codified as amended at 5 U.S.C. §§ 5108 & 5314 and various sections of 42 U.S.C. § 2000e). See infra note 186 for a discussion of Congress' power to abrogate state sovereign immunity.

\textsuperscript{38} 42 U.S.C. § 2000e(b) (1988) (emphasis added). The full text of the section states: "The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person . . . ."

\textsuperscript{39} The drafting of the ADEA was based on the existing language of Title VII. See Miller v. Maxwell's Int'l, Inc., 991 F.2d 583, 588 (9th Cir. 1993); Lowe v. Commack United Sch. Dist., 886 F.2d 1364 (2d Cir. 1989) ("Thte substantive prohibitions of the ADEA were derived in haec verba from Title VII."). cert. denied, 494 U.S. 1026 (1990).

\textsuperscript{40} The only difference is the jurisdictional limitation based on the number of employees. 29 U.S.C. § 630(b) (1988). The full text of the section states: "The term 'employer' means a person engaged in an industry affecting commerce who has twenty or more employees for each working day in each twenty or more calendar weeks in the current or preceding calendar year . . . . The term also means (1) any agent of such a person . . . ." Id.

\textsuperscript{41} When interpreting the meaning of statutes, the cardinal rule is to first look at the plain language of the text. See infra Part IV.A. for a discussion of why the "any agent" language of the statutes cannot be understood as recognizing individual liability.

\textsuperscript{42} See infra Part III.B., analyzing cases imposing individual liability on supervisor personnel. The decisions that have upheld supervisor liability have been consistent in requiring that individual liability may only be imposed on agents who exercise significant control over the plaintiff's hiring, firing, or conditions of employment. Sauers v. Salt Lake County, 1 F.3d 1122, 1125 (10th Cir. 1993); Hamilton v. Rodgers, 791 F.2d 439, 443 (5th Cir. 1986) (defining an "agent" as someone who "participated in the decision-making process that forms the basis of the discrimination"); York v. Tennessee Crushed Stone Ass'n, 684 F.2d 360, 362 (6th Cir. 1982) (dictum) (defining "agent" as an "employee to whom employment decisions have been delegated by the employer"). See also McAdoo v. Toll 591 F. Supp. 1399, 1405 (D.Md.}
2. **Respondeat Superior**

On the other hand, an increasing majority of federal courts have interpreted the agent provisions as merely enacting the doctrine of respondeat superior\(^43\) in order to ensure that the acts of individual employees are imputed to the employer entity and have held that these fair employment laws were not intended to provide plaintiffs with a remedy against the actual individual offenders.\(^44\) These courts have also reasoned that the equitable statutory remedies originally afforded plaintiffs by Title VII\(^45\)—back pay and reinstatement—\(^46\) are characteristic of those levied against businesses, not employee supervisors. This remedial structure evidenced Congress' intention not to extend remedies to include personal liability.\(^47\)

In the last three years every federal circuit court addressing the issue of individual liability under Title VII and the ADEA has decided against the imposition of individual liability. Only two federal circuit courts of appeals have declined to accept review of this issue, and it is only a matter of time before they join the majority.

**III. THE FEDERAL CIRCUITS**

This Part analyzes federal judicial decisions addressing the question of individual liability under Title VII and the ADEA. It first examines

---

\(^{43}\) Respondent superior is a doctrine that holds "a master liable in certain cases of wrongful acts of his servant, and a principal liable for those of his agent." BLACK'S LAW DICTIONARY 1311 (6th ed. 1990).

\(^{44}\) See infra Part III.A.


\(^{47}\) See infra Part IV.B and accompanying text discussing why the remedies afforded plaintiffs imply that Congress did not intend to create individual liability. See also Williams v. Hevi-Duty Elec. Co., 668 F. Supp. 1062, 1070 (M.D. Tenn. 1986) (no individual liability because the "employer guilty of violation of Title VII is the one against whom affirmative relief, including back pay, may be adjudged"), rev'd on other grounds, 819 F.2d 620 (6th Cir. 1987).
those jurisdictions that do not recognize individual liability and then surveys the remaining jurisdictions that up to now have failed to resolve this issue.

A. INDIVIDUAL LIABILITY BARRED

Beginning with the Ninth Circuit's decision in Miller v. Maxwell's Int'l, Inc. in 1993, ten circuit courts of appeals have held that individuals cannot be adjudged personally liable for their acts of employment discrimination. Because Miller is representative of the arguments presented on both sides of the issue, the survey of case law begins with that opinion.


In Miller v. Maxwell's Int'l, Inc., the United States Court of Appeals for the Ninth Circuit ruled that individual employees cannot be held liable under Title VII or the ADEA for their own discriminatory acts. Phyllis Miller worked as a manager at the defendant corporation's restaurant and alleged that she had been subjected to a pattern of harassment and was discharged because of her sex and age. She brought sex and age discrimination claims under Title VII, the ADEA, and the Equal Pay Act against her corporate employer and six individual defendants—executives, managers, and lower level employees of Maxwell's International.

Although the Ninth Circuit stated that the argument in support of individual liability based on the "any agent" language was "not without merit," the court relied on Padway v. Palches in finding there was no

---

48 991 F.2d 583 (9th Cir. 1993), cert. denied sub nom. Miller v. LaRosa, ___ U.S. ___, 114 S. Ct. 1049 (1994).
49 Id. at 588.
51 Miller v. Maxwell's Int'l, Inc., No. C-87-1906-WWS, 1990 U.S. Dist. LEXIS 10479, at *4 (N.D. Ca. Jan. 17, 1990), aff'd, 991 F.2d. 583 (9th Cir. 1993), cert. denied sub nom. Miller v. LaRosa, ___ U.S. ___, 114 S. Ct. 1049 (1994). Although the district court stated that it was "unlikely that Congress intended to impose personal liability on employees," it ultimately permitted the plaintiff to amend her complaint to plead specific instances of intentional discrimination by the individual defendants. Id.
52 Miller, 991 F.2d at 587.
53 665 F.2d 965, 968 (9th Cir. 1982). In Padway, an elementary school principal brought suit against the school board and the superintendent of her school alleging sex discrimination in her compensation, reassignment, and discharge. The Ninth Circuit affirmed the trial court's grant of summary judgment to the defendants. Padway was decided before the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (1991), but the Miller court made no acknowledgment of that.
individual liability under Title VII or the ADEA. The Padway court had previously held that Title VII "speaks of unlawful practices by the employer and not . . . by officers or employees of the employer. Back pay awards are paid by the employer. The individual defendants cannot be held liable for back pay."55

The majority in Miller accepted the district court's conclusion that the "obvious purpose of [the] provision was to incorporate respondeat superior liability into the statute,"56 and therefore supervisors are protected from liability in their individual capacities.57 The opinion extended this line of reasoning to ADEA cases "because of the similarities in the Title VII and ADEA statutory schemes."58

The majority further noted that both statutes excluded small employers from coverage (by requiring a minimum number of employees before an entity could be considered a covered employer) and extrapolated that if the intention of this provision was to protect small entities from the burdensome liability and the cost of litigation, Congress certainly would not contradict itself by extending liability to individual defendants: "If Congress decided to protect small entities with limited resources from liability, it is inconceivable that Congress intended to allow civil liability to run against individual employees. . . [t]he statutory scheme itself indicates that Congress did not intend to impose individual liability on employees."59

The Miller court also addressed the concern that its holding "would encourage supervisory personnel to believe that they may violate Title VII with impunity."60 The court stated: "An employer that has incurred civil damages because one of its employees believes he can violate Title VII with impunity will quickly correct that employee's erroneous be-

---

54 Miller, 991 F.2d at 588. The Miller court also cited two district court cases as well: Seib v. Elko Motor Inn, Inc., 648 F. Supp. 272, 274 (D. Nev. 1986) (holding that Title VII claims cannot be made against plaintiff's supervisor because back pay is paid by the employer) and Pree v. Stone & Webster Eng'g Corp., 607 F. Supp. 945, 950 (D. Nev. 1985) ("only the employer may be held liable for the back wages; the individual employee may not"). Miller, 991 F.2d at 587. See also Robinson v. Jacksonville Shipyards, Inc., 760 F. Supp. 1486, 1533 (M.D. Fla. 1991).

55 Padway, 665 F.2d at 968 (citations omitted). Although the plaintiff also sought compensatory and punitive damages rather than back pay, the court still dismissed the claim because these forms of relief were not yet provided for in the statute at that time. See infra Part IV.B.2. for a discussion of the Civil Rights Act of 1991, which amended Title VII to allow for compensatory and punitive damages.

56 Miller, 991 F.2d at 587 (internal quotations omitted).
57 Id.
58 Id. at 588.
59 Id.
60 Id.
lief." It is in the business interests of the employer to monitor and discipline employees who violate antidiscrimination laws.

Judge Fletcher dissented in *Miller* and observed that, even if individuals were not liable for back pay before *Padway*, the Civil Rights Act of 1991 expanded the remedies available to plaintiffs by authorizing recoveries of compensatory and punitive damages for victims of intentional discrimination. Judge Fletcher reasoned that these new provisions justified imposing individual liability when there is intentional discrimination because the new remedies were no longer limited to compensation traditionally paid by businesses, namely back pay and reinstatement. The dissent also rejected the majority's comparison between the ADEA and Title VII, stating that although there are many similarities between the two statutes, the ADEA's scope of relief is broader than that afforded by Title VII. The ADEA incorporates the remedies and procedures of the Fair Labor Standards Act that allows an individual to be held personally liable.

The majority countered these contentions by noting that the 1991 amendments only allowed compensatory and punitive damages against employers on a sliding scale based upon the employer's size and that there were no provisions on the scale for individuals. The majority further noted that the amendments did not do away with the exclusion of small employers from Title VII and ADEA coverage. With this conclusion the Ninth Circuit became the first federal court of appeals to explicitly disavow claims of individual liability under Title VII and the ADEA.

2. The Fourth Circuit — Birkbeck v. Marvel Lighting Corp.

In *Birkbeck v. Marvel Lighting Corp.*, the Fourth Circuit affirmed the district court's grant of judgment as a matter of law to the defendants.

---

61 *Id.*
62 It is important to note that employers may have a claim against the employee for contribution or indemnification for adverse judgments. See Douglas L. Williams, *Individual Liability and Defending Individual Co-defendants*, C463 A.L.I.-A.B.A. 205 (1989).
63 *Miller*, 991 F.2d at 588 (Fletcher, J. dissenting).
66 *Miller*, 991 F.2d at 588.
68 *Id.* See supra 34 and accompanying text for a discussion of the ADEA's incorporation of FLSA procedural provisions.
70 *Miller*, 991 F.2d at 587 n.2.
71 *Id.*
on an ADEA claim, holding that actions against individuals could not be brought under the ADEA. The plaintiffs in this case were supervisory employees working for the defendant corporation when they were laid off from their positions. The plaintiffs filed ADEA claims against both the corporation and the vice-president primarily responsible for the layoff decisions. After a jury verdict in favor of the plaintiffs, the district court granted defendants’ motion for judgment as a matter of law, reasoning that the plaintiffs had failed to establish a prima facie case.

On appeal, the Fourth Circuit dismissed the claim against the vice-president in his individual capacity as an initial matter. Like the Ninth Circuit, the court read section 630(b) of the ADEA “as an unremarkable expression of respondeat superior—that discriminatory personnel actions taken by an employer’s agent may create liability for the employer.” The court also agreed with the Miller court’s explanation that the ADEA’s small business exemption was meant to reduce the burden on entities with limited resources. The court stated that “it would be incongruous to hold that the ADEA does not apply to the owner of a business employing, for example, ten people, but that it does apply with full force to a person who supervises the same number of workers in a company employing twenty or more.” Therefore, in the Fourth Circuit, ADEA liability is limited to the employer entity and does not reach individual agents of the employer.

3. The Fifth Circuit — Grant v. Lone Star Co.

The Fifth Circuit has also followed the lead of the Miller court in holding that managers cannot be sued in their individual capacities under

---

73 Id. at 511 (“[T]he ADEA limits civil liability to the employer.”).
74 See id. at 510.
75 Id. (citing Miller, 991 F.2d at 589).
76 Id. at 510.
77 Id.
78 The court hinted that employees, acting as agents for their employers, “may not be shielded . . . in all circumstances,” Birkbeck, 30 F.3d at 510 n.1, and limited its holdings to those “of a plainly delegable character.” Id. The court cited to Paroline v. Unisys Corp., 879 F.2d 100 (4th Cir. 1989). However, the decision in Paroline regarding individual liability was effectively overruled by Birkbeck. In Paroline, the plaintiff sued the Unisys Corporation and an Unisys employee for sexual harassment under Title VII. The court of appeals reversed the district court grant of summary judgment in favor of the defendants on the Title VII claims. Paroline, 879 F.2d at 113. In addressing the individual liability claim the court stated, “[A]n individual qualifies as an 'employer' under Title VII [and therefore becomes individually liable] if he or she serves in a supervisory position and exercises significant control over the plaintiff's hiring, firing or condition of employment . . . . The supervisory employee need not have ultimate authority to hire, fire to qualify as an employer, as long as he or she has significant input into such personnel decisions.” Id. at 104 (citations omitted). The language of Birkbeck seems to make this analysis in Paroline a mere discussion of the respondeat superior doctrine.
federal employment discrimination laws. In doing so, this circuit has managed to come full circle in a period of a dozen years.

Initially, the Fifth Circuit established non-liability by its ruling in *Clanton v. Orleans Parish Sch. Bd.* However, in *Hamilton v. Rodgers*, the court held that an individual was subject to liability for participating in supervisory decisions found to be discriminatorily motivated. The plaintiff in *Hamilton*, an employee of the Houston Fire Department, asserted Title VII claims against the Fire Department and various individual defendants alleging racial harassment and discriminatory discharge. The Fire Department and Hamilton’s immediate supervisor were found liable by the district court and were ordered to give back pay and compensatory damages. The Fifth Circuit affirmed, stating that Title VII’s definition of “employer” was broad and should be given a liberal interpretation: “To hold otherwise would encourage supervisory personnel to believe that they may violate Title VII with impunity.” Thus the Fifth Circuit extended liability to Hamilton’s supervisors because they had authority over staffing, assignment, and other employment decisions which formed the basis for the discrimination.

The holding in *Hamilton* was subsequently limited in *Harvey v. Blake*. In *Harvey*, the court limited the liability of public officials to claims alleging employment discrimination in their official capacities. Although the court defined the term “employer” liberally, it held that any recovery against the defendant must be based upon the defendant’s

---

79 649 F.2d 1084, 1099 (5th Cir. 1981).
80 791 F.2d 439 (5th Cir. 1986).
81 *Id.* at 442-43. "We agree with the view that ‘[a] person is an agent under § 2000e(b) if he participated in the decision-making process that forms the basis of the discrimination.’” *Id.* (citing *Jones v. Metropolitan Denver Sewage Disposal Dist.*, 537 F. Supp. 966, 970 (D. Colo. 1982)).
82 *Hamilton v. Rodgers*, 573 F. Supp. 452, 454 (S.D. Tex. 1983), aff’d, 791 F.2d 439 (5th Cir. 1986). The Fifth Circuit noted that the lower court found that there was a racist work environment and a deliberate effort to punish the plaintiff for seeking equal treatment. *Hamilton*, 791 F.2d at 442. The supervisors not only ignored the racist behavior, but also intentionally discriminated against Hamilton themselves. *Id.*
83 *Hamilton*, 791 F.2d at 442 (“The definition of ‘employer’ is, however, broad, including agents of the actual employer. . . . Title VII ‘should be accorded a liberal interpretation in order to effectuate the purpose of Congress to eliminate the inconvenience, unfairness, and humiliation of ethnic discrimination.’”) (quoting *Rogers v. EEOC*, 454 F.2d 234, 238 (5th Cir. 1971)).
84 *Id.* at 443.
85 *Id.* at 442. The defendants made car assignments, had authority over work shifts, and file reports that led to Hamilton’s suspension in 1982.
86 913 F.2d 226 (5th Cir. 1990).
87 *Id.* at 227-28. The plaintiff in *Harvey* was employed as an inspector in the Houston Public Service Department and alleged sexual harassment by the supervisor.
88 *Id.* at 227 (“immediate supervisors are employers when delegated the employer’s traditional rights, such as hiring and firing.”).
role as an agent of the city acting in an official capacity. The opinion explicitly qualified the Hamilton decision to this extent.

Finally, in Grant v. Lone Star Co., the Fifth Circuit abolished the public-private distinction and held that individual defendants could not incur liability under Title VII. In this case, the plaintiff filed suit against the Lone Star Corporation and individual employees of the corporation for sexual harassment and hostile work environment under Title VII. After a jury trial, only the Branch Manager was found liable. In addition, the trial court held that the Branch Manager was personally liable for sexual harassment because he directly participated in acts that contributed to a hostile work environment.

The Court of Appeals reversed, holding that individual defendants, as a matter of law, could not be held liable under Title VII for their own alleged discriminatory acts. Citing Clanton v. Orleans Parish Sch. Bd., the Fifth Circuit stated, "only 'employers,' not individuals acting in their individual capacity who do not otherwise meet the definition of 'employers,' can be liable under Title VII." In addition, the court noted that the structure of Title VII, in setting out the damages available to plaintiffs, further indicates that Congress did not intend to hold individual defendants liable, since reinstatement and back pay are not the usual remedies expected from a fellow employee.


Until recently, the United States Court of Appeals for the Second Circuit had failed to expressly address the issue of individual liability under Title VII or the ADEA. The district courts, most notably those

---

89 Id. at 227-28.
90 The court stated:

[T]here is one case... in which we failed to make the distinction between a supervisor's official and unofficial capacity... [T]o the extent that Hamilton is inconsistent with the rule established in Clanton [v. Orleans Parish Sch. Bd., 649 F.2d 1084 (5th Cir. Unit A July 1981)], that public officials may be liable for back pay under Title VII in their official capacity only, Hamilton is nonauthoritative.

Id. at 228 n.2.


91 21 F.3d 649 (5th Cir. 1994).
92 See id. at 650.
93 Id. at 653.
94 649 F.2d 1084 (5th Cir. Unit A July 1981).
95 Grant, 21 F.3d at 652.
96 Id. at 653. "In particular, the [Clanton] court noted that title VII makes 'employer[s]' responsible for back pay damages, whereas 42 U.S.C. § 1983 applies specifically to 'persons.'" Id. at 652-53.
located in the Southern District of New York, were in disarray.\textsuperscript{97} Finally, in \textit{Tomka v. Seiler Corp.},\textsuperscript{98} the Second Circuit settled the law of individual liability in one of the most contentious jurisdictions by and became one of the latest federal circuit courts to decide against the imposition of individual liability.

The plaintiff, Carole Tomka, alleged that she had been subject to sexual harassment during her tenure at Seiler. She also alleged that she was terminated because she threatened to pursue criminal charges against a supervisor and her two co-workers who had sexually assaulted her.\textsuperscript{99} Tomka subsequently filed suit against the Seiler Corporation and three co-employees, claiming hostile work environment and retaliatory discharge under Title VII and the New York Human Rights Law.\textsuperscript{100} The district court granted summary judgment to the defendants on all counts except for the common law claims.\textsuperscript{101}

The Second Circuit affirmed with respect to the dismissal of the Title VII claims against the individuals.\textsuperscript{102} After briefly surveying the conflict in the district courts of the Second Circuit and the law in other circuits, the court stated that while a literal reading of Title VII implies individual liability, "a broader consideration of Title VII indicates that this interpretation of the statutory language does not comport with Congress' clearly expressed intent in enacting that statute."\textsuperscript{103} Citing \textit{Miller}, the court explained that the statutory scheme of Title VII limiting liability to employers with more than 14 employees showed Congress' intent not to burden small entities.\textsuperscript{104}


\textsuperscript{98} 66 F.3d 1295 (2d Cir. 1995).

\textsuperscript{99} Id. at 1300-02.

\textsuperscript{100} Id. at 1299. Tomka also had claims under the Equal Pay Act, 29 U.S.C. § 206(d) and common law assault and intentional infliction of emotional distress.

\textsuperscript{101} Id. at 1303-04.

\textsuperscript{102} Id. at 1313-16.

\textsuperscript{103} Id. at 1314.

\textsuperscript{104} Id.
The circuit court then addressed Title VII's remedial provisions. The court generally "agree[d] that the Civil Rights Act of 1991 is a valuable source of insight into Congress' intent on the issue of individual liability." However, the initial remedial structure of Title VII only allowed for the equitable relief of back pay and reinstatement which are traditional remedies from the employer-entity. Although the Civil Rights Act of 1991 expanded the remedies available, it also "calibrate[d] the maximum allowable damage award to the size of the employer and failed to repeal the exemption for defendants with less than fifteen employees." Thus, the entire remedial structure of Title VII addresses itself toward employer-entities, not individuals.


The Seventh Circuit's ruling in *EEOC v. AIC Security Investigations, Ltd.* settled the conflicting common law of individual liability in this jurisdiction. Prior to *AIC Security*, the Seventh Circuit had hinted at the possibility of individual liability in *Shager v. Upjohn Co.* In *Shager*, the circuit court reversed a lower court's grant of summary judgment in favor of the defendant employer, finding that an intentional act of an employee — when performed within the scope of that employee's authority — was an act of the employer and could be imputed to the employer under *respondeat superior*.

---

105 Id. at 1315 n.13.
106 Id. at 1315.
107 Id. at 1315.
108 Id. (citing Miller v. Maxwell's Int'l, Inc., 991 F.2d 583, 588 n.2 (9th Cir. 1993)).
109 55 F.3d 1276 (7th Cir. 1995).
111 913 F.2d 398 (7th Cir. 1990).
112 Id. at 404. (citing with approval House v. Cannon Mills Co., 713 F. Supp. 159 (M.D.N.C. 1988)).
that individual supervisors should also be held liable under the ADEA. It stated the “statutory language ... could mean ... that [the supervisor] is liable along with the [employer], or even possibly instead of [the employer].” With its ruling in *AIC Security*, however, the Seventh Circuit joined the majority of other circuits in finding that individual employees could not incur liability.

In *AIC Security*, Charles Wessel was the executive director of AIC Security Investigation Ltd., a company providing private security guards in the Chicago area. In June 1987, Wessel discovered that he had lung cancer, and following five years of treatment, Wessel was diagnosed in 1992 with inoperable metastatic brain cancer, a terminal illness. During the previous five years, Wessel continued to work for AIC, though he missed work from time to time.

In July 1992, Ruth Vrdolyak became owner of AIC. Aware of Wessel’s illness, she fired him on July 29, 1992. Wessel filed a charge with the EEOC, and in November both the EEOC and Wessel sued AIC and Ruth Vrdolyak alleging a violation of the Americans With Disabilities Act (“ADA”).113 The Americans with Disabilities Act is analogous to Title VII and the ADEA in its broad definition of “employer” and its expansive scope of available damages.114 A federal jury in Chicago awarded Wessel $22,000 in back pay, $50,000 in compensatory damages, and $250,000 in punitive damages against each defendant, AIC and Vrdolyak. A United States magistrate judge remitted the punitive damage awards to $75,000 per defendant and found the defendants jointly and severally liable for the $50,000 compensatory damages award.115 Both defendants appealed.

The Seventh Circuit affirmed in part and reversed in part. The court affirmed the judgment and damages award against AIC.116 However, Judge Michael S. Kanne, writing for the court, concluded that the trial judge erred in submitting the claims against Vrdolyak to the jury. He wrote, “Contrary to the EEOC’s and Wessel’s argument, the actual reason for the ‘and any agent’ language in the definition of ‘employer’ was to ensure that courts would impose *respondeat superior* liability upon employers for the acts of their agents.”117 In reprimanding the EEOC, the court noted the similarities of the ADA, ADEA, and Title VII:

---

113 EEOC v. AIC Security, 55 F.3d 1276, 1279 (7th Cir. 1995).
114 See 42 U.S.C. § 12101(b) (1994) (purposes); § 12117(a) (remedies); § 12102(5) (definition of “employer”).
115 *AIC Security*, 55 F.3d at 1279.
116 Id. at 1285-87.
117 *AIC Security*, 55 F.3d at 1281 (quoting *Birkbeck* v. Marvel Lighting Corp., 30 F.3d 507, 510 (4th Cir. 1994)). The Seventh Circuit acknowledged that *Birkbeck* was decided under the ADEA, but it declined to find any significance in that fact. *Id.*
Those statutes all limit employer liability to employers with either 15 or 20, or more employees. That limitation struck a balance between the goal of stamping out all discrimination and the goal of protecting small entities from the hardship of litigating discrimination claims... The EEOC's interpretation upsets that balance and distorts the statutory framework.¹¹⁸

The court continued:

The Civil Rights Act of 1991 allowed successful plaintiffs under Title VII and the ADA to obtain compensatory and punitive damages in addition to the already available types of remedies. The EEOC and Wessel noted, correctly, that compensatory and punitive damages are typical remedies obtainable from individuals... However, we conclude... that the Civil Rights Act of 1991 further shows that Congress never intended individual liability.¹¹⁹

The court reasoned that when Congress adopted the definition of employer in the ADA, Title VII and the ADEA, it granted only remedies that an employer-entity, not an individual, could provide — reinstatement and back pay. “It is a long stretch to conclude that Congress silently intended to abruptly change its earlier vision through an amendment to the remedial portions of the statute alone.”¹²⁰ In addition, the court reasoned that since the caps on the total amount of compensatory and punitive damages were on a sliding scale based on the number of employees and because there were no caps for individuals, this was further proof that Congress did not intend for individuals to be liable.

Consequently, the court rejected Wessel’s argument that employee liability was necessary to achieve the “paramount consideration [of] stamping out discrimination.”¹²¹ The court reasoned that “[t]he employing entity is still liable, and that entity and its managers have the prior incentive to adequately discipline wayward employees, as well as to instruct and train employees to avoid actions that might impose liability.”¹²² The court concluded by inferring that “Congress has struck a balance between deterrence and societal cost” and that while the “remedial purposes [of the ADA] should be interpreted liberally,... that can-

¹¹⁸ Id.
¹¹⁹ Id.
¹²⁰ Id.
¹²¹ Id.
¹²² Id.
not trump the narrow, focused conclusion [drawn] from the structure and logic of the statute.”

6. Other Circuits Disallowing Personal Liability

Five other circuits have also refused to impose individual liability under Title VII and the ADEA. The Third Circuit, in Dici v. Pennsylvania, cited the rationale of other circuits and a previously vacated panel decision in holding that employees could not be held personally liable under Title VII.

In the Eighth Circuit case of Lenhardt v. Basic Institute of Technology, Inc., the sole issue on appeal was whether James A. Zoeller was an employer within the meaning of the Missouri Human Rights Act (MHRA). Peter Lenhardt was employed by the Basic Institute of Technology, Inc. (BITI) and served as BITI’s admissions director. During Lenhardt’s employment, Zoeller was the president, sole director, and sole shareholder of BITI. Lenhardt was diagnosed with cancer in 1992, subsequently had surgery, and was scheduled for radiation treatment. While Lenhardt had planned to continue working while receiving radiation treatment, BITI required him to take a leave of absence and subsequently terminated his employment.

Lenhardt filed a two-count complaint against BITI and Zoeller in federal district court. The jury awarded damages for Lenhardt’s state law claim, but the district court entered judgment for Zoeller despite the jury’s verdict. On appeal, the Eighth Circuit was required to interpret the Missouri Human Rights Act, but did so by drawing from analogous federal legislation.

123 Id. Nonetheless, an important part of the court’s reasoning is that the employer-entity will have the resources to pay the punitive and compensatory damages awarded a successful plaintiff. For closely-held corporations on the threshold of financial troubles, this might leave a plaintiff, after a successful claim, unable to collect against the company. Individual liability in this case would assist the plaintiff in collection of damages.

124 91 F.3d 542 (3d Cir. 1996).

125 Id. at 552 (citing Tomka v. Seiler Corp., 66 F.3d 1295, 1313 (2d Cir. 1995); Grant v. Lone Star Co., 21 F.3d 649, 653 (5th Cir. 1994); Sayers v. Salt Lake County, 1 F.3d 1122, 1125 (10th Cir. 1993); and Miller v. Maxwell’s Int’l Inc., 991 F.2d 583, 587 (9th Cir. 1993)). The court also made reference to Sheridan v. E.I. DuPont de Nemours which was later vacated en banc on different grounds at 74 F.3d 1439 (3d Cir. 1996). However, the court still referred to the Sheridan rationale against individual liability. No. 94-7504, 1996 U.S. App. LEXIS 3892 (3d Cir. Feb. 28, 1996).

126 55 F.3d 377 (8th Cir. 1995).

127 Id. at 379.


129 Lenhardt, 55 F.3d at 379.

The circuit court ultimately declined to decide whether Title VII contemplated individual employee liability. However, the court strongly implied that it would be disinclined to impose individual liability. The court noted, for instance, that it had previously declined to extend Title VII liability to co-workers in Smith v. St. Bernards Regional Medical Center despite the possibility they might be considered "agents" of their employer. Thus, the Eighth Circuit will most likely join many of the other circuits in barring individual liability in federal employment discrimination cases.

In Sims v. KCA, Inc., the Tenth Circuit held summarily that "[s]uits against persons in their individual capacities are inappropriate under Title VII." The plaintiffs had brought this Title VII action against KCA and individual supervisors alleging that they were not hired by KCA because they were Caucasian. The three-judge panel affirmed the trial court's grant of judgment as a matter of law to the defendants at the close of the plaintiffs' case. Quoting Sauers v. Salt Lake County, the court stated that "relief granted under Title VII is against the employer, not individual employees whose actions would constitute a violation of the Act."

More recently, in Haynes v. Williams, a panel of the Tenth Circuit reaffirmed that jurisdiction's position against the imposition of personal liability under Title VII and the ADEA. This panel also quoted Sauers, but in addition, it addressed the remedial changes to Title VII made by the Civil Rights Act of 1991. This was necessary because, in deciding against individual liability, Sauers emphasized that "a successful Title VII plaintiff was typically limited to reinstatement and back pay as potential remedies" but the 1991 Act "adds compensatory and punitive damages to the remedies available . . . the type [of award] that an individual can normally be expected to pay."

Nevertheless, the court sided with the majority view that the language and structure of Title VII as amended "continue[d] to reflect the legislative judgment that statutory liability is appropriately borne by employers, not individual supervisors."

---

131 Lenhardt, 55 F.3d at 380.
132 19 F.3d 1254, 1255 (8th Cir. 1994).
133 No. 93-2953, 1994 U.S. App. LEXIS 15065 (10th Cir. June 17, 1994).
134 Id. at *20.
135 1 F.3d 1122, 1125 (10th Cir. 1993).
137 88 F.3d 898 (10th Cir. 1996).
138 Id. at 899.
139 Id. at 900-01.
140 Id. at 901 (quoting Tomka v. Seiler Corp., 66 F.3d 1295, 1314-15 (2d Cir. 1995)).
141 Haynes, 88 F.3d at 901.
The Eleventh Circuit held in *Busby v. City of Orlando*,¹⁴² that all Title VII "claims must be made against [a] municipal officer in his official capacity, not in his individual capacity."¹⁴³ Busby was employed by the Orlando Police Department and asserted Title VII and other claims against the City of Orlando, the Police Department, the Mayor of Orlando, the Chief of Police, and two officers in their individual capacities. The court dismissed the claims against the defendants in their individual capacities stating that the "proper method for a plaintiff to recover under Title VII is by suing the employer, either by naming the supervisory employees as agents of the employer or by naming the employer directly."¹⁴⁴

The District of Columbia Circuit Court of Appeals has also recently decided against individual liability under Title VII. In *Gary v. Long*,¹⁴⁵ the court followed the rationale of *Miller* and held that the purpose of the agent provision was to incorporate respondeat superior liability into Title VII. Therefore, supervisory employees who are joined as party defendants in Title VII actions should be viewed as being sued as agents of the employer who is alone liable for violations of Title VII.¹⁴⁶

B. The Holdouts

Only the Sixth and the First Circuits appear to remain ambiguous on the issue of individual liability.


The most recent case from the Sixth Circuit to address the issue of personal liability under Title VII is *Jones v. Continental Corp.*¹⁴⁷ In *Jones*, the plaintiff appealed from the district court’s dismissal of her case and assessment of costs and attorney’s fees against her and her counsel. The plaintiff had brought an employment discrimination case under Title VII and section 1981.¹⁴⁸ In dismissing the plaintiff’s suit, the

---

¹⁴² 931 F.2d 764, 772 (11th Cir. 1991).
¹⁴³ *Id.* at 772.
¹⁴⁴ *See id. Accord* Harvey v. Blake, 913 F.2d 226, 227-28 (5th Cir. 1990) ("[L]iability under Title VII is premised upon her role as agent of the city, any recovery to be had must be made against her in her official, not her individual, capacity"). More recently, the Eleventh Circuit reaffirmed *Busby* in *Cross v. Alabama*, 49 F.3d 1490, 1504 (11th Cir. 1994).
¹⁴⁵ 59 F.3d 1391 (D.C. Cir. 1995).
¹⁴⁶ *Id.* at 1399.
¹⁴⁷ 789 F.2d 1225 (6th Cir. 1986). *See also* Wilson v. Nutt, 1995 U.S. App. LEXIS 35117 (6th Cir. October 10, 1995), *reh’g denied*, 1995 U.S. App. LEXIS 37525 (6th Cir. Dec. 19, 1995). The court in *Wilson* briefly surveyed opinions from the Sixth Circuit that have been cited by other courts as supporting both the majority and minority positions. The court concluded, however, that the "Sixth Circuit has not directly addressed this issue [of individual liability], and we need not do so in this case." *Id.* at *4-*5.
district court observed that "the plaintiff could be a quite petty person who assumed that anything that did not suit her was a product of racial prejudice."\(^{149}\)

The Sixth Circuit, in reversing the district court's assessment of attorney's fees against the plaintiff and her counsel, stated almost casually that "the law is clear that individuals may be held liable... as 'agents' of an employer under Title VII."\(^{150}\) Adding nothing more to the discussion of individual liability, the court proceeded with its analysis of why attorney's fees were inappropriate in this case.\(^{151}\)

Subsequent decisions in the district courts have allowed individuals to be personally named in Title VII actions. In *Kolb v. Ohio Dept. of Mental Retardation & Dev. Disabilities*,\(^{152}\) the court upheld individual liability. The plaintiff, Kolb, sued her employer and three individual supervisors for failing to promote her, discharging her on the basis of her race and sex, and retaliating for past charges of discrimination. The court denied the individual defendants' motions for summary judgment.\(^{153}\)

The court in *Connelly v. Park-Ohio Indus.*\(^{154}\) similarly permitted a Title VII claim to proceed against a supervisor. The court simply held that "[i]n order for an individual employer to be liable under Title VII, that individual must be an officer, director or supervisor for a Title VII employer or otherwise be involved in managerial decisions."\(^{155}\)

2. *The First Circuit*

The Court of Appeals for the First Circuit has yet to address the issue of individual liability under Title VII or the ADEA. The district courts in this jurisdiction remain divided over this issue. For example, a

---

\(^{149}\) *Jones*, 789 F.2d at 1228 (quoting the district court slip opinion at 4).


\(^{151}\) *But cf.* York v. Tennessee Crushed Stone Ass’n, 684 F.2d 360, 362 (6th Cir. 1982). The court in this case attributed the agency language of the ADEA as merely designating managers who may be sued in their official capacities under respondeat superior. The case, however, was resolved on the ground that the employer had fewer employees than the ADEA jurisdictional requirement.


\(^{153}\) "Holding responsible those who control the aspects of employment accorded protection under Title VII is consistent with the congressional intent both that the Act's effectiveness not be frustrated by an employer's delegating authority... and that the Act be interpreted liberally in order to achieve its remedial purpose of eradicating discrimination in employment." *Id.* at 891.


New Hampshire district court commented in *Lamirande v. Resolution Trust Corp.*\(^{156}\) that the "First Circuit has not yet defined 'agent' as it appears in [Title VII]; however, there is a general agreement among the circuits which have addressed the issue that an 'agent' of an 'employer' is subject to individual liability under Title VII."\(^{157}\) The court went on to criticize the *Miller* decision for "citing no authority for its conclusion that [Title VII] was intended to protect 'small entities' rather than small businesses" and that it is "much more likely that the size restriction contained in [Title VII] was intended to protect small family-run businesses" that preferred to hire friends and relatives.\(^{158}\)

In *Weeks v. Maine*,\(^{159}\) Judge Morton A. Brody, in surveying the case law up to that time, permitted Title VII and ADEA discrimination claims to proceed against the defendants. Quoting *Lamirande*, Judge Brody stated, "[t]he primary purpose of . . . Title VII in particular, is remedial. Its aim is to eliminate employment discrimination by creating a federal cause of action to promote and effectuate its goals . . . of eradicating the evils of employment discrimination. Title VII should be given a liberal construction."\(^{160}\)

Within nine months, Judge Brody reversed his position in *Quiron v. L.N. Violette Co. Inc.*\(^{161}\) The judge cited *Singer v. Maine*\(^{162}\) and discussed the analysis in *EEOC v. AIC Sec. Investigations, Ltd.*\(^{163}\) in finding that the structure and logic of Title VII and the ADEA did not reveal Congress' intent to subject individuals to liability. Judge Brody was "now, persuaded both by the number of recent decisions on this area, and by the rationale behind those decisions, that the agents of employers, including supervisory employees, are not subject to personal liability under the federal employment discrimination statutes."\(^{164}\)

The most recent district court cases from the First Circuit seem to be uniform in barring individual liability under federal antidiscrimination employment statutes. However, there remains a variety of precedent from which to choose.\(^{165}\) In light of the number of circuit courts ad-

---


\(^{157}\) Id. at 528.

\(^{158}\) Id.

\(^{159}\) 871 F. Supp. 515 (D. Me. 1994).

\(^{160}\) Id. (quoting *Lamirande v. Resolution Trust Corp.*, 834 F. Supp. 526, 528 (D.N.H. 1993)).


\(^{163}\) 55 F.3d 1276 (7th Cir. 1995).


dressing individual liability in the last two years, it is inevitable that the
First Circuit will settle this issue soon.

IV. ANALYSIS OF INDIVIDUAL LIABILITY ARGUMENTS

This Part argues that a rational interpretation of the statutory lan-
guage of Title VII and the ADEA calls for the denial of individual liabil-
ity under these statutes.

A. THE PLAIN MEANING OF "AGENT"

The strongest argument for interpreting employment discrimination
statutes in favor of individual liability is in the literal reading the lan-
guage of these statutes. "The task of resolving the dispute over the
meaning of [a statute] begins where all such inquiries must begin: with
the language of the statute itself."166 When interpreting statutory lan-
guage, a court must first look to the plain meaning167 of the language.168
The Supreme Court describes this rule as the "one, cardinal canon before
all others."169

When the language of the statute is plain, the inquiry ends with the
language of the statute because, in such instances, "the sole function of
the courts is to enforce [the statute] according to its terms."170 The court
should apply the plain meaning of the statute without looking to statutory
construction.171 However, "plain meaning, like beauty, is sometimes in
the eye of the beholder."172 Thus, the statutory language should be read
in its ordinary and natural sense, and if doubts remain, they should be
resolved in light of the public policies intended to be served by the
enactments.

167 Note that despite language in the Congressional record by Senator Case that the word
"employer" would have "its common dictionary meaning, except as expressly qualified by the
act," 110 Cong. Rec. 6996 (1964), when a term is defined within a statute, that definition will
be used in place of the ordinary meaning of the word throughout that statute, 2A NORMAN J.
that a legislature say in a statute what it means and means in a statute what it says there." Con-
that the plain language of the enacted text is the best indicator of intent." Nixon v. United
169 Germain, 503 U.S. at 252. See also United States v. Oregon, 366 U.S 643, 648
(1961).
(1917)).
171 United States v. Oregon, 366 U.S 643, 648 (1961); Estate of Cowser v. Commis-
sioner, 736 F.2d 1168, 1171 (7th Cir. 1984). See also EARL T. CRAWFORD, THE CONSTRUC-
TION OF STATUTES 92, at 130-31 (1940); Singer, supra note 167 at 151-53 (5th ed. 1992);
In addition, because of the remedial nature of antidiscrimination statutes, definitions within those acts should be given a liberal construction in order to carry out the purposes of Congress.\textsuperscript{173} "[O]ne overriding lesson the 1991 Act [broadening available damage provisions] tutors all but its most unmindful readers is that Congress was unhappy with increasingly parsimonious constructions of Title VII."\textsuperscript{174}

In the context of individual liability, the language of Title VII and the ADEA defines the term "employer" to include the "agents" of employers with a sufficiently large number of employees.\textsuperscript{175} Applying the plain meaning rule, it seems that "agents" are among the persons who may be held liable under Title VII and the ADEA. The statutory language, "and any agent," is an odd choice of language if Congress merely wanted to impose respondeat superior liability. Existing legal principles have already made it clear that an employer can be held liable for the discriminatory acts of its agents. Therefore, it appears that the plain meaning of "and any agent" must be something more than imposing respondeat superior liability.

Nevertheless, while the wording of the statute deceptively suggests that "agents" are employers within the meaning of Title VII, a closer analysis indicates that the more reasoned reading of the statute as a whole is that the "and any agent of such a person" language was meant to incorporate the doctrine of respondeat superior into the statute. The use of the conjunctive word "and," as opposed to the disjunctive word "or," supports the argument that Congress merely intended to incorporate respondeat superior into the statute. The disjunctive "or" usually separates words or phrases in the alternate relationship, indicating that either of the separating words or phrases may be employed without the other. Thus, if the word "or" had been drafted in section 2000e(b), it would mean that the "any agent of such a person" language could stand alone so that an employer would be defined to include agents of a person engaged in industry affecting commerce who has fifteen or more employees. Use of the word "and," however, ties the "any agent of such a person" language to the previous words in the statute, suggesting that the "agent" language

\textsuperscript{173} Tart v. Hill Behan Lumber Co., 31 F.3d 668, 671 (8th Cir. 1994); Wilde v. County of Knadigo, 15 F.3d 103, 105 (8th Cir. 1994). See also Hamilton v. Rodgers, 791 F.2d 439, 442 (5th Cir. 1986) ("In ascertaining the scope of agency, we have recognized that Title VII 'should be accorded a liberal interpretation in order to effectuate the purpose of Congress to eliminate the inconvenience, unfairness, and humiliation of ethnic discrimination.'") (quoting Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971), cert. denied, 406 U.S. 957 (1972)).

\textsuperscript{174} Mardell v. Harleysville Life Ins. Co., 31 F.3d 1221, 1234 (3d Cir. 1994).

was not meant to stand alone in terms of defining “employer” under Title VII.\textsuperscript{176}

Thus, the language of Title VII and the ADEA does not clearly express any congressional intention to hold the “agents” of employers personally liable for their discriminatory acts. So what did Congress want to do?

B. LEGISLATIVE INTENT

It is an accepted principle of statutory interpretation to look to legislative intent when dealing with issues not expressly addressed by the statute.\textsuperscript{177} In addition, a cause of action for illegal employment discrimination is purely a statutory creation, and thus, the legislative history and intent of Title VII and the ADEA play a significant role in determining whether individual liability exist under these statutes.\textsuperscript{178}

1. The Civil Rights Act of 1964

Most of the legislative history of Title VII is located in the Congressional Record. Because supporters of the bill proposing the Civil Rights Act of 1964 feared that it would be buried in committee hearings, the legislation was rushed through committee before being debated and voted upon on the floors of both Houses. As a consequence, there is no legislative history dealing directly with the issue of individual liability. In fact, the primary concerns of legislators generally addressed the issue of whether the legislation was constitutional or should even be enacted.\textsuperscript{179}

Senator Humphrey, the main proponent of Title VII in the Senate, stated that the primary reason for the minimum employee requirement was that larger businesses have a more substantive effect on commerce.\textsuperscript{180} However, discussions of the minimum employee jurisdictional requirements of Title VII and the ADEA\textsuperscript{181} are significant to the individual liability debate. When Title VII was enacted, small businesses constituted ninety-two percent of the nation’s employers.\textsuperscript{182} Congress did

\begin{footnotes}
\item[177] See 2A Norman J. Singer, Statutes and Statutory Construction § 45.09 (5th ed. 1992) ("Legislative purpose may . . . be a valuable guide to decision" for issues unforeseen by the legislature and unresolved by the statutory language).
\item[178] After the passage of Title VII, Boston College devoted an entire volume of its law review to this statute. 7 B.C. INDUS. & COM. L. REV. 413-652 (1966).
\item[179] See 110 Cong. Rec. 6831-34 (1964).
\item[181] See supra notes 38 & 40 for the text of the statutes providing the minimum employee requirements for jurisdiction under Title VII and the ADEA.
\end{footnotes}
not want to subject small employers to the prohibitions of Title VII and the ADEA because it did not want to restrict such a vital part of the nation's economy.\(^{183}\) Accordingly, Congress imposed a jurisdictional threshold requiring that employer entities have at least fifteen employees before a cause of action can be initiated under Title VII.\(^{184}\) As the *Miller* court reasoned, "If Congress decided to protect small entities with limited resources from liability, it is inconceivable that Congress intended to allow civil liability to run against individual employees."\(^{185}\)

It would certainly be nonsensical to impose liability on supervisors working for an employer entities with fifteen employees and yet give immunity to supervisors working for employer entities with only fourteen employees. In order to be consistent, individual liability would require that all supervisors be subject to liability under fair employment laws. This, however, would render the minimum employee requirement meaningless. This can not be what Congress intended.

2. *The Civil Rights Act of 1991*

Title VII was amended\(^{186}\) by the Civil Rights Act of 1991 ("1991 CRA").\(^{187}\) As originally enacted, Title VII only provided for the reme-

---

\(^{183}\) Jendusa v. Cancer Treatment Ctrs. Am., Inc., 868 F. Supp. 1006, 1015 (N.D. Ill. 1994). *See also infra* Part IV.B.2 discussing the Civil Rights Act of 1991 and the sliding scale used to limit damages based on the number of employees signifying the current legislative intent to protect small businesses from potentially debilitating liability.

\(^{184}\) Employer entities must have at least twenty employees before a cause of action can be initiated under the ADEA.

\(^{185}\) Miller v. Maxwell's Int'l, Inc., 991 F.2d 583, 587 (9th Cir. 1993).


Like other civil rights legislation enacted in the 1960s, Title VII was originally created pursuant to the Commerce Clause. The 1972 Amendments expanded the coverage of Title VII to include states and local public employees by abrogating state sovereign immunity pursuant to the Fourteenth Amendment. The definition of "person" was expanded to include "governments, governmental agencies, [and] political subdivisions." 42 U.S.C. § 2000e(a) (1988). *See Fitzpatrick v. Bitzer, 427 U.S. 445 (1976)* (discussing Congress' intent to abrogate state sovereign immunity under the Fourteenth Amendment).

Note that Title VII's application to the states and local public employees was not affected by the recent Supreme Court decision in *Seminole Tribe of Florida v. Florida*, 116 S. Ct. 1114 (1996). That decision held that Congress could not abrogate state sovereign immunity by using its Commerce Clause powers. However, *Seminole Tribe* reaffirmed the holding in *Fitzpatrick* that the Fourteenth Amendment fundamentally altered the federalism balance, and Congress may abrogate state sovereign immunity pursuant to the Fourteenth Amendment.

dies of back pay and other equitable relief. The 1991 CRA expanded the remedies under Title VII by making compensatory and punitive damages available to victims of intentional employment discrimination. A witness for the Committee on Education and Labor stated:

Compensatory and punitive damages will not give back to a plaintiff, in many cases, the career that they lost or the ability to rise further in that career. Congress doesn’t have the ability to do that. It’s lasting permanent damage. I think what the increased remedies under the bill will do, however, is primarily to act as a deterrent.

Congress passed the 1991 CRA in the face of several Supreme Court decisions limiting the scope of fair employment laws and the adequacy of their remedies. In addition to attempting to make victims of intentional discrimination “whole” for their injuries and providing for additional deterrence against intentional discrimination, the new legislation brought remedies for gender discrimination into conformity with remedies for racial and ethnic discrimination by providing for com-

---

189 42 U.S.C. 1981a(a) (1) provides:
In an action brought by a complaining party under section 706 of 717 of the Civil Rights Act of 1964 (42 U.S.C. § 2000e3-5) against respondent who engaged in unlawful intentional discrimination not an employment practice that is unlawful because of its disparate impact) prohibited under section 703, 704, or 717 of the Act (42 U.S.C. § 2000e2 or 2000e-3), and provided that the complaining party cannot recover under section 1981 of this title, the complaining party may recover compensatory and punitive damages as allowed by subsection (b) of this section, in addition to any relief authorized by section 706(g) of the Civil Rights Act of 1964, from the respondent.
191 The primary purpose of the Civil Rights Act of 1991 was to reverse five Supreme Court decisions that were undermining the existing employment discrimination laws. See Wards Cove Packing Co. v. Atonio, 490 U.S. 642 (1989) (shifting burden of proof in disparate impact cases by requiring a plaintiff to show that an employer’s practice is not a “business necessity” contrary to Griggs v. Duke Power Co., 401 U.S. 424 (1971)); Patterson v. McLean Credit Union, 491 U.S. 164 (1989) (42 U.S.C. § 1981 only prohibits discrimination in the formation of contracts in hiring decisions); Martin v. Wilks, 490 U.S. 755 (1989) (a third party challenging affirmative action consent decrees cannot bring collateral action to challenge settlement); Price Waterhouse v. Hopkins, 490 U.S. 228 (1989) (holding that plaintiffs must prove that an illegal practice was the “but for” causation for an employment decision); and Lorance v. AT&T Technologies, Inc., 490 U.S. 900 (1989).
192 The congressional findings in § 2 of the 1991 amendments state:
§ 2. FINDINGS
The Congress finds that:
(1) additional remedies under Federal law are needed to deter unlawful harassment and intentional discrimination in the workplace . . . .
pensatory and punitive damages\textsuperscript{194} for all categories of Title VII plaintiffs.\textsuperscript{195}

Thus, the remedies created by the 1991 CRA were intended to mirror those available under the Civil Rights Act of 1870\textsuperscript{196} ("section 1981").\textsuperscript{197} Notably, under section 1981, individuals could be held individually liable for racial discrimination.\textsuperscript{198} Therefore, it may be argued that since Congress intended the remedies to be the same, and since individual liability is allowed under section 1981, Congress intended to permit individual liability under Title VII through the expansion of remedies in the 1991 CRA.

However, upon closer examination, it is clear that the language of the two statutes differ. Title VII specifies that damage awards are "payable by the employer, employment agency, or labor organization, as the case may be, responsible for the unlawful employment practice."\textsuperscript{199} This

\textsuperscript{194} 42 U.S.C. § 1981a(b) (1) provides:

(b) Compensatory and punitive damages.

(1) Determination of Punitive damages.

A complaining party may recover punitive damages under this section against a respondent . . . if the complaining party demonstrates that the respondent engaged in a discriminatory practice with malice or with reckless indifference to the federally protected rights of an aggrieved individual.


Before the 1991 CRA, compensatory and punitive damages were only recoverable by victims of racial or ethnic discrimination under 42 U.S.C. § 1981. See 137 Cong. Rec. H9551 (daily ed. Nov. 7 1991) (statement of Rep. Kleczka) ("[T]itle VII of the 1964 Civil Rights Act is broadened by [the 1991 CRA] to allow punitive damages awards, bringing this important antidiscrimination law more into line with its counterpart, section 1981 of the 1866 Civil Rights Act.").".


\textsuperscript{196} 42 U.S.C. § 1981 (1988). Section 1981 guarantees "all persons" the right to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and no other.

\textsuperscript{197} H.R. Rep. No. 102-40(I), 65 \textit{reprinted in} 1991 U.S.C.C.A.N. at 603 ("Gender and religious discrimination may have different cultural or historic origins than racial discrimination. It does not follow, however, that Congress should differentiate among them for the purposes of the remedial scheme provided by federal law for intentional discrimination."). H.R. Rep. No. 102-40(I), 70 \textit{reprinted in} 1991 U.S.C.C.A.N. at 608 (There was a "compelling need to permit the recovery of damages under Title VII in order to conform the remedies available for intentional gender and religious discrimination to those currently available for intentional race discrimination under section 1981"). "The [Judicial] Committee intends that compensatory damages be awarded under Title VII using the same standards that have been applied under [ ] 1981." H.R. Rep. No. 40(II), 102d Cong., 1st Sess. 28-29 (1991), \textit{reprinted in} 1991 U.S.C.C.A.N. 717.

\textsuperscript{198} \textit{See}, e.g., Al-Khazraji v. Saint Francis College, 784 F.2d 505, 518 (3d Cir. 1986).

is distinguishable from the wording of section 1981 which provides that "all persons" may sue or be parties.\textsuperscript{200}

In the context of judicial analyses of the question of individual liability, courts scrutinizing congressional intentions for expanding Title VII remedies have come to different conclusions.\textsuperscript{201} The Bridges court reasoned that since compensatory and punitive damages are the types of damages individuals could be expected to pay,\textsuperscript{202} the current law permitted individual liability despite the more limited relief afforded before the 1991 CRA.\textsuperscript{203} On the other hand, because the only relief available prior to the enactment of the 1991 CRA was of the type that the employer-entity would generally provide, Congress could not have meant to alter the scope of Title VII coverage by merely amending the remedial scheme.\textsuperscript{204}

Perhaps the most persuasive evidence that Congress did not intend to permit individual liability are the limits Title VII imposes on the amount of compensatory and punitive damages that may be awarded. These damage awards have caps that are determined by the number of employees working for the employer-entity.\textsuperscript{205} The majority in Miller, analyzing these limitations, reasoned, “Congress specifically limited the

\textsuperscript{201} Shortly after passage of the Civil Rights Act of 1991, one court came out on both sides of the issue. In Carroll v. ABF Freight Sys., Inc., 61 Fair Empl. Prac. Cas. (BNA) 1329, 1330 (N.D. Ala. 1993), Judge James Hancock observed that from the 1991 CRA “a strong argument can be made that an award of compensatory and punitive damages (as opposed to lost wages) can be made against [an] employee in his individual capacity.” However, one month later in Berr v. North Ala. Elec. Coop., 61 Fair Empl. Prac. Cas. (BNA) 1331, 1333 (N.D. Ala. 1993), the same judge could find nothing in the 1991 CRA to permit individual liability under Title VII.

\textsuperscript{202} Bridges v. Eastman Kodak Co., 800 F. Supp. 1172, 1180 (S.D.N.Y. 1992) (the court concluded that in view of this fact, arguments against individual liability on the basis of the limited remedies available before 1991 lost “virtually all of its force”).


\textsuperscript{205} 42 U.S.C. § 1981a(b) (3) (Supp. IV 1994) provides:

\textsuperscript{(3) Limitations}

The sum of the amount of compensatory damages awarded under this section for future pecuniary losses, emotional pain, suffering, inconvenience, mental anguish, loss of enjoyment of life, and other nonpecuniary losses, and the amount of punitive damages awarded under this section, shall not exceed, for each complaining party—

(A) in the case of a respondent who has more the 14 and fewer than 101 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $50,000;

(B) in the case of a respondent who has more the 100 and fewer than 201 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $100,000;
damages available based upon the size of the respondent employer. ... 

We think that if Congress had envisioned individual liability under Title VII for compensatory or punitive damages, it would have included individuals in this litany of limitations and would have discontinued the exemption for small employers ... .”

Another court observed:

If both the offending employee and the employer were to be liable for monetary damages, Congress would have provided some guidance as to how damages should be apportioned, or, whether a plaintiff could collect the cap amount from both the employer and the individual. And if the discrimination against the plaintiff involved several co-employees, would each be liable for the cap amount, based on the size of the employer? If Congress had intended individual liability, it would not have left these questions unanswered and would have incorporated individual liability into the damage limitation scheme in some manner, perhaps by establishing individual damage caps.

Even the Equal Employment Opportunity Commission (“EEOC”) has concluded that individual liability would be “inconsistent with Congress’ clear intent to spare small respondents from large damage awards.” Otherwise, individual liability would be subject to the $50,000 limitation on compensatory and punitive damages in order to fit within the damage caps in the 1991 CRA. This logical conclusion, however, conflicts with the clear language of the new damages provision which only permits awards against employers with “more than 14” employees. In fact, individual liability would seem to allow a sole employee of an employer-entity to sue the owner who is acting as an

(C) in the case of a respondent who has more the 200 and fewer than 501 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $200,000;

(D) in the case of a respondent who has more the 500 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $300,000.

206 Miller v. Maxwell’s Int’l, Inc., 991 F.2d 583, 587-88 n.2 (9th Cir. 1993) (citations omitted).


208 Enforcement Guidance: Compensatory and Punitive Damages Available Under § 102 of the Civil Right Act of 1991, 3 EEOC Compl. Man. (BNA) No. 6071, at 43 (July 1992). The Title VII respondents discussed in these Enforcement Guidelines were not individuals but labor organizations and government agencies. Nevertheless the rationale of the Guidelines would apply to all respondents with less than fifteen employees. Id. at 54. This would seem the correct position of the EEOC given its part in the AIC Security litigation.

209 Id.

"agent" for the business.\textsuperscript{211} This would be a wrong result in light of the minimum employee jurisdictional requirements of Title VII as well as the minimum employee requirements of the damage caps.

A more egregious view of the damage caps under individual liability would be a literal interpretation of the statute. Under this analysis, because the 1991 CRA contains no limitation for an individual, as distinct from employer-entities, the conclusion is that individuals are subject to unlimited liability. At least one court recognizes that "it would be illogical to cap the damages recoverable against the employer and allow unlimited liability as to its agent."\textsuperscript{212}

A final attempt to reconcile individual liability with the damage caps would be to base the amount of damages against an offending supervisor on the size of the employer. However, while gearing the amount of damages to the size of the employer makes sense if the employer is the party to be held liable, it makes no sense if it is an individual who is to be held liable. A plaintiff could presumably recover $50,000 from an offending supervisor at a company with 15 to 100 employees, but $300,000 from an offending supervisor at a very large corporation. This would be the case even if both supervisors earn the same salary and engaged in identical discriminatory conduct. Congress could not have intended the odd circumstances that would result from such a scheme of individual liability.

The inclusion of the compensatory and punitive damage caps of the 1991 CRA reflects the intent to preserve the original statutory scheme of Title VII. The fact that the lowest statutory cap on damages can only take affect when an employer has more than fourteen employees shows Congress’ desire to protect small entities and to omit individual defendants from the class of defendants subject to liability. The legislative history and statutory scheme of Title VII preclude the imposition of individual liability.

C. AGENCY THEORY

The Supreme Court has stated that in the context of analyzing employer liability under Title VII for the acts of agents, "Congress wanted courts to look to agency principles for guidance."\textsuperscript{213} Under the common law of agency, an employer could be held liable for the torts committed by its employees that occur within the scope and furtherance of their employment.\textsuperscript{214} Thus, the courts have used this doctrine of \textit{respondeat

\textsuperscript{211} See EEOC v. AIC Sec. Investigations, Ltd., 823 F. Supp. 571, 577 (N.D. Ill. 1993), aff’d in part and rev’d in part, 55 F.3d 1276 (7th Cir. 1995).
\textsuperscript{212} Id.
\textsuperscript{214} \textit{RESTATEMENT (SECOND) OF AGENCY} § 228 (1958).
superior\textsuperscript{215} to impute liability to an employer for the discriminatory acts of its supervisory personnel toward subordinate employees.\textsuperscript{216}

Although the Supreme Court's mandate was restricted to analyses of whether employers may be held liable for the discriminatory acts of their agents, some courts have applied agency principles to the different question of whether a supervisor may be held personally liable for discriminatory conduct.\textsuperscript{217} For example, in Griffith v. Keystone Steel & Wire Co.,\textsuperscript{218} the district court, concluding that the liability provision of Title VII permits suits against individual employees, found that:

the Restatement (Second) of Agency states that "Principle and agent can be joined in one action for a wrong resulting from the tortious conduct of an agent . . . and a judgment can be rendered against each." Thus the law of agency recognizes personal liability of agents.\textsuperscript{219}

However, any analysis of the agency provisions should first look to Congressional intent because liability under Title VII or the ADEA is determined by statute, not by common law. In defining the scope of Title VII and ADEA liability, Congress had to determine exactly who would be held responsible for illegal discrimination and may have used agency language to incorporate the doctrine of respondeat superior. After all, if the agency provision had not been included, the statutes might have been interpreted as merely imposing liability only for the discriminatory policies of the employer entity and not the acts of individuals. Because liability under Title VII and the ADEA is statutory, in order to incorporate respondeat superior principles, use of agency language is necessary, not redundant.

The Supreme Court discussed "agency principles" only in the context of traditional respondeat superior liability and did not apply them to the issue of individual liability under Title VII or the ADEA. Because there are two equally plausible explanations for the use of agency language, arguments based on this theory are at best inconclusive.

\textsuperscript{215} BLACK'S LAW DICTIONARY 1331 (6th ed. 1990).
\textsuperscript{217} As the Seventh Circuit Court of Appeals observed in dicta:

The Act imposes liability only on employers, but defines "employer" to include "agent," . . . a term that embraces but is more encompassing than "employee": all employees are agents, but not all agents are employees. . . . On this understanding, the statute is silent on the issue of derivative liability and it is left to the courts to decide as a matter of federal common law whether to apply the doctrine of respondeat superior . . .

Shager v. Upjohn Co., 913 F.2d 398, 404 (7th Cir. 1990).
\textsuperscript{218} 858 P. Supp. 802, 806 (C.D. Ill. 1994).
\textsuperscript{219} Id. (quoting RESTATEMENT (SECOND) AGENCY, § 359C(1) (1958)).
D. DETERRENCE

One of the goals of fair employment laws is to prevent illegal discrimination before it ever happens. The remedial scheme of Title VII serves the dual purposes of compensating victims of illegal employment discrimination for their losses and deterring future discriminatory conduct: "The best way to obey these laws is to have the threat out there that, if you do not obey the laws, it is your pocketbook that will reimburse the plaintiff..."220

Imposing personal liability in individual defendants would presumably further the goal of eliminating discrimination in the workplace because individuals forced to pay for their illegal acts are more likely to alter their behavior in the future.221 In the view of some courts, Congress could not have intended to prohibit prosecution of "the very persons who have engaged in the employment practices which are the subject of the action."222

However, imposing employer-entity liability has a substantial and sufficient deterrent effect of its own. "No employer will allow supervisory or other personnel to violate Title VII when the employer is liable for the Title VII violation. An employer that has incurred civil damages because one of its employees believe that he can violate Title VII with impunity will quickly correct that employee's erroneous belief."223

The question now becomes whether any benefits from the marginal increase

---


221 Id.


[This Court is unconvinced that exempting supervisors from individual liability will lead to... greater discrimination in the workplace... While supervisors may be exempt from individual liability, their employers do not wish to employ supervisors who discriminate and subject their employers to liability. Thus, supervisors hardly will be encouraged to violate Title VII by this ruling-potential termination from liable employers exists as an effective deterrent.

Id. at 469.


[If the person most responsible for invidious discriminatory actions (that is, the employee who actually discriminates) were shielded from personal liability, that person may never be sufficiently punished or deterred. Employers, particularly large organizations, might not be able to accurately identify all of those employees who engage in wrongful conduct. Failure to identify and punish such individuals may
in deterrence created by imposing individual liability outweighs the inefficiencies caused by the specter of judicial second-guessing of employment decisions.

E. CHILLING EFFECT

Aside from the evidence that Congress never contemplated individual liability, the strongest argument against holding supervisors personally responsible for their acts of employment discrimination is the effect such a law will have on business decisions. Individual liability has a chilling effect on supervisors by perversely encouraging them to limit their interactions to avoid exposure to liability thus leading to inefficiency.224 "Congress in the public sector context has recognized that liability of individual personnel for acts attributable to an institutional entity can have undesirable chilling effect on the ability of the entity to perform its functions."225

Additionally, however unjustified, increasing the scope of liability will increase the potential cost of hiring minorities and women in the eyes of employers. "Such suits actually provide employers with a distinctive-perhaps even a net disincentive-to hire minorities and women."226 Companies may react by hiring fewer employees, or simply moving elsewhere.

These concerns should make courts wary of imposing individual liability when Congress has failed to clarify its intentions. This is especially true when, as discussed further below, the plaintiff gains nothing from such suits.

F. THE FAIR EMPLOYMENT STATUTES WERE NOT MEANT TO FULLY REMEDY ALL DISCRIMINATION

Holding supervisors personally liable form their acts of discrimination will not increase the size of plaintiffs' awards. Furthermore, victims of discrimination will usually recover compensatory damages from the employer entity. In fact, employers often indemnify supervisors for their

---

employment decisions and are the ones who actually pay plaintiffs. Thus, nothing is gained from the creation of individual liability.

Some employers do become insolvent before victims are fully compensated. It is only in these rare cases that recovering from individual transgressors may be the only recourse for the plaintiffs. However, even in these situations, individuals would still not be liable for back pay. This is evidence that Congress did not intend to provide recovery for every instance of employment discrimination. As further proof, "Congress could have achieved eradication of discrimination with greater force by not excluding employers with less than fifteen employees and by not capping monetary damage awards, but it chose a more conservative path."\textsuperscript{227}

Recognition of individual liability is inconsequential because the employer entity will in most cases pay all the damages. "Although the purpose of Title VII admittedly is to eradicate employment discrimination, a court may not expand liability onto another class of persons merely to meet that purpose in the absence of congressional directive."\textsuperscript{228}

V. CONCLUSION

A proper statutory interpretation of Title VII and the ADEA shows that individual liability does not exist under the framework for ensuring equal employment opportunities established by Congress. The purpose of Title VII and the ADEA—to eliminate impermissible discrimination in the workplace—is appropriately served by imposing respondeat superior liability on the employer-entity. Supervisors who break the law will be quickly disciplined by their employers who must pay the bill. Thus, individual liability will have no additional effect in reducing discrimination. However, individual liability does encumber legitimate employment decisions.

In the end, it is Congress' job to weigh the competing policies in fashioning the best method for eliminating illegal employment discrimination.\textsuperscript{229} From the language and structure of the statutes, the conclusion

\begin{footnotes}
\item[228] Id.
\item[229] See 137 Cong. Rec. S15,479 (daily ed. Oct. 30, 1991) (statement of Sen. Bumpers) ("[T]he job of the U.S. Senate is to craft legislation on civil rights that is strong enough to dissuade people from discriminating against their employees on the basis of race, sex, disability, or religious belief but not so liberal that is literally promotes litigation. That is a very delicate, difficult balance to achieve.").
\end{footnotes}
is unavoidable that Congress did not intend to create individual liability under Title VII or the ADEA.

Henry P. Ting†

† J.D. 1996, Cornell Law School; Sc.B. 1991, Brown University. The author gratefully acknowledges Professor Winnie Taylor, Grace H. Yang, and John Mayer for their helpful comments and Valerie Cross for introducing me to this subject.