

1996

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Recommended Citation

Ming K. Ayvas, *The Circuit Split on Title VII Personal Supervisor Liability*, 23 Fordham Urb. L.J. 797 (1996).

Available at: <https://ir.lawnet.fordham.edu/ulj/vol23/iss3/9>

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Cover Page Footnote

The author wishes to dedicate this Note to her grandfather, Gerald A. Vickers, Sr., who in a different time, would have made an exceptional lawyer. The author is also grateful to Professor Terry Smith for his guidance in the writing of this Note.

THE CIRCUIT SPLIT ON TITLE VII PERSONAL SUPERVISOR LIABILITY

Ming K. Ayvas*

Introduction

In employment discrimination cases, supervisors are often shielded from personal liability for their willful violations of antidiscrimination laws. Consider *Wilson v. Wayne County*,¹ which concerned nineteen-year-old Wendy Wilson, a police dispatcher in the small town in which she had grown up,² and Leon “Buddy” Nutt, a fifty-five-year-old sheriff who had extensive service with the Sheriff’s Department.³ The town being small, Sheriff Nutt was aware of Wilson’s kidnap and rape at age eleven; he remembered the incident first-hand, and believed that Wilson’s psyche was still damaged from the tragic event.⁴ On a hot summer night, Sheriff Nutt arrived at headquarters at approximately 1:30 in the morning; Wilson was on dispatch duty.⁵ After Wilson mentioned that she was running low on complaint cards, Sheriff Nutt asked Wilson to join him in the office.⁶

Wilson followed, expecting to replenish her supply of complaint cards.⁷ However, Sheriff Nutt locked the door and turned out the lights; the surprised Wilson froze in fear.⁸ Nutt fondled her, and placed her hands upon his body.⁹ Although Wilson did not resist, she did not participate, and withdrew her hand when Nutt no longer held it against him.¹⁰ Nutt then pulled her to the floor and raped her.¹¹ Wilson did not resist because her resistance to her previous rape had failed.¹² Wilson testified, “[W]hen you go

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1. *Wilson v. Wayne County*, 856 F. Supp. 1254 (M.D. Tenn. 1994).
2. *Id.* at 1256.
3. *Id.*
4. *Id.*
5. *Wilson*, 856 F. Supp. at 1257.
6. *Id.*
7. *Id.*
8. *Id.*
9. *Wilson*, 856 F. Supp. at 1257.
10. *Id.*
11. *Id.*
12. *Id.*

through something like that one and it doesn't work . . . when you fight and it does not work . . . you don't feel like fighting again."¹³ She explained further that she did not resist because the sheriff was "in a position of authority."¹⁴

Federal district judge Thomas A. Higgins found that Sheriff Nutt's rape of police dispatcher Wendy Wilson constituted sexual harassment under Title VII.¹⁵ Because Wilson settled with her municipal employer, Nutt was the sole defendant at trial.¹⁶ Although disgusted by Nutt's actions,¹⁷ the judge dismissed the claim against Nutt in his individual capacity¹⁸ because the weight of authority does not recognize individual liability under Title VII, regardless of a supervisor's culpability.¹⁹

A split among the federal circuits has left individual liability under Title VII in a state of disarray. Title VII of the Civil Rights Act of 1964 (Title VII or the Act) prohibits employers from discriminating on the basis of race, sex, religion, color and national origin.²⁰ The Act further prohibits employers from retaliating against individuals who oppose discriminatory practices under Title VII.²¹

Title VII prohibits discrimination by employers.²² Under the Act, "employer" is defined as:

(b) a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of

13. *Wilson*, 856 F. Supp. at 1257 n. 5.

14. *Id.* at 1257.

15. *Id.* at 1259-60. Defendant was found guilty of both quid pro quo and hostile environment sexual harassment. The court also found Nutt guilty of the retaliatory discharge of Stevie Burns, a male co-worker of Wilson's who supported Wilson's allegations. *Id.* at 1260-61.

16. *Id.* at 1256.

17. The court stated:

The fact that an eighteen-year-old girl wore shorts during the summer months in Tennessee, wore a bathing suit on a canoe trip, and engaged in non-sexual horseplay with a co-worker her own age should not be perceived by even the most optimistic fifty-three-year-old man as a willingness to have sex with him.

Wilson, 856 F. Supp. at 1260.

18. *Id.* at 1260, 1264-65.

19. *Id.* at 1264-65.

20. 42 U.S.C. § 2000e-2(a) (1994) [hereinafter "Title VII" or "the Act"].

21. 42 U.S.C. § 2000e-3(a).

22. For the purposes of this note, the term "employer" shall refer to the employing entity, who pays employees and for whom all employees and supervisors are engaged. The term "supervisor" shall refer to supervisory individuals who exercise at least some control over employees' terms and conditions of employment. See BLACK'S LAW DICTIONARY 525, 1438 (6th ed. 1990).

twenty or more calendar weeks in the current or preceding calendar year, and *any agent of such person . . .*²³

However, courts are split over the intent of the Act's definition. Are employer's agents, such as supervisors, personally liable under Title VII;²⁴ or does Title VII merely subject employers to respondeat superior liability for the acts of an agent?²⁵

The Fourth and Tenth Circuits and numerous district courts hold individual supervisors liable for Title VII violations, or rely upon the existence of individual liability by declining to dismiss claims against individual defendants for failure to state a proper claim.²⁶ The Second, Fifth, Ninth, Eleventh and District of Columbia Circuits hold only employers, not individual supervisors, liable for Title VII violations.²⁷

This Note examines the competing rationales for and against individual supervisor liability under Title VII, and concludes that supervisor liability is the better reasoned view. Unlike other articles that have endorsed individual supervisor liability for Title VII discrimination,²⁸ this Note argues that respondeat superior liability may unduly punish employers, and that individual liability will serve to clarify when respondeat superior liability is appropriate under Title VII. This Note further differs from other articles by

23. 42 U.S.C. 2000e(b) (emphasis added).

24. Hereinafter "supervisor liability" or "expanded liability."

25. Hereinafter "employer liability" or "limited liability."

26. See, e.g., *Sauers v. Salt Lake County*, 1 F.3d 1122 (10th Cir. 1993) (allowing individual supervisor liability); *Paroline v. Unisys Corp.*, 879 F.2d 100 (4th Cir. 1989) (same), *rev'd in part, aff'd in relevant part*, 900 F.2d 27 (4th Cir. 1990); *Weeks v. Maine*, 871 F. Supp. 515 (D. Maine 1994) (same); *Johnson v. University Surgical Group Assoc.*, 871 F. Supp. 979 (S.D. Ohio 1994) (same); *Doe v. William Shapiro, Esq., P.C.*, 852 F. Supp. 1246 (E.D. Pa. 1994) (same); *Vakharia v. Swedish Covenant Hosp.*, 824 F. Supp. 769, 786 (N.D. Ill. 1993) (same).

27. *Tomka v. Seiler Corp.*, 66 F.3d 1295 (2d Cir. 1995) (precluding liability for actor who doesn't fulfil definition of "employer" under Title VII, absent statutory specification allowing individual liability); *Gary v. Long*, 59 F.3d 1391 (D.C. Cir. 1995) (same); *Grant v. Lone Star Co.*, 21 F.3d 649 (5th Cir.) (same), *cert. den.*, — U.S. —, 115 S. Ct. 574 (1994); *Miller v. Maxwell's Int'l, Inc.*, 991 F.2d 583 (9th Cir. 1993) (same), *cert. den.*, *Miller v. LaRosa*, — U.S. —, 114 S. Ct. 1049 (1994). The Eleventh Circuit has denied individual supervisor liability, but in cases involving public employers. *Busby v. City of Orlando*, 931 F.2d 764 (11th Cir. 1991).

28. Janice R. Franke, *Does Title VII Contemplate Personal Liability For Employee/Agent Defendants?*, 12 HOFSTRA LAB. L.J. 39 (1994) (individual liability appropriate on legal and policy grounds). See also Steven K. Sanborn, Note, *Employment Discrimination—Miller v. Maxwell's International, Inc.: Individual Liability For Supervisory Employees Under Title VII and the ADEA*, 17 W. NEW ENG. L. REV. 143 (1995) (same); Christopher Greer, Note, "Who, Me?": *A Supervisor's Individual Liability For Discrimination in the Workplace*, 62 FORDHAM L. REV. 1835 (1994) (same).

undertaking a comprehensive analogy to other federal discrimination statutes.

Part I explains how courts construe the term "employer" in Title VII to either allow or disallow direct supervisor liability. Part II discusses the rationales for and against individual supervisor liability. Part III concludes that individual supervisor liability is the better reasoned view, on construction, policy and comparative grounds. Part III proposes joint and several liability for supervisors and employers in all Title VII cases, which will clarify when respondeat superior liability is appropriate under Title VII. This proposal will deter Title VII violations, remedy plaintiffs appropriately and protect employers from undue vicarious liability.

I. Title VII Of The 1964 Civil Rights Act

The Civil Rights Act of 1964²⁹ provides broad protection for minorities and women.³⁰ Title VII of the Act prohibits employment discrimination on the basis of race, color, religion, sex or national origin,³¹ as well as retaliatory acts against employees who file complaints of employment discrimination.³² The Civil Rights Act of 1991 expanded Title VII relief to include the legal remedies of compensatory and punitive damages.³³ Some courts consider this

29. 42 U.S.C. §§ 2000e-2000e-17 (1994).

30. John A. Tisdale, *Deterred Nonapplicants in Title VII Class Actions: Examining the Limits of Equal Employment Opportunity*, 64 B.U. L. REV. 151, 154 (1984).

31. Title VII states in pertinent part:

(a) It shall be an unlawful employment practice for an employer-

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his 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 his employees or applicants for employment 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 race, color, religion, sex, or national origin.

42 U.S.C. § 2000e-2(a).

32. "It shall be an unlawful employment practice for an employer to discriminate against any of his employees . . . because he has opposed any practice made an unlawful employment practice by this chapter, or because he has made a charge, testified, assisted or participated in any manner in an investigation, proceeding, or hearing under this subchapter." 42 U.S.C. § 2000e-3(a).

33. 42 U.S.C. § 1981a(a)(1) (1994) states in pertinent part:

In an action brought by a complaining party under [Title VII, 42 U.S.C. § 2000e-5 or e-16] against a respondent who engaged in unlawful intentional discrimination . . . prohibited under [this Act], and provided that the complaining party cannot recover under section 1981 of this title, the com-

relief to be specifically suited to individual supervisor liability.³⁴ Prior to the 1991 amendments, only the equitable remedies of reinstatement and back-pay were available; these remedies were generally assessed against employers.³⁵

Seemingly irreconcilable policies combat one another under Title VII. Title VII's prohibition of employer discrimination on the basis of sex, race, color, religion and national origin,³⁶ clearly implicates the Act's public policy of eradicating workplace discrimination.³⁷ Conversely, the Act's limit on liability to employers who employ a minimum of fifteen persons, acknowledges the importance of small businesses to the American economy,³⁸ and a desire to limit government's intrusive reach into small businesses.³⁹

As civil rights legislation, Title VII was designed specifically to eradicate discrimination in the workplace; its stated purpose is to "eliminate, through the utilization of formal and informal remedial procedures, discrimination in employment based on race, color,

plaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section

However, these damages are limited according to the number of employees in the employer's workforce. 42 U.S.C. § 1981a(b)(3) thus provides:

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 than 14 and few than 101 employees . . . , \$50,000; (B) . . . who has more than 100 or fewer than 201 employees . . . , \$100,000; (C) . . . who has more than 200 and fewer than 501 employees . . . , \$200,000; and (D) . . . who has more than 500 employees . . . , \$3000,000.

34. *See, e.g.*, *Accordino v. Langman Constr., Inc.*, 862 F. Supp. 237, 239 (1994) (discussing effect of Civil Rights Act of 1991 in leading many courts to conclude that Congress' addition of compensatory and punitive damages to Title VII created personal liability in supervisors); *Bridges v. Eastman Kodak Co.*, 800 F. Supp. 1172, 1179-80 (S.D.N.Y. 1992) (same).

35. *See Tomka*, 66 F.3d at 1314 (citing pre-1991 remedies as supporting employer liability). *But cf.* *Cornwall v. Robinson*, 23 F.3d 694 (2d Cir. 1994) (affirming back pay award against individual defendants).

36. 42 U.S.C. § 2000e-2(a).

37. H.R. REP. NO. 914, 88th Cong., 2d Sess. 2401 (1964), *reprinted in* 1964 U.S.C.C.A.N. 2355, 2401 ("the purpose of this title is to eliminate, through the utilization of formal and informal remedial procedures, discrimination in employment based on race, color, religion, or national origin").

38. *See, e.g.*, 110 CONG. REC. 13,088 (1964) (remarks of Sen. Humphrey) (at time of Title VII's enactment, noting that small businesses constituted 92% of employers and played a significant role in America's economic well-being).

39. *See, e.g., id.* at 13,085-86 (1964) (remarks of Sen. Cotton) (voicing concern that small businesses that employ friends and family will be subject to excessive government regulation); 137 CONG. REC. 18,336, 18,337-38 (1991) (remarks of Sen. Hatch) (regarding 1991 addition of compensatory and punitive damages; voicing concern for overall impact on economy if small businesses should be forced to litigate discrimination claims); *id.* at 3857, 3874 (1991) (remarks of Rep. Moody) (same).

religion or national origin."⁴⁰ By broadening Title VII's remedies,⁴¹ Congress may have avowed its desire that the Act be construed broadly, consistent with its remedial purpose.⁴² The express purpose of these expanded remedies, which are especially well-suited to individual defendants, is "to strengthen existing remedies to provide more effective deterrence and ensure compensation commensurate with the harms suffered by victims of intentional discrimination."⁴³

On the other hand, Title VII manifests genuine economic and commerce concerns by excluding employers with fewer than fifteen employees from liability.⁴⁴ This provision is the result of floor debate on the burdens placed upon small businesses forced to comply with federal regulations and to defend against a Title VII suit.⁴⁵ Other factors considered were the protection of intimate and personal relations existing in small businesses;⁴⁶ Title VII's potential effect on the economy;⁴⁷ and the constitutionality of Title VII under the Commerce Clause.⁴⁸

Literally meaning "let the master answer,"⁴⁹ respondeat superior liability imputes liability to employers for their employee's wrongful conduct.⁵⁰ The doctrine holds a master responsible for the acts that its agent takes without care, when they injure an individual to

40. H.R. REP. NO. 914, 88th Cong., 2d Sess. 2401 (1964), *reprinted in* 1964 U.S.C.C.A.N. 2355, 2401.

41. Prior to the Civil Rights Act of 1991, Title VII allowed only the equitable remedies of reinstatement and back pay. *See supra* note 35 and accompanying text.

42. *See* H.R. REP. NO. 102-40(I), 102d Cong., 1st Sess. 113 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 651.

43. *See id.* at 556.

44. 42 U.S.C. § 2000e(b).

45. *See* 110 CONG. REC. 13,092 (1964) (Remarks of Sen. Cotton); *id.* at 13,088 (Remarks of Sen. Humphrey); *id.* at 13,092-93 (Remarks of Sen. Morse).

46. *See id.* at 6566 (letter from minority membership of House Committee on the Judiciary) (discussing concerns that Title VII would inject federal government into "partnership" with private business which would grant government "the power to dictate hiring, firing, and promotion policies of business").

47. *Id.* at 7088 (remarks of Sen. Stennis) (discussing breadth of Title VII coverage to "businesses, industries, individuals, employment, and labor unions" and effect of federal supervision of hiring, firing, promotion, compensation and the terms and conditions of employment under Title VII).

48. *Id.* at 7207-17 (remarks of Sen. Clark) (finding erroneous the averment made by some opponents that Title VII specifically, and the Civil Rights Act of 1964 generally, were unconstitutional).

49. BLACK'S LAW DICTIONARY, *supra* note 22 at 1311-12.

50. RESTATEMENT (SECOND) OF AGENCY § 219(1) (1958) [hereinafter "RESTATEMENT"] (master liable for torts of servants that are committed during the servant's course of employment).

whom the master owes a duty of care.⁵¹ Title VII is widely considered to implicate respondeat superior liability because the statute imposes a duty of care upon employers to investigate and remedy discriminatory conduct in the workplace.⁵²

However, circumstances may shield an employer from common law respondeat superior liability. For instance, an employer is relieved of respondeat superior liability if the relation of master and servant does not exist at the time of the injury.⁵³ This exception is based on the notion that a master should not be liable for conduct that falls outside an agent's legitimate scope of authority.⁵⁴ Nor are employers liable when the servant's acts are independent and therefore "unexpected" to the master.⁵⁵ Moreover, conduct which is taken for the servant's benefit, rather than for that of the master, falls outside the legitimate scope of the servant's authority and releases the employer of liability for it.⁵⁶

By hinging respondeat superior liability on the legitimacy of the agent's authority, the doctrine implicitly allows individual liability for actions taken without legitimate authority.⁵⁷ Agents may be held personally liable for actions which were undertaken without the apparent, actual or implied authority of the employer.⁵⁸ In addition, agency principles allow a master and agent to be joined in one action, allowing a judgment against each.⁵⁹ The agency doctrine thus contemplates joint and several liability for tortious con-

51. See *id.* §§ 214 (failure of agent to perform non-delegable duty of master results in master's liability); *id.* § 219(2)(c) (master's non-delegable duty mandates master's liability for servant's acts which breach duty).

52. See 42 U.S.C. § 2000e-2(a), see *supra* note 31 and accompanying text. See also MACK A. PLAYER, EMPLOYMENT DISCRIMINATION LAW, 481-82, 489-80 (1988).

53. See RESTATEMENT, *supra* note 50, § 219 (when master liable for torts of servants); cf. RESTATEMENT, *supra*, § 221 (what constitutes relation of master and servant. See also RESTATEMENT, *supra*, Title B, Introductory Notes, at 480).

54. RESTATEMENT, *supra* note 50, § 219(2) (master not subject to liability for torts of servants committed while acting outside scope of employment).

55. RESTATEMENT, *supra* note 50, § 229 (factors in determining whether servant acted within scope of employment include whether master has reason to expect that act will occur).

56. RESTATEMENT, *supra* note 50, §§ 228, 235 (act must be committed in contemplation of some benefit for master for employer to incur respondeat superior liability).

57. RESTATEMENT, *supra* note 50, § 219 (master liable for acts of servant committed in scope of employment, but not liable for acts outside of scope unless master intended conduct, acted recklessly, had non-delegable duty; or enabled servant's tort by agency relation).

58. RESTATEMENT, *supra* note 50, § 349C(1).

59. RESTATEMENT, *supra* note 50, §§ 217B, 359C(1) ("principal and agent can be joined in one action for a wrong resulting from the tortious conduct of an agent and principle, and a judgment can be rendered against each").

duct, against both agent and employer.⁶⁰ Therefore “[p]rincipal and agent can be joined in an action for a wrong resulting from the tortious conduct of an agent or that of an agent and principal, and a judgement can be rendered against each.”⁶¹

Whether respondeat superior is applied, and whether supervisors are thereby excluded from Title VII liability, turns largely on courts’ construction of the Act. Courts refer to canons of statutory construction to determine Title VII liability. These analyses begin by interpreting the Act in accordance with the statute’s plain meaning.⁶² Where courts find a statute’s plain language to dictate an outcome, further inquiries into legislative intent and public policy are precluded, and the inquiry ends.⁶³

However, courts divine contradictory interpretations from Title VII’s language. Courts which find statutory language to be ambiguous inquire into legislative intent, if a plain language interpretation will frustrate Congress’s clear intention.⁶⁴ Courts may also look to similar statutes as a guide to interpreting ambiguous statutes.⁶⁵ The more similar the language and policies between the comparative statutes, the more likely it is that Congress intended

60. RESTATEMENT, *supra* note 50, §§ 217B, 359C(1). *See also Tomka*, 66 F.3d at 1323-24 (Parker, J., dissenting).

61. RESTATEMENT, *supra* note 50, § 217B.

62. *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982) (in all statutory construction cases starting point is language). *See also Freytag v. Commissioner of Internal Revenue*, 501 U.S. 868 (1991) (if statute is unambiguous, judicial inquiry is complete except in rare circumstances); *United States v. Monsanto*, 491 U.S. 600, 611 (1989) (clear statutory language precludes further inquiry); *Rodriguez v. United States*, 480 U.S. 522, 526 (1987) (same). *See also* 2A NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION [hereinafter SUTHERLAND STAT. CONST.] § 46.04 (5th ed. 1994).

63. *See United States v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 242 (1989) (plain meaning of statute is conclusive “except in rare cases”); *Commissioner of Internal Revenue Service v. Asphalt Products Co.*, 482 U.S. 117, 121 (1987) (“Judicial perception that a particular result would be unreasonable may enter into the construction of ambiguous provisions, but cannot justify disregard of what Congress has plainly and intentionally provided.”). *See also* SUTHERLAND STAT. CONST., *supra* note 62, § 46.04; *cf.* SUTHERLAND STAT. CONST., *supra*, § 46.01.

64. *See Crandon v. United States*, 494 U.S. 152, 158 (1990) (courts may look to object, policy and design of ambiguous statute to determine meaning); *National Labor Relations Board v. Lion Oil Co.*, 352 U.S. 282, 288 (1957) (same). *See also* SUTHERLAND STAT. CONST., *supra* note 62, § 46.07.

65. *See Northcross v. Bd. Educ. Of Memphis City Schools*, 412 U.S. 427, 428 (1973) (statutes containing similar language and showing common “raison d’etre” should be interpreted equably); *cf.* *Thompson v. Mississippi*, 414 U.S. 890, 892 (1973) (comparing state statute to similar federal statute).

See also SUTHERLAND STAT. CONST., *supra* note 62, §§ 51.05, 52.02, 53.02. “Habit and caution seek the easy comfort of past decisions and shun responsibility for new determinations. Thus new legislation usually ties to past experience and prior enact-

the statutes to be read similarly.⁶⁶ But unfortunately, these interpretive tools have widened rather than resolved the split between the circuits.

II. Title VII Liability: The Competing Rationales

By comparing the arguments for limiting Title VII liability to employers and expanding liability to include supervisors, a principled choice can be made between the two. Both views rely on principles of statutory construction, the proper scope of judicial authority, analogous statutes, and competing public interests arguments.

A. Arguments For Limiting Title VII Liability To Employers

In *Tomka v. Seiler Corporation*,⁶⁷ a divided U.S. Court of Appeals for the Second Circuit precluded individual Title VII liability.⁶⁸ Carole Tomka, a travelling account executive recently assigned to a new-accounts position, alleged that three Seiler Corporation (Seiler) supervisors sexually assaulted her following a business dinner, and that Seiler terminated her because she complained of her alleged rape and threatened to pursue criminal charges.⁶⁹ Tomka further alleged that the assault was a continuation of eighteen months of verbal sexual harassment at Seiler.⁷⁰

Tomka asserted Title VII hostile environment sexual harassment and retaliatory discharge claims against Seiler and three supervisors.⁷¹ A majority of a Second Circuit panel agreed with Tomka that the district court impermissibly dismissed her claims against Seiler Corporation.⁷² However, it affirmed the lower court's dismissal of the claims against the supervisors in their individual capacities, on several grounds.⁷³

ment. Continuity of regulation and consistency of purpose is much more real than is generally supposed." SUTHERLAND STAT. CONST., *supra*, §§ 45.09-45.10.

66. See *Thompson*, 414 U.S. at 892 (state statute struck down where federal statute included significant requirement that state version did not); *cf. Northcross*, 412 U.S. at 428 (state statute interpreted similarly to federal counterpart where both contained similar provisions). See also SUTHERLAND STAT. CONST., *supra* note 62, § 52.02.

67. *Tomka v. Seiler Corp.*, 66 F.3d 1295 (2d Cir. 1995).

68. *Id.*

69. *Id.* at 1300.

70. *Id.*

71. *Tomka*, 66 F.3d at 1299.

72. *Id.* at 1299-1300 (reversing in part and remanding for further proceedings).

73. *Id.*

Acknowledging that "the plain meaning of a statute is normally controlling," the majority noted that a facial reading of Title VII's agent provision implied individual liability.⁷⁴ However, it reasoned that Title VII's failure to explicitly allow agent liability is dispositive of Congress's intent not to hold individuals liable.⁷⁵ Thus, *Tomka* was considered one of "the rare cases [in which] the literal application of a statute will produce a result demonstrably at odds with the intentions of the drafters."⁷⁶ Under such circumstances, "it is the 'intentions of the legislators, rather than the strict language, that controls.'" ⁷⁷

Bypassing Title VII's plain language, the majority was compelled to interpret Congress's intentions. The majority relied upon Title VII's statutory scheme and its remedial provisions to find that allowing agents to be held liable under Title VII for discriminatory conduct "would lead to results that Congress could not have contemplated."⁷⁸ Basic but unspoken assumptions about the hierarchy of public interests underlie the several inferences which the *Tomka* majority drew from Title VII's legislative history.⁷⁹

First, the majority reasoned that because Title VII's statutory scheme excluded employers with fewer than fifteen employees from liability, it was necessarily "inconceivable" that Congress would allow liability to run against individual employees.⁸⁰ Con-

74. *Id.* at 1313-14. The agent provision defines employers who may be held liable under Title VII as "a person engaged in an industry affecting commerce who has fifteen or more employees . . . and any agent of such person . . ." 42 U.S.C. § 2000e(b) (emphasis added).

75. *Tomka*, 66 F.3d at 1315-16. *But cf.* *Jendusa v. Cancer Treatment Ctrs. of Am., Inc.*, 868 F. Supp. 1006 (N.D. Ill. 1994), where the omission of plain language precluding individual liability was significant. The judge noted that the legislative history of the 1991 amendments reveals Congress' knowledge of the practice of holding individuals liable under Title VII: "[i]f Congress found this practice objectionable or otherwise inconsistent with Congressional intent it surely could have voiced that opinion directly somewhere in the comprehensive reports accompanying the 1991 Act." *Id.* at 1016.

76. *Tomka*, 66 F.3d at 1315-16 (citing *Samuels, Kramer & Co. v. C.I.R.*, 930 F.2d 975, 979 (2d Cir. 1982)).

77. *Id.* at 1314.

78. *Id.* See also *Accordino*, 862 F. Supp. 237 (refusing to infer Congress's affirmative desire to include supervisors within Title VII's scope because and refused to infer Congress' affirmative desire to include supervisors within Title VII's scope because "[b]roadening the sweep of Title VII is a task for Congress, not the courts"). *Id.* at 238-39.

79. See *Tomka*, 66 F.3d at 1314-16 (rationale favoring employers without so specifying).

80. *Id.* at 1314 (citing *Miller*, 991 F.2d 583). Prior to *Tomka*, *Miller* was leading authority in precluding individual Title VII liability. *Miller* reasoned that Congress decided to protect small employers "in part because Congress did not want to burden

gress's intention to exclude individuals from Title VII liability is not apparent on the statute's face; however, the majority found support for its holding in the statute's legislative history.⁸¹ Floor debate addressed defense and compliance costs which some feared would overly burden small businesses.⁸² The legislative history also revealed an absence of any mention of agent liability.⁸³

The majority further reasoned that Title VII's remedial provisions are intended to limit liability to employers via respondeat superior.⁸⁴ First, Title VII's pre-1991 equitable remedies of reinstatement and back-pay were of a type that only employers could provide.⁸⁵ The majority also found support in the Civil Rights Act of 1991's expansion of Title VII relief to include compensatory and punitive damages.⁸⁶ Although such money damages are of the type that an individual could be expected to pay, the majority reasoned that Title VII's calibration of damages to workforce size indicated that "Congress contemplated that only employer-entities could be held liable for compensatory and punitive damages"⁸⁷

small entities with the costs associated with litigating discrimination claims." 991 F.2d at 587. Thus, individuals were also excluded. *Id.*

81. *Tomka*, 66 F.3d at 1314-16. *But cf.* *Archer v. Globe Motorists Supply Co.*, 833 F. Supp. 211 (S.D.N.Y. 1993) (denying summary judgment for individual defendants who owned employer because employer met Title VII's statutory minimum of 15 employees).

82. *Tomka*, 66 F.3d at 1314 (citing 110 CONG. REC. 13,088, 13,092-93). However, the majority noted that this concern did not directly support preclusion of individual Title VII liability.

83. *Id.* (citing 110 CONG. REC. 6566 (letter from minority membership of the House Committee on the Judiciary) and 110 CONG. REC. 7212 (Remarks of Sen. Clark)).

84. *See also Schaffer v. Ames Department Stores, Inc.*, 889 F. Supp. 41 (D. Conn. 1995) (construing Title VII's failure to specify individual liability in 1991 amendments and to remove "small entity" exemptions to disallow individual liability); *Saville v. Houston County Healthcare Authority*, 852 F. Supp. 1512, 1524-25 (M.D. Ala. 1994) (same); *Smith v. Capitol City Club of Montgomery*, 850 F. Supp. 976, 980 (M.D. Ala. 1994) (citing the damage caps' failure to apportion damages between individual and institutional defendants, the court was "convinced that the damage caps as they exist indicate Congress' intent that a plaintiff collect damages from the employer [only].").

85. *Tomka*, 66 F.3d at 1314. *But cf.* *Cornwall v. Robinson*, 23 F.3d 694 (2d Cir. 1994) (back pay award against individual defendants affirmed).

86. *Tomka*, 66 F.3d at 1314. *See also* 42 U.S.C. § 1981(a)(1), *supra* note 33 (text of amendment).

87. *Tomka*, 66 F.3d at 1315. *See also Verde v. City of Philadelphia*, 862 F. Supp. 1329, 1331 (E.D. Pa. 1994), where claims against the individual defendants were dismissed because Congress did not specifically include supervisors within Title VII's scope. "Had Congress intended such liability, Title VII would have expressly included supervisors and would have discontinued the exemption for small employers." *Verde*, 862 F. Supp. at 1333-34 (citing *Miller*, 981 F.2d at 588 n.2).

Finally, the majority dismissed the contention that individual Title VII liability was supported by the existence of individual liability under Section 1981 of the Civil Rights Act of 1871.⁸⁸ Like Title VII, Section 1981 is an antidiscrimination statute which is often invoked in employment related disputes.⁸⁹ However, Section 1981 covers only racial discrimination, while Title VII covers race, sex, religious and national origin discrimination.⁹⁰ The dissent noted that Congress's alleged exclusion of individual Title VII liability was undermined by the fact that both employers and agents face unlimited civil liability under Section 1981.⁹¹ The majority dismissed the analogy:

[T]he fact remains, however, that we are concerned here with an interpretation of Title VII, not [Section] 1981 . . . [s]ignificant differences in the statutory enforcement mechanism, coverage, and remedial provisions of [Section] 1981, as distinguished from Title VII, reveal that the breadth of one statute provides no support for divining the intent of Congress in limiting the coverage of the other.⁹²

B. Arguments For Expanding Title VII Liability To Include Supervisors⁹³

One example of a case advancing the position that Title VII contemplates individual liability is *Bishop v. Okidata, Inc.*,⁹⁴ which analyzed Title VII precedent to allow individual supervisor liability under the Americans with Disabilities Act (ADA).⁹⁵ In *Bishop*,

88. *Tomka*, 66 F.3d at 1315. See also 42 U.S.C. § 1981.

89. See *infra* notes 168-70 and accompanying text.

90. See 42 U.S.C. § 1981; cf. 42 U.S.C. § 2000e-2(a).

91. *Tomka*, 66 F.3d at 1324 (Parker, J., dissenting) (citing 42 U.S.C. § 1981); cf. *Tomka*, 66 F.3d at 1316 (Scheidlin, J., writing for majority and responding to dissent).

92. *Tomka*, 66 F.3d at 1316-17.

93. Because no single case allows individual liability while adequately discussing each of the arguments for individual Title VII liability, this discussion relies on two model cases: *Bishop v. Okidata, Inc.*, 864 F. Supp. 416 (D. N.J. 1994), and *Vakharia v. Swedish Covenant Hosp.*, 824 F. Supp. 769 (N.D. Ill. 1993).

94. 864 F. Supp. 416 (D. N.J. 1994).

95. *Id.* at 422-23. Curiously, and perhaps significantly, the cases which allow individual Title VII liability do not state their rationales as clearly or eloquently as *Bishop*. However, courts routinely analyze Title VII precedent to interpret ambiguous terms under the ADA. See, e.g., *DeLuca v. Wiener Industries, Inc.*, 857 F. Supp. 606 (N.D. Ill. 1994) (analyzing Title VII liability to find that supervisors may be individually liable under ADA); *Janopoulos v. Harvey L. Walner & Assoc.*, 835 F. Supp. 459 (N.D. Ill. 1993) (same). But see *Vodde v. Indiana Michigan Power Co.*, 852 F. Supp. 676 (N.D. Ind. 1994) (Title VII precedent precluding individual liability under

plaintiff Cheryl Bishop asserted claims against Okidata and two individual supervisors under the ADA,⁹⁶ alleging discrimination on the basis of her cancer.⁹⁷ The supervisors moved for summary judgement, claiming that they could not be held individually liable under the ADA.⁹⁸

In determining whether agent liability was available,⁹⁹ Judge Joseph F. Irenas looked to Title VII for guidance.¹⁰⁰ The judge found no preclusion of individual liability under Title VII or the ADA, and thus, denied the supervisors' motion to dismiss.¹⁰¹ Because both Title VII's and the ADA's language are virtually identical,¹⁰² the conclusion that agent liability is available under Title VII supported the same conclusion under the ADA.¹⁰³

First, the judge relied on the language of Title VII and the ADA.¹⁰⁴ Like Title VII, the ADA prohibits discrimination by employers with more than fifteen employees and their agents.¹⁰⁵ Agents are generally considered to include all individuals possess-

Title VII and ADA); *Dunham v. City of O'Fallon*, 1994 WL 228598 (E.D. Mo. May 12, 1994) (same).

96. *Bishop*, 864 F. Supp. at 419.

97. *Id.* at 419. The alleged discrimination included: announcing her confidential illness to others; passing her over for ten jobs; ordering her to return to work within two weeks of cancer surgery; refusing her time to take chemotherapy treatments; demoting her; decreasing her salary; negatively commenting upon her cancer in work evaluations; and failing to advise her of training opportunities. *Id.*

98. *Id.* at 422.

99. ADA case law, like Title VII, is unsettled on whether supervisors are subject to individual liability under the ADA. *Bishop*, 864 F. Supp. at 422.

100. *Id.* See generally *E.E.O.C. v. A.I.C. Security Investigations, Ltd.*, 55 F.3d 1276, 1280 (7th Cir. 1995) ("courts routinely apply arguments regarding individual liability to [Title VII, the ADA and the ADEA] interchangeably"); see also *Jendus*, 868 F. Supp. at 1010-13 (ADA case analyzed under Title VII authority).

101. *Bishop*, 864 F. Supp. at 423.

102. *Id.* at 422.

103. See *id.* at 423.

104. See also *Sauers*, 1 F.3d at 1125 (supervisors may be liable as "agents" of employer); *Cassano v. DeSoto*, 869 F. Supp. 537 (N.D. Ill. 1994) ("read in the normal way (that is, as a matter of plain meaning), [agent] provisions would appear to make individuals . . . as well as [the] corporate employer . . . potentially liable." Any other reading "explain[s] away the normal reading of the statutory provisions."). *Id.* at 538-39.

See also *King v. Ohse Meat Products, Inc.*, 1990 WL 254965 (D. Kan. Dec. 18, 1990) (discussing expansion of "employer" definition to include supervisors who act as agents of their employers); *Kelly v. Richland Sch. Dist. 2*, 463 F. Supp. 216, 218 (D. S.C. 1978) (denying dismissal of individual capacity suit where supervisor was "agent" of employer/school district, who as "agent of the District, is also an employer and can be held accountable for its violation").

105. *Bishop*, 864 F. Supp. at 422. See ADA, 42 U.S.C. § 12111(5)(A); cf. Title VII, 42 U.S.C. § 2000e(5).

ing supervisory authority.¹⁰⁶ The judge reasoned that “[t]he plain language of the ADA . . . indicates that ‘agents’ of those who employ more than fifteen workers are ‘employers’ and thus liable under the statute. Supervisory employees are clearly ‘agents,’ and thus the distinction between ‘individual’ and ‘[employer]’ liability should be abandoned in ADA cases.”¹⁰⁷

The judge also dismissed analogies between small employers and individual defendants as support for limiting liability to traditional employers. Judge Irenas stated: “[T]he court sees no inconsistency in imposing individual liability on supervisory employees of large employers while exempting small employers and their agents [S]mall employers are exempted from the ADA because of the undue burden compliance would put on their financial condition.”¹⁰⁸

In addition, the judge questioned why individuals should be shielded from liability for their tortious conduct under the ADA. Suggesting that excluding individuals from ADA liability did not follow from Congress’s exclusion of small employers, Judge Irenas noted that “[i]ndividuals . . . have always been liable for torts committed in the workplace, including indemnification of their employer where the plaintiff proceeds directly against the employer under the theory of respondeat superior.”¹⁰⁹ Individual liability is reasonable under Title VII because “the traditional theory was that only the employee, and not the employer, was liable for intentional torts such as those contemplated by [Title VII’s compensatory and punitive damages].”¹¹⁰ The judge thus considered respondeat superior to provide no basis upon which to preclude individual liability.¹¹¹

106. *Bishop*, 864 F. Supp. at 422.

107. *Id.* at 423.

108. *Id.* at 423-24.

109. *Id.* at 424.

110. *Bishop*, 864 F. Supp. at 424.

111. *See id.*; *Jendusa*, 868 F. Supp. at 1012 (“Neither the Ninth Circuit nor the Fourth Circuit cited any authority—by way of legislative history or otherwise—as support for their assertions [that “agent” language was intended to incorporate respondeat superior liability].”); *E.E.O.C. v. Vucitech*, 842 F.2d 936, 942 (7th Cir. 1988) (joint and several Title VII liability against employers and their agents via court-ordered contribution makes individual Title VII liability conceivable).

But cf. Miller, 991 F.2d at 587 (dismissing complaint in individual capacity because respondeat superior precludes individual liability); *Weiss v. Coca-Cola Bottling Co.*, 772 F. Supp. 407, 411 (N.D. Ill. 1991) (dismissing suit against supervisor in his individual capacity because his actions were taken as surrogate for employer); *Babb v. Bridgestone/Firestone*, 861 F. Supp. 50, 52 (M.D. Tenn. 1993) (because supervisors authority arises from employer interests liability may only be assessed against the employer).

Additional reasons to support individual supervisor liability under Title VII are offered in *Vakharia v. Swedish Covenant Hospital*.¹¹² Plaintiff Vakharia served for fifteen years as an anaesthesiologist on the medical staff of the Swedish Covenant Hospital.¹¹³ She alleged that an effort was made to force out three female Asian anaesthesiologists, including Vakharia.¹¹⁴ The department chair relegated the Asian females to a lower or "junior" class of anaesthesiologists, restricted their practices, singled out Vakharia for criticism and passed her over for promotion.¹¹⁵ Vakharia brought suit against the hospital, her supervisors, physicians and members of the Board of Directors, in their individual capacities.¹¹⁶

Chief Judge James B. Moran denied defendants' contention that Vakharia's complaints must be dismissed because individual liability is not available under Title VII.¹¹⁷ He relied on a simple public policy argument.¹¹⁸ Noting that "Title VII always has served two purposes: to compensate the victims of discrimination . . . and to deter discrimination in the future,"¹¹⁹ the judge reasoned that "to conclude that personal accountability of supervisory employees is unnecessary to reinstate victims or to award them their back pay is to neglect Title VII's broader goal of eradicating discrimination."¹²⁰ Judge Moran stated:

[I]f the people who make discriminatory decisions do not have to pay for them, they may never alter their illegal behavior and the wrongdoers may elude punishment entirely, while the victim may receive no compensation whatsoever. That outcome is incompatible with the broad remedial purposes of the ADEA and Title VII, which were intended to provide all "necessary relief" and to ensure "complete justice."¹²¹

112. *Vakharia v. Swedish Covenant Hosp.*, 824 F. Supp. 769 (N.D. Ill. 1993).

113. *Id.* at 772.

114. *Id.*

115. *Id.*

116. *Vakharia*, 824 F. Supp. at 772.

117. *Id.* at 786.

118. *Id.* at 785-86. See also generally *Jendus*, 868 F. Supp. at 1011 (arguing that supervisory agents are included in the liability scheme of Title VII because contrary readings undermine the eradication of workplace discrimination); *Tomka*, 66 F.3d at 1319 (Parker, J., dissenting) (same).

119. *Vakharia*, 824 F. Supp. at 785-86 (citing *Albermarle Paper Co. v. Moody*, 422 U.S. 405, 417-18 (1975)).

120. *Id.* at 785.

121. *Id.* at 786 (citing *Albermarle Paper Co.*, 422 U.S. at 418). See also *Dague v. Riverdale Athletic Ass'n.*, 99 F.R.D. 325 (N.D. Ga. 1983) ("It is inconceivable that Congress could have intended to exclude from liability the very persons who have

Judge Moran also pointed to Section 1981 of the Civil Rights Act of 1871 as support for agent liability under Title VII.¹²² The judge noted that defendants may be liable under both Title VII and Section 1981, even if the defendant is not the plaintiff's employer *per se*.¹²³ Section 1981 allows individuals to be held "personally liable for civil rights violations that they commit while working as agents of larger institutions, provided that their individual liability is based on individual acts distinct from institutional policy set by their superiors."¹²⁴ Individual Title VII liability arose from analogous liability under Section 1981. Logically, "individual defendants should be treated the same way under . . . Title VII as they are under Section 1981."¹²⁵

These arguments, like those in *Tomka*, have been criticized by opposing authority. Both views use similar terms and rationales to support their divergent conclusions. For instance, principles of statutory construction simultaneously support the "plain language" of agent liability,¹²⁶ and the "plain language" of employer liability.¹²⁷ Similarly, judicial authority, congressional intent and public policy are cited to support contrary viewpoints. Thus, the debate, as currently framed, provides no conclusive guidance on the issue of individual Title VII liability.

engaged in the employment practices which are the subject of the action. Absent some showing that such was Congress' intent, this court must deny the motion to dismiss."). *Id.* at 327.

See also *Schallehn v. Central Trust and Sav. Bank*, 877 F. Supp. 1315, 1334 (N.D. Iowa 1995); *Jendus*, 868 F. Supp. at 1011 (ADA case analyzed under Title VII approved agent liability on public policy grounds); *Jeter*, 554 F. Supp. at 952 n.20 (allowing agent liability because excluding individual actors from liability "encourage[s] supervisory employees to violate Title VII with impunity").

122. *Vakharia*, 824 F. Supp. at 784. See also *Tomka*, 66 F.3d at 1323 (Parker, J., dissenting) (Title VII amendments attempted to draw "parity" between Section 1981's agent liability and Title VII); *Bishop*, 864 F. Supp. at 423 (individual liability for decision-making employees under Section 1981 supports agent liability under Title VII).

123. *Vakharia*, 824 F. Supp. at 784. For instance, employment agencies are not an employer, but who send applicants to potential employers, may be liable if they discriminatorily refuse to refer applicants. See 42 U.S.C. § 2000e-2(b). Under section 1981, any person who interferes with employment contracts may be held personally liable even if they are not the plaintiff's employer. 42 U.S.C. § 1981.

124. *Vakharia*, 824 F. Supp. at 784.

125. *Id.* at 785.

126. See, e.g., *supra* notes 104-107 and accompanying text.

127. See, e.g., *supra* notes 74-77 and accompanying text.

III. Resolving The Split

A. The Better Reasoned View

The shared terms of this debate demonstrate that Title VII and its legislative history provide support for both limiting Title VII liability to employers, and enlarging liability to include supervisors. Supporters of opposing views acknowledge the correctness of the legal theories which the opposition applies, but disagree with the opposition's application of those principles. Consequently, this split must be resolved by analyzing the divergent authorities' application of the underlying legal principles, rather than by analyzing the statute's language. In order to discuss the validity of the rationales underlying the competing ideologies, we must determine a hierarchy for Title VII's competing policy goals.

Ultimately, it is public policy that frames this debate; the statutory construction, judicial authority and congressional intent rationales are merely by-products of public policy determinations. Courts invoke rationales to justify their initial, if unstated preferences for certain social interests. Thus, all other rationales follow from weighing the conflicting public policies.

The better reasoned view is that *all* wrongdoers should be held jointly and severally liable under Title VII. Both supervisors and their employers can be held directly liable for their violative conduct: supervisors, for their discriminatory actions; employers, for failing to remedy a discriminatory situation which was created by a supervisor. There should be no respondeat superior liability under Title VII.

1. Public Policy Supports Individual Supervisor Liability

As previously discussed, Title VII implicates contradictory policy goals.¹²⁸ On the one hand, Title VII's purpose is to eradicate workplace discrimination.¹²⁹ America's desire to guarantee equal opportunity in the workplace is manifest in the Act's prohibition of arbitrary discrimination.¹³⁰ Conversely, however, the Act excludes small employers from Title VII liability.¹³¹ This exception implicitly recognizes that small business is crucial to the American economy and should be protected from crushing liability.¹³²

128. See *supra* notes 36-48 and accompanying text.

129. See *supra* note 40 and accompanying text.

130. See *supra* notes 36-37 and accompanying text.

131. See *supra* note 38 and accompanying text.

132. See *supra* notes 38-39 and accompanying text.

The seemingly irreconcilable policies implicated by Title VII can be reconciled. Although the Act manifests commerce concerns,¹³³ Title VII is, in the final analysis, civil rights legislation which specifically seeks to eradicate workplace discrimination.¹³⁴ As between the purpose of the Act and one of its subsections, the purpose of the Act as a whole should control over the purpose underlying a subsection of the Act. Otherwise, the tail will wag the dog: the purpose of an exception will frustrate the purpose of the Act. This becomes apparent if we compare the validity of deterrence arguments for and against agent liability, to the purposes of Title VII's limiting provisions.

Many argue that individual liability will not increase Title VII's deterrent effect.¹³⁵ The strength of this rationale is its intuitive appeal: it is sufficient that employers discourage discriminatory behavior for fear of being subjected to respondeat superior liability because supervisors will avoid discriminatory conduct for fear of being subjected to discipline or termination. Moreover, to infer individual liability into Title VII would, at best, increase deterrence by applying principles of Title VII public policy, rather than Title VII's actual language. Title VII enumerates specific procedures for bringing private discrimination suits.¹³⁶ Thus, courts may be tempted to usurp Congress's authority by creating law via statutory interpretation contrary to the plain language of existing laws.

However, a more detailed analysis demonstrates the merit of the deterrence argument. The argument that supervisor liability will not additionally deter violative conduct assumes that derivative liability routinely occurs, and that employees will refrain from discriminatory conduct for fear of being subject to discipline for causing derivative liability. However, derivative liability is not assured.¹³⁷ For example, claimants' complaints may be dismissed as

133. See *supra* notes 38-39 and accompanying text.

134. See *supra* notes 29-33, 40 and accompanying text.

135. See, e.g., *Miller*, 991 F.2d at 588 (employers have proper incentives to discipline supervisors and thereby dissuade Title VII violations). See also *A.I.C. Security Investigations, Ltd.*, 55 F.3d at 1282 (acknowledging increased deterrence arising from personal liability but questioning its value beyond deterrence value of employer discipline).

136. 42 U.S.C. § 2000e-5(f)(1)(A).

137. See Bruce C. Smith, Comment, *When Should An Employer Be Held Liable For The Sexual Harassment By A Supervisor Who Creates A Hostile Work Environment? A Proposed Theory Of Liability*, 19 ARIZ. ST. L. J. 285, 293 (1987) (discussing a survey performed by the Harvard Business Review in which only four percent of high-level managers would express strong disapproval to a male manager who was observed standing impermissibly close to his visibly upset and flustered female secretary).

the product of an oversensitive nature or mistaken impression. In such cases, supervisors would not be penalized for claims that the employer considers to be misperceptions. Moreover, an individual's discriminatory tendencies are not necessarily controlled by rational behavior. This is evident from the large number of Title VII actions which arise in vicarious employer liability jurisdictions. Those supervisors who violate Title VII despite their employer's liability presumably believe that they will escape discipline by their employers.

Ultimately, the value of increasing deterrence by imposing supervisor liability outweighs the value of limiting Title VII liability to employers. The increased deterrence which arises from supervisor liability clearly supports Title VII's underlying purpose of eradicating workplace discrimination. The policies which underlie Title VII's exclusion of small employers are secondary to Title VII's basic purpose. If the legislation's key purpose was to protect small business and management, the subject of the Act would be limiting tort liability to small businesses, rather than civil rights.

2. *Statutory Construction, Judicial Authority And Congressional Intent Do Not Preclude Supervisor Liability*

Establishing a hierarchy of public policies demonstrates that congressional intent supports individual supervisor liability. Once congressional intent is determined from the overall purpose of Title VII, judicial authority is limited to applying the statute consistent with the intention of the legislation. The intention of Title VII is to eradicate discrimination.¹³⁸ Placing the limited intention to cap liability above the underlying purpose of the Act itself exceeds proper judicial authority because this reading contradicts the primary legislative intent to eradicate discrimination. Courts must defer to the statute's main purpose.

More importantly, supervisor liability is not inconsistent with Title VII's limiting provisions. Title VII limits liability to employers and their agents employing fifteen or more persons;¹³⁹ supervisor liability does not broaden that class to those employing less than fifteen persons. Title VII also limits compensatory and punitive damages according to workforce size.¹⁴⁰ Supervisor liability neither changes these limits, nor applies them to individual supervisors contrary to the statute's face or explicit legislative history.

138. *See supra* note 40 and accompanying text.

139. 42 U.S.C. § 2000e(b).

140. 42 U.S.C. § 1981a(b)(3).

Moreover, supervisors are not typically engaged in the small business entrepreneurial activity that Congress sought not to discourage.¹⁴¹ Because agent liability does not invalidate Title VII's limiting provisions, supervisor liability is not inappropriate under principles of statutory construction.

Even assuming *arguendo* that Title VII's plain language is unclear or contradictory, proper construction demands that the second level of inquiry be legislative purpose.¹⁴² The judiciary is bound to interpret in accordance with Title VII's intended purpose: to eradicate and remedy workplace discrimination. Individual liability furthers Title VII's purpose by personalizing liability for violative conduct. Thus, in order to comport with proper judicial authority, courts must interpret Title VII to allow agent liability.

Some courts limit Title VII liability to employers because of Congress's alleged silence on agent liability.¹⁴³ These courts assert that inferring personal liability creates law and is therefore an abuse of judicial authority.¹⁴⁴ However, because respondeat superior liability is not specified in Title VII,¹⁴⁵ employer liability for the acts of its agent may also breach judicial authority. In fact, agent liability may be justifiable while vicarious liability may not. Support for agent liability can be found in the Act's inclusion of agents within employers who may be held liable under Title VII.¹⁴⁶ Conversely, Title VII offers no direct support for, or reference to, respondeat superior liability.¹⁴⁷

141. In order to not discourage entrepreneurial activity, Congress excluded "mom and pop" employers from liability. See 42 U.S.C. § 2000(e)b. Such small businesses rarely employ supervisors, but instead, are managed by their owners. Conversely, large and mid-sized corporations are the primary employer of supervisory middle-management. Thus liability for supervisors, who are generally not employed by entrepreneurs, does not endanger the entrepreneurial activity which Congress' sought to protect.

142. See *Crandon*, 494 U.S. at 158 (courts may look to legislative purpose once it is determined that statute is ambiguous); *American Tobacco Co.*, 456 U.S. at 526 (same); *Lion Oil Co.*, 352 U.S. at 288 (same). See also SUTHERLAND STAT. CONST. §§ 46.01, 46.04, *supra* notes 62-63 and accompanying text.

143. *Tomka*, 66 F.3d at 1315 (reasoning that Congress would have specified individual liability if such was intended individual under Title VII); *Grant*, 21 F.3d at 652-53 (same); *Miller*, 991 F.2d at 588 n. 2 (same).

144. See, e.g., *Tomka*, 66 F.3d at 1314 (suggesting that individual that judicial readings which infer individual liability do "not comport with Congress' clearly expressed intent" in enacting Title VII); *Miller*, 991 F.2d at 588 (same).

145. 42 U.S.C. § 2000e(b); 42 U.S.C. § 1981a(a)-(b).

146. 42 U.S.C. § 2000e(b) (including agents within definition of employers who may be held liable under Title VII).

147. See *supra* notes 111, 145 and accompanying text. See also *Bishop*, 864 F. Supp. at 424 (noting absence of explicit reference to respondeat superior).

3. *Title VII Is Not Limited To Respondeat Superior Liability*

Proponents of individual liability argue that the wholesale importation of respondeat superior principles into Title VII is an invalid application of judicial authority.¹⁴⁸ Conversely, courts that exclude individual supervisors from Title VII liability commonly assume that Title VII contemplates respondeat superior liability.¹⁴⁹ Respondeat superior concepts are not expressly mentioned in Title VII,¹⁵⁰ and Title VII's legislative history is notably devoid of express contemplation of respondeat superior liability.¹⁵¹

Assuming that respondeat superior is a valid Title VII liability scheme, some courts apply the respondeat superior and agency doctrines inappropriately to hold that respondeat superior liability precludes supervisor liability.¹⁵² However, under the common law the respondeat superior doctrine allows for personal supervisor liability as well.¹⁵³ Those courts that preclude individual liability on the basis of respondeat superior liability forget that

Individuals . . . have always been liable for torts committed in the workplace, including indemnification of their employer where the plaintiff proceeds directly against the employer under the theory of respondeat superior.¹⁵⁴

Moreover, limited applications of respondeat superior and agency principles contravene Supreme Court mandates that courts should look to agency principles in Title VII cases.¹⁵⁵ In *Meritor Sav. Bank FSB v. Vinson*,¹⁵⁶ the Supreme Court stated, "Congress

148. See, e.g., *Jendusa*, 868 F. Supp. 1006; *Tomka*, 66 F.3d at 1319 (Parker, J., dissenting). This contradicts the popular argument that personal liability is precluded by Congress's presumed intent that respondeat superior liability be invoked. *Miller*, 991 F.2d 583. This popular argument for employer liability is often cited by courts precluding personal liability for supervisors. *Id.*; cf. *Jendusa*, 868 F. Supp. at 1008.

149. E.g., *Grant*, 21 F.3d at 531-53; *Miller*, 991 F.2d at 587; *Busby*, 931 F.2d at 772.

150. 42 U.S.C. §§ 2000e.

151. See *supra* note 111, 145 and accompanying text; but see notes 80-83 and accompanying text.

152. See generally *Miller*, 991 F.2d at 587 (individual liability precluded by respondeat superior liability).

153. RESTATEMENT, *supra* note 50, §§ 217B, 359C(1) (allowing joinder of master and servant and judgement against each). See also *supra* notes 57-61 and accompanying text.

154. *Bishop*, 864 F. Supp. at 423 (citing W. PAGE KEETON ET AL., PROSSER AND KEETON ON TORTS § 51).

155. See *infra* notes 156-58 and accompanying text.

156. *Meritor Sav. Bank FSB v. Vinson*, 477 U.S. 57 (1986). Courts are split as to whether Title VII and *Meritor* (i) merely authorize joint and several liability under agency principles, or (ii) preclude individual liability under respondeat superior principles. See, e.g., *Tomka*, 66 F.3d at 1316, 1320 (majority and dissent disputing interpretation of *Meritor* agency language).

wanted courts to look to agency principles for guidance" in determining liability for sexual harassment under Title VII.¹⁵⁷ The High Court also noted that "such common law principles may not be transferable in all their particulars to Title VII."¹⁵⁸

Agency principles provide for individual liability for wrongful acts taken by agents, where the acts fall outside the agent's authority.¹⁵⁹ Employers generally do not authorize conduct that could result in employer liability, or reduce workplace efficiency. An agent's legitimate scope of authority is limited to acting for the benefit of the employer.¹⁶⁰ Because violative conduct can only inhibit the employer's interests, all supervisor discrimination necessarily falls outside the agent's legitimate scope of authority. Individual liability is therefore available for supervisors' discriminatory conduct, regardless of the importation of respondeat superior liability into Title VII.

4. *Analogous Federal Discrimination Statutes Support Individual Supervisor Liability*

Title VII shares similar language and policies with other civil rights statutes, namely the Age Discrimination in Employment Act of 1967 (ADEA),¹⁶¹ the Americans With Disabilities Act (ADA),¹⁶² Section 1981 of the Civil Rights Act of 1871 (Section

157. *Meritor*, 477 U.S. at 72; accord *Harris v. Forklift Systems*, 510 U.S. 17 (1993); *Griffith v. Keystone Steel & Wire Co.*, 858 F. Supp. 802 (C.D. Ill. 1994).

158. *Meritor*, 477 U.S. at 72.

159. See *supra* note 56 and accompanying text.

160. See RESTATEMENT, *supra* note 50, § 219(2) (master not subject to liability for torts of servants committed while acting outside scope of employment). See also RESTATEMENT, *supra*, § 235 (servant's act not within scope of employment if act committed with no intention to benefit master).

161. 29 U.S.C. §§ 621-633(a) (1994) [hereinafter "ADEA"]. The ADEA prohibits workplace discrimination on the basis of age. Protected claimants must be at least forty years of age. Under the ADEA "employer" is defined as an employing entity having at least 20 employees, as compared to Title VII's requirement of fifteen.

Like Title VII, courts are split on individual liability under the ADEA. Although judicial construction of this statute is not dispositive, several courts have suggested that the same construction should be used for both the ADEA and Title VII. The Southern District of Florida held that "[t]here 'is no compelling reason to distinguish between the liability coverage under Title VII and the ADEA.'" *Weeks*, 871 F. Supp. 515. See also *Straka v. Francis*, 867 F. Supp. 767, 773 (N.D. Ill. 1994) (declining "to hold that employees are *per se* immune from all personal liability resulting from their individual discriminatory conduct or omissions under Title VII or ADEA claims"); *House v. Cannon Mills*, 713 F. Supp. 159 (M.D. N.C. 1988) (predicating personal liability of supervisors upon defendants' authority over employment decisions affecting the claimant).

162. 42 U.S.C. § 12112 (1995) [hereinafter "ADA"]. Both statutes define an "employer" subject to liability as "a person engaged in an industry affecting commerce

1981), and Section 1983 of the Civil Rights Act of 1871 (Section 1983).¹⁶³ For example, the ADEA and ADA respectively exclude from liability employers of fewer than twenty and fifteen persons.¹⁶⁴ Sections 1981 and 1983 similarly share policy goals with Title VII. Section 1981 seeks to eradicate discrimination in the enforcement of employment contracts; Section 1983 deters discrimination by state actors.¹⁶⁵ Analyzing the scopes of liability available under other analogous statutes suggests that shielding individuals from Title VII liability is inappropriate.¹⁶⁶

a. *Individual Liability Under Section 1981*

The Civil Rights Act of 1871 has been unanimously construed to allow individual agent liability.¹⁶⁷ Section 1981 provides a cause of action for race discrimination which interferes with another's right to make and enforce contracts.¹⁶⁸ Section 1981 is regularly con-

who has 15 or more employees . . . and any agent of such person." 42 U.S.C. § 12111(5)(A); *Janopoulos v. Harvey L. Walner & Assoc., Ltd.*, 835 F. Supp. 459, 462 (N.D. Ill. 1993) (citing 42 U.S.C. § 12111(5), as compared to 42 U.S.C. § 2000(e) and 29 U.S.C. § 630(b)).

Courts are similarly split on individual liability under the ADA. Although the Seventh Circuit has recently precluded individual liability, no other circuits have spoken. *A.I.C. Security*, 55 F.3d at 1280 (precluding individual liability). Supporters of supervisor liability under the ADA reason that "[t]he plain language of the ADA . . . indicates that 'agents' of those who employ more than 15 workers are 'employers' and thus liable under the statute. Supervisory employees are clearly 'agents'" *Bishop*, 864 F. Supp. at 422. See also *Schallehn*, 877 F. Supp. 1315 (supervisors may be personally liable under ADA); *Jendusa*, 868 F. Supp. 1006 (same).

163. 42 U.S.C. §§ 1981(a), 1983 [hereinafter "Section 1981" and "Section 1983"].

164. See *supra* notes 161-62 (delineating statutory exclusions under the ADEA and ADA); cf. 42 U.S.C. § 2000(e)b (excluding employers of fewer than fifteen persons).

165. See *infra* notes 168, 182 and accompanying text (statutory prohibitions under Sections 1981 and 1983); cf. *supra* note 31 and accompanying text (statutory prohibition under Title VII).

166. Supreme Court case law and canons of statutory construction allow for consistent interpretation of similar statutes. See *supra* note 65-66 and accompanying text.

167. *Mitchell v. Keith*, 752 F.2d 385, 388 (9th Cir.), *cert. den.*, 472 U.S. 1028 (1985); *Mahone v. Waddle*, 564 F.2d 1018, 1029 (3d Cir. 1977), *cert. den.*, 422 U.S. 1006 (1978); *Faraca v. Clements*, 506 F.2d 956, 960 (5th Cir.), *cert. den.*, 422 U.S. 1006 (1975). See also *Vakharia*, 824 F. Supp. 769 (citing individual supervisor liability in Section 1981 claims to support individual Title VII, ADA and ADEA liability); *Jeter*, 554 F. Supp. 946 (same); *Hanshaw*, 405 F. Supp. 292 (same).

168. 42 U.S.C. § 1981 (1994) states in pertinent part:

(a) All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts . . . 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 . . .

(b) For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts,

strued to apply to enforcement of employment contracts.¹⁶⁹ Section 1981 assigns individual liability to supervisory "agents" who violate their employer's implied or explicit institutional policy.¹⁷⁰ Section 1981 and Title VII seek, and are applied, to the same ultimate goal: eradication of discrimination in the workplace. However, while individual liability exists under Section 1981, Title VII claimants generally do not enjoy equal relief.¹⁷¹

Courts recognize section 1981 and Title VII suits as indistinguishable by allowing both statutes to remedy essentially identical conduct.¹⁷² Some courts that have held supervisors individually liable under Section 1981 for breach of employment contracts, have also allowed individual liability under Title VII.¹⁷³ Consequently, identical conduct may be actionable under both Title VII and Section 1981. As the Seventh Circuit noted in *Musikiwamba v. Essi, Inc.*,¹⁷⁴ although "Section 1981 was not originally promulgated to regulate the workplace . . . it is now routinely invoked to circumscribe an employer's right to alter the terms and conditions of employment on the basis of an employee's race or national origin."¹⁷⁵

Section 1981 supports Title VII liability for agents because the existence of individual liability under Section 1981, and its absence under Title VII would create an irrational distinction between race discrimination prohibited by Section 1981, and color, gender, religious and national origin discrimination prohibited under Title VII.

and the enjoyment of all benefits, privileges, terms and conditions of the contractual relationship

(c) The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

169. *See, e.g.,* *Gunby v. Pennsylvania Electric Co.*, 840 F.2d 1108 (3d Cir. 1988); *Rowlett v. Anheuser-Busch, Inc.*, 832 F.2d 194 (1st Cir. 1987); *Musikawamba v. Essi, Inc.*, 760 F.2d 740 (7th Cir. 1985).

170. *Al-Khazraji v. Saint Francis College*, 784 F.2d 505, 518-19 (3d Cir.), *cert. den.*, 479 U.S. 812 (1986); *Vakharia*, 824 F. Supp. at 784.

171. *See supra* notes 169-70 and accompanying text. *Cf. Tomka*, 66 F.3d at 1295; *Grant*, 21 F.3d at 650; *Miller*, 991 F.2d at 587.

172. Both statutes remedy discrimination in the workplace by holding employers liable for workplace discrimination: Title VII specifically, and Section 1981 by prohibiting interference with minorities' rights to make and enforce contracts. Section 1981 protects employment contracts by allowing individual liability for parties who interfere with employment contracts. *See, e.g., Al-Khazraji*, 784 F.2d at 518-19 (decision making employees individually liable under § 1981); *cf. House*, 713 F. Supp. 159 (decision making employees individually liable under ADEA).

173. *See, e.g., Vakharia*, 824 F. Supp. at 784-85 (supervisors may be held personally liable under Title VII, Section 1981 and ADEA); *Bridges*, 800 F. Supp. 1172 (decision-making employees individually liable under Title VII).

174. 760 F.2d 740 (7th Cir. 1985).

175. *Id.* at 748.

Section 1981 allows race discrimination victims to sue and obtain relief from individual agents.¹⁷⁶ This creates a distinction without a difference, where the victims are in fact similarly situated.¹⁷⁷ Race and gender discrimination victims suffer the same injuries to their careers, earnings, self-esteem and potential.¹⁷⁸ Both are subjugated to another's irrational prejudices.¹⁷⁹ It is therefore irrational to allow a broader scope of remedies to a victim of race discrimination in an employment setting, while limiting the remedies available to a victim of sex discrimination in an employment setting.

b. Individual Liability Under Section 1983

Section 1983¹⁸⁰ also supports an argument for individual liability under Title VII.¹⁸¹ Section 1983 deters state supported discrimina-

176. See *supra* note 170 and accompanying text. See also *Taylor v. Jones*, 653 F.2d 1193, 1200 (8th Cir. 1981) ("section 1981 applies to all types of racial discrimination, public or private"); *Vakharia*, 824 F. Supp. at 784 ("complete agreement with respect to personal liability of decision making employees under § 1981").

177. Opinions differ on this issue. However, the legislative history of Title VII's expansion to include compensatory and punitive damages notes:

An unfair preference exists in federal civil rights law. Current civil rights laws permit the recovery of unlimited compensatory and punitive damages in case of intentional *race* discrimination. No similar remedy exists in cases of intentional *gender* or *religious* discrimination Gender and religious discrimination may have different cultural or historic origins than racial discrimination. However, it does not follow that Congress should differentiate among them for purposes of the remedial scheme provided by federal law for intentional discrimination.

H.R. REP. NO. 102-40(I), 102D CONG. 1ST SESS. 65 (1991), *reprinted in* 1991 U.S.C.C.A.N. 603 (1992). Significantly, proponents of the 1991 amendments made "parity" between the damages available under Section 1981 and Title VII a goal of those amendments. H.R. REP. NO. 102-40 (II), 102D CONG. 1ST SESS. 24-30 (1991), *reprinted in* 1991 U.S.C.C.A.N. 694, 717-23 (1992).

178. *E.g.*, *Sims v. KCA, Inc.*, 28 F.3d 113 (Table), 1994 WL 266744 (10th Cir. June 17, 1994) (same allegedly discriminatory actions stated claims under both Title VII and Section 1981); *Jones v. Continental Corp.*, 789 F.2d 1225 (6th Cir. 1986) (same); *Vakharia*, 824 F. Supp. 769 (same). See also *Tomka*, 66 F.3d at 1323 (Parker, J., dissenting) (discussing similarity of discriminatory actions under Title VII and Section 1981 causes of action).

179. See *supra* note 178 and accompanying text.

180. 42 U.S.C. § 1983 (1994) reads in pertinent part:

Every person who, under color of any statute, ordinance, regulation, custom or usage, or any State or Territory . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law

181. See, *e.g.*, *Spell v. McDaniel*, 824 F.2d 1380, 1385 (4th Cir. 1987) (discussing the availability of government employer liability under Section 1983), *cert. den.*, 484 U.S. 1027 (1988); *Anela v. Wildwood*, 790 F.2d 1063, 1067 (3d Cir. 1986) (same); *Turpin v. Mailet*, 619 F.2d 196, 199 (2d Cir.), *cert. den.*, 449 U.S. 1016 (1980) (same).

tion by allowing private causes of action against "persons" who deprive others of their constitutional rights while acting under color of law.¹⁸² The Supreme Court in *Monell v. Department of Social Services*¹⁸³ held that the term "person" included both individual officials and municipalities for liability purposes,¹⁸⁴ and that municipal employers could not be liable where a supervisor did not directly participate or authorize the unconstitutional conduct.¹⁸⁵ Conversely, however, supervisors who participate in or authorize discriminatory conduct can be held personally liable under Section 1983.¹⁸⁶

Title VII and Section 1983 both prevent discrimination: Title VII, by private employers;¹⁸⁷ Section 1983, by government and its agents.¹⁸⁸ Although the statutes regulate different groups of actors, and although Section 1983 covers non-minorities as well,¹⁸⁹ both statutes serve to protect specific minorities. However, the clear existence of individual liability for public supervisors renders the exclusion of agent liability for private supervisors confusing at best. The logic of excluding private sector supervisors from Title VII liability where they cause "the deprivation of a federal right" is questionable.

The fact that the two statutes target different employers is not sufficient reason to apply individual liability under Section 1983, but not under Title VII. Under Section 1983, government liability is imposed, presumably because the government should be the model employer.¹⁹⁰ However, the government employer's heightened duty does not lessen the injury derived from Title VII violations. Thus, the government's heightened duty should not shield private supervisors on the happenstance that they are employed by the private sector.

182. Section 1983 was enacted as a mechanism of private enforcement of the Fourteenth Amendment. *Monell v. Department of Social Services*, 436 U.S. 658, 665 (1978).

183. *Id.*

184. *Id.* at 690.

185. *Id.* at 691.

186. *Id.* ("local governments, like very other § 1983 'person,' by the very terms of the statute, may be sued for constitutional deprivations").

187. 42 U.S.C. § 2000e(b), *supra* note 23 and accompanying text.

188. 42 U.S.C. § 1983, *supra* notes 180, 182 and accompanying text.

189. Section 1983 provides a cause of action for minorities and non-minorities for constitutional deprivations arising under color of state law. *See* 42 U.S.C. § 1983 (providing liability to any citizen of the United States).

190. *See, e.g., Monell*, 436 U.S. at 691.

Nor should one believe the corollary presumption that, because government discrimination is considered "worse" than private discrimination, that private supervisors should be held to a lower standard than government supervisors. Even if public supervisors' additional burden arises from an increased deterrence interest in preventing government-sponsored discrimination, shielding the private supervisor does not deter discrimination by public supervisors. Nor does the need to deter government discrimination lessen the same need as to private supervisors. Thus, absent a discernable difference in deterrent purposes, public and private supervisors alike should be subject to personal liability.

The only compelling reason for excluding private sector supervisors from personal Title VII liability is the danger of inhibiting managements' ability to function. Equal economic dangers of management paralysis exist in both the private and public sectors. Yet public supervisors function despite being subject to personal liability, perhaps because they need not fear liability so long as they act correctly. Similarly, private supervisors will be shielded so long as their daily operations comport with Title VII. Increased costs arising from this liability will be absorbed in the cost of doing business.

Admittedly, the doctrine of qualified immunity shields public sector supervisors from personal liability where the alleged deprivations of a claimant's constitutional rights are not "substantial."¹⁹¹ In order to be subject to personal liability under Section 1983, a supervisor must deprive another of a clearly established constitutional right.¹⁹² However, even assuming *arguendo* that the supervisor has violated a constitutional right, he or she will not be liable unless the deprivation was significant enough to cause actual injury to the claimant.¹⁹³ This doctrine helps public supervisors function despite the existence of personal liability, because they are not held

191. See *Albright v. Oliver*, — U.S. —, 114 S. Ct. 807, 821 (1994) (affirming dismissal of claim where petitioner failed to show "substantial deprivation" of liberty arising from mere initiation of prosecution); cf. *Brower v. County of Inyo*, 489 U.S. 593, 599 (1989) (section 1983 liability for violation of fourth amendment rights).

192. See *Siegert v. Gilley*, 500 U.S. 226, 231 (1991) (affirming dismissal because claimant failed to allege violation of "clearly established constitutional right"); *Polk County v. Dodson*, 454 U.S. 312 (1981) (same, for failure to allege violation of sixth, eighth, or fourteenth amendments).

193. See *Albright*, — U.S. —, 114 S. Ct. at 821 (failure to show actual injury arising from insubstantial deprivation arising from initiated prosecution was fatal to section 1983 claim); *Carey v. Phipps*, 435 U.S. 247 (1978) (failure to prove actual injury from school suspension fatal to claim).

liable for the legally insignificant acts which constitute the majority of their duties.

Title VII defendants also enjoy defendant-friendly protections. Although qualified immunity is unavailable to private supervisors, Title VII similarly shields employers from liability where the alleged violation is not severe. In order for hostile work environment harassment to be actionable, the plaintiff's workplace must rise to the level of consistently abusive.¹⁹⁴ Occasional or "stray" remarks, regardless of how distressing they may be, are insufficient to establish a cause of action.¹⁹⁵ Thus, like Section 1983, Title VII shields defendants from liability for conduct that is not substantially violative of the claimant's rights.¹⁹⁶ Private supervisors would not suffer greater exposure to personal liability than do public supervisors currently. Therefore, private supervisors are capable of functioning under the spectre of personal liability, as do their public sector counterparts.

B. The Clarifying Effect Of Personal Supervisor Liability On Employer Respondeat Superior Liability

Despite its noble purposes and vast reach, critics increasingly question Title VII's efficiency in achieving its purposes.¹⁹⁷ Some commentators doubt whether Title VII has accomplished any alleviation of economic and social imbalances, especially for racial mi-

194. *Meritor*, 477 U.S. at 66-67 (harassment must be "sufficiently severe or pervasive to alter the conditions of [the victim's] employment and create an abusive working environment") (citations omitted).

195. *See id.* at 63-69 (clarifying that harassment claims require more than stray remarks); *Price Waterhouse v. Hopkins*, 490 U.S. 228 (1989) (finding Title VII cause of action where stereotyping rose above level of mere stray remarks).

196. *See, e.g., Ray v. Tandem Computers, Inc.*, 63 F.3d 429 (5th Cir. 1995) (that individual defendant threatened to get rid of "the cunt in the office" was insufficient to support finding discriminatory animus); *Kriss v. Sprint Communications Co.*, 58 F.3d 1276 (8th Cir. 1995) (isolated epithets and insults were rude, but not proof of discrimination); *Alvarado v. Health Net, Inc.*, 21 F.3d 1111 (Table), 1994 WL 141271 (9th Cir. April 19, 1994) (two comments did not establish racially hostile work environment); *Cone v. Longmont United Hosp. Ass'n.*, 14 F.3d 526 (10th Cir. 1994) (age-related comments by chief executive officer and personnel supervisor did not establish age discrimination).

197. *E.g., William Landes, The Economics of Fair Employment Laws*, 76 J. POL. ECON. 507, 548 (1968) (economics models denying discrimination in markets militate against antidiscrimination legislations); *cf. John J. Donahue, Is Title VII Efficient*, 134 U. PA. L. REV. 1411, 1426 (1986) (economic models establishing efficiency of Title VII in driving out employment discrimination due to higher transaction costs).

norities.¹⁹⁸ Others argue that Title VII causes more harm than good to the goal of eliminating employment discrimination.¹⁹⁹ Perhaps the only consensus is that workplace discrimination persists despite over 30 years of Title VII enforcement.

Perhaps Title VII would be more effective if liability was consistent among the Act's several causes of action. Consider sex discrimination: courts apply separate standards of liability for hostile environment and quid pro quo sexual harassment causes of action under Title VII.²⁰⁰ This causes inconsistent outcomes, reducing Title VII's usefulness.²⁰¹ "[T]he result is a standardless discretion that is problematic for interpreting a national employment discrimination statute for which predictability surely has some value"²⁰² A consistent standard of liability is necessary to allow Title VII to fulfil its promise of eradicating discrimination in the workplace.

A unified and consistent scheme that confers upon employers and supervisors liability for their own actions will better effectuate Title VII's purposes. Individual liability enhances Title VII's effectiveness by attaching a high degree of personal risk to supervisors' discriminatory actions. Supervisors are often perceived as role models due to their supervisory authority. Thus, punishing supervisors for unlawful conduct has a "rock in a pond" effect: their liability reverberates through the company, clearly showing such conduct to be unlawful, and punishable.

Moreover, individual liability which is severable from employer liability, will also protect employers from undue vicarious liability in situations where the employer has acted responsibly toward the discriminatory condition. Currently, employers are held strictly li-

198. See, e.g., DERRICK BELL, *FACES AT THE BOTTOM OF THE WELL—THE PERMANENCE OF RACISM* (1992) (short stories by civil rights legal scholar, considering racism's prevalence despite 30 years of Title VII enforcement).

199. See, e.g., RICHARD A. EPSTEIN, *FORBIDDEN GROUNDS: THE CASE AGAINST EMPLOYMENT DISCRIMINATION LAWS* (1992) (free markets eventually eliminate employment discrimination, thus legislation encumbers process to detriment of would-be beneficiaries); cf. Erwin Chemerinsky, *Should Title VII of the Civil Rights Act of 1964 Be Repealed?*, 2 S. CAL. INTERDISCIPLINARY L.J. 349 (1993) (arguing success of antidiscrimination laws and that even if unsuccessful, repeal would result in social disaster).

200. Rachel E. Lutner, *Employer Liability for Sexual Harassment: The Morass of Agency Principles and Respondeat Superior*, 1993 U. ILL. L.REV. 589 (1993) (varying liability standards for hostile environment and quid pro quo harassment, increasing strict liability for racial discrimination claims).

201. See *id.* at 593.

202. Michael J. Phillips, *Employer Sexual Harassment Liability Under Agency Principles: A Second Look at Meritor Savings Bank, FSB v. Vinson*, 44 VAND. L. REV. 1229, 1232 (1991).

able for quid pro quo Title VII violations committed by their supervisors.²⁰³ Fairness requires, however, that the employer who is not notified of violative conduct, or who aggressively fulfills his duty to investigate and alleviate the discriminatory condition, should not be held liable.²⁰⁴ An employer's duty must end somewhere.

The greatest impact of joint and several liability would be on hostile work environment cases. Since quid pro quo cases impute strict liability to employers,²⁰⁵ little conflict arises between the interests of the guilty supervisor and his or her employer. Little reason exists for employers to attempt to avoid respondeat superior liability by strenuously asserting the innocence of a guilty supervisor.²⁰⁶ Moreover, counsel who represents both parties has no motive to sacrifice representation of the supervisor for the benefit of the employer.²⁰⁷

However, hostile work environment cases present greater opportunities for conflicts to arise between multiple defendants.²⁰⁸

203. See, e.g., *Meritor*, 477 U.S. at 72 (distinguishing between strict liability quid pro quo claims and "knew/should have known" standard used to determine employer liability in hostile environment claims); *Kauffman v. Allied Signal, Inc.*, 970 F.2d 178, 183, 185-86 (6th Cir.) (describing strict liability standard applied in quid pro quo harassment claims), *cert. den.*, 506 U.S. 1041 (1992).

204. See generally *Smith*, *supra* note 137 at 321.

205. *Meritor*, 477 U.S. at 72; *Kauffman*, 970 F.2d at 183, 185-86.

206. This is because the standard for employer liability in quid pro quo cases requires only a finding that the supervisor committed quid pro quo harassment. Such a finding will turn on the factual record and testimony of the parties. The assertions of the employer, who was not a party to the conduct, are generally irrelevant. See *Kauffman*, 970 F.2d at 183, 185-86 (summary judgment for plaintiff denied in quid pro quo claim despite employer's dismissal of supervisor; factual record was incomplete).

See also *Walker v. MacFrugal's Bargains, Closeouts, Inc.*, 1994 WL 693387 (E.D. La. Dec. 9, 1994) (quid pro quo claim survived summary judgment motion on factual record supported by testimony, rather than due to employer's discipline of supervisor); *Gardinella v. General Electric Co.*, 833 F. Supp. 617 (W.D. Ky. 1993) (summary judgment for defendant denied in quid pro quo action due to plaintiff's compelling deposition testimony, and in spite of employer's failure to take adverse employment action against plaintiff).

207. Although dual representation problems most often arise in criminal cases, the potential of unequal representation is no less problematic in the civil context. See generally *United States v. Agosto*, 538 F. Supp. 1149 (D. Minn.) (attorney disqualified from representing one defendant at trial where two codefendants had interest that were adverse to those of single defendant), *cert. denied*, 459 U.S. 834 (1982). Cf. generally *Clemmer v. Enron Corp.*, 1995 WL 334372 (S.D. Texas March 27, 1995) (ADEA claim where employer was denied summary judgment but no summary judgment motion was made for individual defendants joined in action whose interests were arguably adverse to that of employer).

208. See generally Douglas L. Williams, *Individual Liability and Defending Individual Co-Defendants*, C463 ALI-ABA 205 (1989) (discussing conflict of interest that can

Where respondeat superior liability exists absent individual liability, the employer may erroneously assert the supervisor's innocence in order to avoid respondeat superior liability.²⁰⁹ In *Meritor*, the Court declined "to issue a definitive rule on employer liability."²¹⁰ The consequence of *Meritor's* vagueness is that, more often than not, a finding of Title VII discrimination will be imputed to the employer.²¹¹

The application of joint and several individual liability would rationalize the application of respondeat superior liability under Title VII. Such liability would clarify the debate of when an employee's conduct should be imputed to the employer. Under the current state of the law,²¹² courts may be forced to decide between imputing liability to the employer, or finding no liability at all.²¹³ Courts may prefer to impute liability to a deep pocket, rather than leave the victim uncompensated due to the unavailability of individual Title VII liability.²¹⁴ The existence of individual Title VII liability would remove pressure from courts to unduly impute liability to employers.

Severable employer and supervisor liability does not, however, shield employers from their rightful liability. Where employers are apprised of the discriminatory conduct, but fail to attempt to allevi-

arise in concurrent representation of supervisor and employer in employment actions).

209. See generally *Pratt v. Brown Machine Co.*, 855 F.2d 1225, 1231-32 (6th Cir. 1988) (employer publicly denied supervisor's culpability in criminal act but admitted the supervisor's guilt in private, presumably to avoid respondeat superior liability for state tort claim of intentional infliction of emotional distress). See also generally *Williams*, *supra* note 208 (discussing conflicts of interest which arise from concurrent representation of supervisors and employers).

210. *Meritor*, 477 U.S. at 72.

211. See generally *Lutner*, *supra* note 200 (discussing the "catch-all" respondeat superior Title VII liability that arose from *Meritor*); Katherine Vorwerk, Note, *The Forgotten Interest Group: Reforming Title VII To Address The Concerns of Workers While Eliminating Sexual Harassment*, 48 VAND. L. REV. 1019 (1995) (discussing how 1991 additions of compensatory and punitive damages to Title VII remedies increased incentive for employers to avoid liability).

This proposition is further supported by the availability to employers of insurance against discrimination claims. If employer liability were the exception rather than the norm, no such market would exist for such policies. See generally *Sean W. Gallagher*, Note, *The Public Policy Exclusion And Insurance For Intentional Employment Discrimination*, 92 MICH. L. REV. 1256 (1994).

212. See *supra* notes 26-27 and accompanying text.

213. See, e.g., *Miller*, 991 F.2d at 588 (dismissing claims against individual defendants, leaving only employer as potential defendant; however, claims against employer were dismissed as time-barred).

214. See *id.* and accompanying text. See also *Vakharia*, 824 F. Supp. at 785-86 (discussing danger that lack of individual liability will leave victims uncompensated).

ate the situation, employers could themselves be held liable. This standard holds employers directly liable for their own negligent or reckless failure to remove violative conditions.²¹⁵ Moreover, employers would still be liable for failing to perform their threshold duties under Title VII: to institute and post antidiscrimination policies, and to investigate and remove discriminatory conduct.²¹⁶

In applying joint and several liability to both hostile environment or quid pro quo discrimination, victims would bear the threshold responsibility of notifying the perpetrator and a superior official of her discomfort.²¹⁷ However, the perpetrator may be the highest, or only authority to whom the victim could report such conduct. In such cases, the notice requirement would be fulfilled by the employee's giving either actual or constructive notice to the employer.

Where the supervisor responsible for investigating discrimination claims is not the perpetrator, the employee would be required to notify the company's "watchdog" supervisor, thus giving the company an opportunity to act. Constructive notice would also allow employer liability, but under circumstances where the perpetrator is the "watchdog" supervisor, or is the highest official within the company. By giving actual notice of her discomfort to the perpetrator, the employee would constructively notify the company as well.

Admittedly, under this scheme some plaintiffs may be under compensated because the individual perpetrator has insufficient assets to pay damages. However, this result should not occur unless the plaintiff has failed to notify the company, or if the company received notice and acted adequately in response. Where the claimant failed to give notice, the company should not be held liable. Alternatively, where the company responded adequately, it fulfilled its responsibility and should not be held liable. Although the insolvency of a supervisor may unfortunately sometimes preclude relief, this contingency is not sufficient to place liability where it does not belong. To hold employers liable simply because

215. See generally Ronald Turner, *Title VII and Hostile Environment Sexual Harassment: Mislabeled the Standard of Employer Liability*, 71 U. DET. MERCY L. REV. 817 (1994) (discussing application of a negligence/notice tort standard for imputing liability to corporate employers under Title VII).

216. See, e.g., *Haskins v. Owens-Corning Fiberglas Corp.*, 811 F. Supp. 534 (D. Or. 1992); *E.E.O.C. v. Murphy Motor Freight Lines, Inc.*, 488 F. Supp. 381, 389 (D. Minn. 1980).

217. For a general discussion of notice liability standards in employment discrimination claims, see J. Hoult Verkerke, *Notice Liability In Employment Discrimination Law*, 81 VA. L. REV. 273 (1995).

relief is unavailable from the source of the conduct gives undue windfalls to plaintiffs. The point of Title VII is not exclusively to make plaintiffs whole; rather, it is to eliminate discriminatory conduct. This is best achieved by holding all wrongdoers jointly and severally liable.

Conclusion

An examination of relevant legislative history, analogous statutes and the broad purposes of Title VII reveal that allowing personal liability for culpable individuals is supported by the Act. Accrual of joint and several liability to both employers and supervisors will more efficiently accomplish Title VII's deterrent purposes, while shielding employers from undue vicarious liability. Holding supervisors liable for their own discriminatory conduct will increase Title VII's deterrent effect by preventing further unlawful conduct by culpable supervisors, and by sending a strong message to others that such conduct is personally dangerous. Imposing a regime of joint and several liability shields employers who have responded correctly from undue liability, while applying liability to those employers who have failed to act to alleviate the unlawful condition.

