Case Western Reserve Law Review

Volume 54 | Issue 3

2004

The Individual vs. the Employer: Who Should Be Held Liable under Employment Discrimination Law ?

Tammi J. Lees

NOTES

THE INDIVIDUAL VS. THE EMPLOYER: WHO SHOULD BE HELD LIABLE UNDER EMPLOYMENT DISCRIMINATION LAW?

INTRODUCTION

In a case of first impression for the Second Circuit, the court in *Tomka v. Seiler Corp.*,[1] ruled on the issue of individual liability in employment discrimination law. The significance of the Second Circuit's holding is not that it joined a majority of the circuits,[2] finding that individuals with supervisory control over a plaintiff may not be held personally liable under Title VII,[3] but that it permitted individual liability under state anti-discrimination law,[4] specifically, the New York Human Rights Law.[5] The case, which involved the raping of a co-worker, illustrates the reality that, regardless of the severity of the claim, victims may or may not receive justice under employment discrimination law.[6]

Although this was the first time the Second Circuit addressed the issue of individual liability, the conflicting decisions under

---

[1] 66 F.3d 1295 (2d Cir. 1995).

[2] *See* Indest v. Freeman Decorating, Inc., 164 F.3d 258, 267 (5th Cir. 1999); Hiller v. Brown, 177 F.3d 542, 545-46 (6th Cir. 1999); Gastineau v. Fleet Mortgage Corp., 137 F.3d 490, 494 (7th Cir. 1998); Pink v. Modoc Indian Health Project, Inc., 157 F.3d 1185, 1189 (9th Cir. 1998); Lissau v. S. Food Serv. Inc., 159 F.3d 177, 181 (4th Cir. 1998); Lenhardt v. Basic Inst. of Tech., Inc., 55 F.3d 377, 381 (8th Cir. 1995); Gary v. Long, 59 F.3d 1391, 1398 (D.C. Cir. 1995); Sauers v. Salt Lake County, 1 F.3d 1122, 1125 (10th Cir. 1993) (all refusing to recognize individual liability).

[3] 42 U.S.C. § 2000e (2000).

[4] *Tomka*, 66 F.3d at 1317 (holding that a defendant's actual participation in the discriminatory conduct may give rise to personal liability).

[5] N.Y. EXEC. LAW § 296(6) (McKinney 2001 & Supp. 2004).

[6] The facts of this case are not necessarily representative of the majority of employment discrimination claims.

state and federal anti-discrimination law regarding individual liability are not unique to this case.[7] While basing their decisions on similar sets of facts, courts repeatedly refuse to find individual liability under federal law, yet sometimes hold individuals liable under state law. Often, the courts' justifications are based primarily on the differences in the statutory language or meaning.

The issue of individual liability for employment discrimination may initially be a matter of statutory interpretation, but the fundamental question is why individuals should or should not be held liable. This Note argues that holding both individuals and employers liable under anti-discrimination law is the most effective means to accomplishing the goals of such laws: fully compensating victims and deterring future and continuing discrimination.[8] While the plain language of current federal employment discrimination statutes excludes individual liability, federal statutes should be rewritten to permit individual, as well as enterprise, liability. Part I compares the language of the federal statutes, which forecloses individual liability, with that of state statutes that have been interpreted to permit individual liability. Part II outlines the history and goals of federal and state employment discrimination law in the United States in an attempt to determine why Congress opted for enterprise liability and against individual liability, as well as why many states took the opposite approach. Part III examines the main arguments in favor of enterprise liability, while Part IV considers arguments for supporting the imposition of personal liability. Finally, Part V sets forth arguments in support of holding both individuals and employers liable by focusing on state employment discrimination statutes and case law.

I. STATUTORY CONSTRUCTION: FEDERAL V. STATE

Although the federal statutes are clear that victims of discrimination are entitled to compensation,[9] they fail to specify from whom protected victims may get such relief. As a result, the fed-

---

[7] *E.g.*, Horney v. Westfield Gage Co., 95 F. Supp. 2d 29, 33-34 (finding individual liability under state law, but excluding it under Title VII), *rev'd on other grounds*, Nos. 02-2383, 02-2384, 02-2465, 02-2546, 2003 U.S. App. LEXIS 20776 (1st Cir. Oct. 9, 2003); *see also* Vivian v. Madison, 601 N.W.2d 872, 878 (Iowa 1999); Genaro v. Cent. Transp., Inc., 703 N.E.2d 782, 787-88 (Ohio 1999); Brown v. Scott Paper Worldwide Co., 20 P.3d 921, 926 (Wash. 2001) (all acknowledging the exclusion of individual liability under federal law, yet finding liability under state law).

[8] Albemarle Paper Co. v. Moody, 422 U.S. 405, 417, 422 (1975) (acknowledging that the purposes of Title VII include the full compensation of the victim and deterrence of future discrimination).

[9] *See infra* notes 35, 38 and accompanying text (discussing the remedies available under federal law).

eral judiciary has been required to make this determination. Despite the absence of a U.S. Supreme Court decision on the issue[10] and the presence of some disagreement from the lower courts,[11] the appellate courts consistently hold that liability should fall solely to the employer, thus prohibiting individual liability, even when the individual is acting as an agent of the employer.[12] As mentioned previously, this determination is based primarily on the plain language of the law, specifically on the definition of "employer" and the interpretation of the remedial scheme.[13]

A. The Definition of "Employer" Under Federal Anti-Discrimination Law

Title VII makes it an "unlawful employment practice for an employer (1) 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."[14] The act defines "employer" as a "person engaged in an industry affecting commerce who has fifteen or more employees . . . and any agent of such a person."[15] The Americans with Disabilities Act ("ADA")[16] states that "[n]o [employer] shall discriminate against a qualified individual with a disability,"[17] and shares the same definition of "employer" with Title VII.[18] The Age Discrimination in Employment Act ("ADEA")[19] declares that

---

[10] *See Brown*, 20 P.3d at 926 n.1 (noting that the United States Supreme Court has not addressed whether individuals can be held liable under federal anti-discrimination statutes).

[11] Many lower courts have held that individual liability is permitted under federal law. *See, e.g.*, Griffith v. Keystone Steel & Wire Co., 858 F. Supp. 802, 805-06 (C.D. Ill. 1994) (interpreting Title VII to permit individual liability); Vakharia v. Swedish Covenant Hosp., 824 F. Supp. 769, 784-86 (N.D. Ill. 1993) (same); Lamirande v. Resolution Trust Corp., 834 F. Supp. 526, 528-29 (D.N.H. 1993) (same); Bishop v. Okidata, Inc., 864 F. Supp. 416, 422 (D.N.J. 1994) (interpreting the Americans with Disabilities Act (ADA) to permit individual liability); Jendusa v. Cancer Treatment Ctrs. of Am., Inc., 868 F. Supp. 1006, 1010 (N.D. Ill. 1994) (same).

[12] *Horney*, 95 F. Supp. 2d at 33 (stating that every circuit court that has addressed the issue has found that there is no individual liability under Title VII); *see supra* note 2 (listing the circuit courts that have refused to permit individual liability).

[13] It should be noted that the courts regularly apply arguments regarding Title VII, the Age Discrimination in Employment Act (ADEA), and the ADA interchangeably. EEOC v. AIC Sec. Investigations, Ltd., 55 F.3d 1276, 1279-80 (7th Cir. 1995); *see also* Williams v. Banning, 72 F.3d 552, 553 (7th Cir. 1995) (recognizing that Title VII, the ADA, the ADEA use virtually the same definition of "employer"); Miller v. Maxwell's Int'l Inc., 991 F.2d 583, 588 n.3 (9th Cir. 1993) (noting that the ADEA's definition of "employer" is essentially identical to Title VII's).

[14] 42 U.S.C. § 2000e-2(a)(1) (2000).

[15] *Id.* § 2000e(b).

[16] *Id.* § 12101.

[17] *Id.* § 12112(a).

[18] *Id.* § 12111(5).

[19] 29 U.S.C. § 621 (2000).

"[i]t shall be unlawful for an employer to . . . discriminate against any individual . . . because of such individual's age."[20] In relevant part, an "employer" under the ADEA is "a person engaged in an industry affecting commerce who has twenty or more employees . . . . The term also means (1) any agent of such a person."[21]

The circuit courts that deny individual liability based on statutory language generally offer some or all of the following justifications. First, the "and any agent" language in the statutory definitions of "employer" ensures that courts impose *respondeat superior* liability upon the employers for the acts of their agents.[22] Respondeat superior, under which a master is held responsible for the torts of his servant committed within the scope of employment, is the most common form of vicarious liability.[23] In *Miller v. Maxwell's International, Inc.*,[24] the Ninth Circuit rejected the suggestion that a supervisory employee or other "agent" may be considered a statutory "employer" for purposes of imposing personal liability under Title VII or the ADEA. The court declared that the obvious purpose of the agent provision was to codify the imposition of respondeat superior liability upon the company and not to subject individual employees to personal liability.[25] The Fourth Circuit, in *Birkbeck v. Marvel Lighting Corp.*,[26] held that the inclusion of "agent" under the ADEA's definition of "employer" did not signal a congressional desire to impose liability on individual supervisors. Instead, it simply represented "an unremarkable expression of respondeat superior—that discriminatory personnel actions taken by an employer's agent may create liability for the employer."[27] Similarly, the Seventh Circuit, in *EEOC v. AIC Security Investigations, Ltd.*,[28] applied respondeat superior to an ADA claim, holding that "the actual reason for the 'and any agent' language in the definition of 'employer' was to ensure that courts

---

[20] *Id.* § 623(a)(1).

[21] *Id.* § 630(b).

[22] *E.g.*, Gastineau v. Fleet Mortgage Corp., 137 F.3d 490, 494 (7th Cir. 1998) (finding respondeat superior applicable to Title VII); Lissau v. S. Food Serv. Inc., 159 F.3d 177, 181 (4th Cir. 1998) (same); Gary v. Long, 59 F.3d 1391, 1399 (D.C. Cir. 1995) (same); EEOC v. AIC Sec. Investigations, Ltd., 55 F.3d 1276, 1281 (7th Cir. 1995) (finding respondeat superior applicable to the ADA); Shager v. Upjohn Co., 913 F.2d 398, 405 (7th Cir. 1990) (finding respondeat superior applicable to ADEA).

[23] DAN B. DOBBS, THE LAW OF TORTS § 333 (2000).

[24] 991 F.2d 583 (9th Cir. 1993).

[25] *Id.* at 587.

[26] 30 F.3d 507 (4th Cir. 1994).

[27] *Id.* at 510.

[28] 55 F.3d 1276 (7th Cir. 1995).

would impose respondeat superior liability upon employers for the acts of their agents."[29]

Second, federal anti-discrimination statutes all limit employer liability to employers with at least fifteen or twenty employees,[30] thus striking a balance between ending discrimination and protecting small entities from the economic hardship of litigating discrimination claims.[31] A contrary interpretation might upset that balance and distort the statutory framework.[32] In *Miller*, the court concluded that this protection of small entities also precludes individual liability because Congress would not intend to protect a small entity, yet hold an individual personally liable.[33]

B. The Remedial Scheme Under Federal Anti-Discrimination Law

Circuit courts additionally examine the remedial scheme of the federal laws, finding that the damages scheme under Title VII, the ADA, and the ADEA precludes individual liability.[34] First, until 1991, only backpay and equitable relief, including reinstatement, were available to plaintiffs,[35] which are remedies typically only obtainable from an employer.[36] Second, the Civil Rights Act

---

[29] *Id.* at 1281.

[30] 42 U.S.C. § 2000e(b) (2000) (limiting liability under Title VII to employers with fifteen or more employees); 42 U.S.C. § 12111 (2000) (limiting liability under the ADA to employers with fifteen or more employees); 29 U.S.C. § 630(b) (2000) (limiting liability under the ADEA to employers with twenty or more employees).

[31] *AIC Sec. Investigations, Ltd.*, 55 F.3d at 1281.

[32] *Id.* at 1282 (rejecting plaintiff's argument that a company president, as an "agent," must be liable).

[33] Miller v. Maxwell's Int'l, Inc., 991 F.2d 583, 587 (9th Cir. 1993) ("If Congress decided to protect small entities with limited resources from liability, it is inconceivable that Congress intended to allow civil liability to run against individual employees."); *see also* Birkbeck v. Marvel Lighting Corp., 30 F.3d 507, 510 (4th Cir. 1994) (stating that it would be incongruous to hold that the ADEA does not apply to the employer of ten people, but it does apply to a supervisor in a company employing twenty or more employees).

[34] *See, e.g.*, Tomka v. Seiler Corp., 66 F.3d 1295, 1314 (2d Cir. 1995); *AIC Sec. Investigations, Ltd.*, 55 F.3d at 1281; Sauers v. Salt Lake County, 1 F.3d 1122, 1125 (10th Cir. 1993) (all stating that the proper method to recover under federal anti-discrimination law is to sue the employer).

[35] Title VII states that if the defendant has been found to engage in discriminatory conduct, "the court may enjoin the respondent from engaging in such . . . practice, and order such affirmative action as may be appropriate, which may include . . . reinstatement or hiring of employees, with or without back pay (payable by the employer) . . . ." 42 U.S.C. § 2000e-5(g)(1) (2000).

[36] Haynes v. Williams 88 F.3d 898, 899 (10th Cir. 1996) ("The relief granted under Title VII is against the *employer*, not individual employees whose actions would constitute a violation of the Act."); *Tomka*, 66 F.3d at 1314 ("[A] successful Title VII plaintiff was typically limited to reinstatement and backpay . . . . [These are] equitable remedies which are most appropriately provided by employers, defined in the traditional sense of the word."); *AIC Sec. Investigations, Ltd.*, 55 F.3d at 1281 (recognizing that at the time it defined employer in the three statutes, Congress granted only remedies that an employing entity, not an individual, could provide).

of 1991[37] reinforces Congress' intent to preclude individual liability. The act allowed for the recovery of punitive and compensatory damages,[38] but it limited monetary recovery under Title VII and the ADA by placing caps on damage awards based on the number of employees.[39] "[T]he linkage between the size of the employer and the amount of available relief clearly indicates a congressional intent to limit plaintiffs' remedies to suits against employers."[40] Courts have also inferred that Congress did not consider individuals liable since it did not enact a cap for individuals.[41] In *Lissau v. Southern Food Service, Inc.*,[42] the Fourth Circuit held that if "Congress felt that individual liability was needed to deter . . . discrimination, surely it would have included this remedy in the 1991 Amendments."[43] Additionally, "[i]t is a long stretch to conclude that Congress silently intended to abruptly change its earlier vision through an amendment to the remedial portions of the statute alone."[44]

C. State Statutes

Although federal and state employment discrimination statutes share the same objectives,[45] the statutes do not agree on how

---

[37] Pub. L. No. 102-166, § 105 Stat. 1071 (1991).

[38] *Id.* at 1072 ("In an action brought by a complaining party under section 706 or 717 of the Civil Rights Act of 1964 against a respondent who engaged in unlawful intentional discrimination . . . the complaining party may recover compensatory and punitive damages . . . in addition to any relief authorized by § 706(g) of the Civil Rights Act of 1964." (current version at 42 U.S.C. § 1981a(a)(1))).

[39] The statute places the following maximum limitations on damage awards depending on the size of the employer: for employers with more than 14 and fewer than 101 employees, there is a $50,000 cap; there is a $100,000 cap for employers with more than 100 and fewer than 201 employees; there is a $200,000 cap for employers with more than 200 and fewer than 501 employees; and employers with more than 500 employers have a $300,000 cap. *Id.* at 1073 (current version at 42 U.S.C. § 1981a(b)(3)).

[40] Lissau v. S. Food Serv. Inc., 159 F.3d 177, 181 (4th Cir. 1998) (reasoning that Congress' omission of a cap for individuals meant that Congress had not intended for individuals to be liable).

[41] *AIC Sec. Investigations, Ltd.*, 55 F.3d at 1281; *see Lissau*, 159 F.3d at 181 ("Nowhere does the [1991 Act] mention individual liability as an available remedy."); *Tomka*, 66 F.3d at 1315 ("It appears that Congress contemplated that only employer-entities could be held liable for compensatory and punitive damages, because 'if Congress had envisioned individual liability . . . it would have included individuals in this litany of limitations and discontinued the exemption for small employers.'" (quoting Miller v. Maxwell's Int'l, Inc., 991 F.2d 583, 588 n.2 (9th Cir. 1993))).

[42] 159 F.3d 177 (4th Cir. 1998).

[43] *Id.* at 181.

[44] *AIC Sec. Investigations, Ltd.*, 55 F.3d at 1281.

[45] *See* Albemarle Paper Co. v. Moody, 422 U.S. 405, 417-18 (1975) (describing Title VII's purposes of achieving equal employment opportunity and removing discriminatory employment barriers); Wallace v. Skadden, Arps, Slate, Meagher & Flom, 715 A.2d 873, 889 (D.C. 1998) ("Our Human Rights Act was designed 'to secure an end in the District of Columbia to discrimination for any reason . . . .'" (citing D.C. Code § 1-2501 (1992))); Vivian v.

best to achieve the elimination of workplace discrimination. In contrast to the federal statutes' imposition of vicarious liability, many state laws hold the individuals themselves liable for their acts.[46] Several state anti-discrimination statutes define "employer" in a slightly different manner than the federal statutes, which allows for a finding of individual liability. Courts have found individual liability under state law by interpreting phrases such as "employer or agent of the employer" to include supervisors and co-workers, or through recourse to aiding and abetting provisions,[47] which do not exist under federal law.[48] The following is a brief description of state employment discrimination statutes that permit individual liability, and some discussion of case law pertaining to the issue. This Note is limited to four representative states: Washington, Ohio, Massachusetts, and Iowa; and to Washington D.C.

1. Washington

Under Washington's anti-discrimination law, section 49.60 of the Revised Code of Washington, it is an unfair practice for any employer to discriminate against a person in terms of employment "because of age, sex, marital status, race, creed, color, national origin, or the presence of any [disability]."[49] The Washington Supreme Court, in *Brown v. Scott Paper Worldwide Co.*,[50] refused to follow the approach taken under federal anti-discrimination statutes, finding that the interpretation of federal laws was not applicable because the language of the state law is significantly different from the corresponding federal law.[51] That court relied on

---

Madison, 601 N.W.2d 872, 874-75 (Iowa 1999) (acknowledging that the Iowa Civil Rights Act prohibits various forms of employment discrimination and was established to promote parity in the workplace and market opportunity for all).

[46] *See infra* notes 47-48 and accompanying text.

[47] An aider or abettor is one who "in some sort associate[s] himself with the venture, . . . participate[s] in it as something that he wish[es] to bring about, [and] seek[s] by his action to make it succeed." Roy v. United States, 652 A.2d 1098, 1104 (D.C. 1995) (quoting United States v. Peoni, 100 F.2d 401, 402 (2d Cir. 1938)).

[48] *See, e.g.*, Dici v. Pennsylvania, 91 F.3d 542, 553 (3d Cir. 1996); Comiskey v. Auto. Indus. Action Group, 40 F. Supp. 2d 877, 891 (E.D. Mich. 1999); Meara v. Bennett, 27 F. Supp. 2d 288, 291 (D. Mass. 1998); Wyss v. Gen. Dynamics Corp., 24 F. Supp. 2d 202, 210 (D.R.I. 1998); Tyson v. CIGNA Corp., 918 F. Supp. 836 (D.N.J. 1996); Broomfield v. Lundell, 767 P.2d 697 (Ariz. Ct. App. 1988); Wallace v. Skadden, Arps, Slate, Meagher & Flom, 715 A.2d 873, 888 (D.C. 1998); Genaro v. Cent. Transp., Inc., 703 N.E.2d 782, 785 (Ohio 1999); Schram v. Alberton's, Inc., 934 P.2d 483, 488 (Or. Ct. App. 1997); Carr v. U.P.S., 955 S.W.2d 832, 838 (Tenn. 1997) (all finding individual liability under state employment discrimination laws).

[49] WASH. REV. CODE ANN. § 49.60.180 (West 2002).

[50] 20 P.3d 921 (Wash. 2001).

[51] *Id.* at 926.

Marquis v. City of Spokane,[52] which held that the interpretation of federal anti-discrimination statutes is only persuasive if the provisions in those statutes do not differ from those in section 49.60.[53] The *Marquis* court concluded that federal courts' interpretations of Title VII are not helpful in interpreting the Washington statute because there is no Title VII provision equivalent to the section 49.60 requirement that the act be construed liberally in order to accomplish its purposes.[54]

In *Brown*, the court focused primarily on the differences in the definitions of "employer" under the state and federal laws.[55] The Washington statute defines "employer" to include "any person acting in the interest of an employer, directly or indirectly, who employs eight or more persons."[56] The court interpreted the phrase "person acting in the interest of an employer, directly or indirectly" as standing alone, and the following clause "who [employs] eight or more persons" as referring to the term "employer" and not to the whole phrase. Thus, a manager acting in the interest of an employer who employs eight or more people can be held individually liable for his or her discriminatory acts.[57]

2. Ohio

Under Ohio's employment discrimination statute, section 4112 of the Ohio Revised Code, "[i]t shall be an unlawful discriminatory practice: (A) for any employer, because of the race, color, religion, sex . . . of any person . . . to discriminate against that person with respect to hire, tenure, terms, conditions, or privileges of employment, or any matter directly or indirectly related to employment."[58] The Ohio Supreme Court, in *Genaro v. Central Transport, Inc.*,[59] held that "individual supervisors and managers are accountable for their own discriminatory conduct occurring in the workplace environment."[60] The court ruled that the plain lan-

---

[52] 922 P.2d 43 (Wash. 1996).

[53] *Id.* at 50; *see also* Martini v. Boeing Co., 971 P.2d 45, 54 (Wash. 1999) (finding Title VII case law unpersuasive when interpreting state law due to the significant differences in the remedial provisions of the two laws).

[54] *Marquis*, 922 P.2d at 50.

[55] *Brown*, 20 P.3d at 926.

[56] WASH. REV. CODE ANN. § 49.60.040(3) (West 2002).

[57] *Brown*, 20 P.3d at 926. The court also relied on the interpretations of two other jurisdictions that have fair employment law statutes that define "employer" similarly. Both the District of Columbia and Ohio have ruled that the definition of "employer" encompasses individual liability. *See* Wallace v. Skadden, Arps, Slate, Meagher & Flom, 715 A.2d 873, 888 (D.C. 1998); Genaro v. Cent. Transp. Inc., 703 N.E.2d 782, 787 (Ohio 1999).

[58] OHIO REV. CODE ANN. § 4112.02(A) (West 2001 & Supp. 2003).

[59] 703 N.E.2d 782 (Ohio 1999).

[60] *Id.* at 787.

guage of the statute, particularly the definition of "employer," imposes individual liability for discriminatory conduct.[61] Under the Ohio statute, "employer" includes "any person employing four or more persons within the state, and any person acting directly or indirectly in the interest of an employer."[62] The court reasoned that the language employed by the General Assembly in section 4112 should be construed liberally because it is much broader in scope than that applied by the analogous Title VII provision.[63] The court also relied on *Davis v. Black*,[64] which concluded that "[c]learly, the supervisor for whom an employer may be vicariously liable under the doctrine of *respondeat superior* is also an employer within [the Ohio statute's] definition [of employer]."[65]

3. Massachusetts

The Massachusetts anti-discrimination statute makes it unlawful "[f]or an employer, by himself or his agent, because of the race, color, religious creed, national origin, sex, sexual orientation . . . to refuse to hire or employ or to bar or to discharge from employment such individual or to discriminate against such individual in compensation or in terms . . . of employment."[66] The statute exempts private employers of fewer than six persons but does not otherwise limit who can be held liable.[67] The appellate court in *Beaupre v. Cliff Smith & Associates*[68] held that "the plain language of the statute provides on its face for individual personal liability in several sections, unlike the cognate provisions of other jurisdictions (including Federal)."[69] For instance, the statute forbids any person to "aid, abet, incite, compel or coerce the doing of any of the acts forbidden under this chapter."[70] The Massachusetts statute also includes a mandate that its provisions must be construed liberally for the accomplishment of its purposes, which are to discourage and penalize employment discrimination.[71]

---

[61] *Id.* at 785.

[62] OHIO REV. CODE ANN. § 4112.01(A)(2).

[63] *Genaro*, 703 N.E.2d at 785.

[64] 591 N.E.2d 11 (Ohio 1991).

[65] *Id.* at 19.

[66] MASS. GEN. LAWS ANN. ch. 151B, § 4 (West 1996 & Supp. 2003).

[67] *Id.* § 1.

[68] 738 N.E.2d 753 (Mass. App. Ct. 2000).

[69] *Id.* at 764.

[70] MASS. GEN. LAWS ANN. ch. 151B, § 4(5); *see* Schutz v. Go Ahead Vacations, Inc., No. 97-4409, 1999 WL 959681, at *2 (Mass. App. Ct. Sept. 1, 1999) (finding a company president liable under the aiding and abetting provision for dictating a policy of discrimination against older workers).

[71] MASS. GEN. LAWS ANN. ch. 151B, § 9.

4. Iowa

The Iowa Supreme Court, in *Vivian v. Madison*,[72] ruled that under the Iowa Civil Rights Act ("ICRA"),[73] supervisory employees are subject to individual liability for unfair employment practices.[74] The court, ruling on a matter of first impression, based its conclusion on several differences between the ICRA and Title VII. First, unlike Title VII, which prohibits any "employer" from discriminating, the ICRA forbids "any [*p*]*erson* to refuse to hire, accept, register, classify, or refer for employment, to discharge any employee, or to otherwise discriminate in employment . . . because of the age, race, creed, color, sex, national origin, religion or disability of such applicant or employee, unless based upon the nature of the occupation."[75] Second, the ICRA incorporates an aiding and abetting provision that forbids "[a]ny person to intentionally aid, abet, compel, or coerce another person to engage in any of the practices declared unfair or discriminatory by this chapter."[76] In contrast, Title VII contains no similar language.[77] Third, the remedial sections of the ICRA allow a claimant to commence an action against a person, employer, employment agency, or labor organization alleged to have committed a discriminatory act.[78]

The IRCA defines a person as "one or more individuals, partnerships, associations, corporations, legal representatives, trustees, receivers, and the state of Iowa and all political subdivisions and agencies thereof."[79] The court in *Vivian* rejected the defendant's argument that the exemption of employers with fewer than four employees from liability[80] was evidence of the drafters' intent not to hold individual employees liable. The court additionally cited two other provisions of the act. The first states that the chapter should be "construed broadly to effectuate its purposes."[81] The second says that "[e]very person in this state is entitled to the opportunity for employment on equal terms with every other person. A person or employer shall not discriminate in the employment of individuals because of race, religion, color, sex, national origin, or

---

[72] 601 N.W.2d 872 (Iowa 1999).

[73] IOWA CODE ANN. § 216 (West 2000).

[74] *Vivian*, 601 N.W.2d at 872, 878.

[75] IOWA CODE ANN. § 216.6 (emphasis added); *cf.* 42 U.S.C. § 2000e-2(a)(1) (2000) (using the term "employer," rather than "person").

[76] IOWA CODE ANN. § 216.11.

[77] *Vivian*, 601 N.W.2d at 873 (referencing 42 U.S.C. § 2000e).

[78] IOWA CODE ANN. § 216.15(1); *cf.* 42 U.S.C. § 2000e-5(b) (not authorizing claims against persons).

[79] IOWA CODE ANN. § 216.2 (11).

[80] *Id.* § 216.6(6)(a).

[81] *Id.* § 216.18.

ancestry."[82] The court found it "significant that the words 'person' and 'employer' are used in conjunction with one another, indicating the legislature's clear perception of their separate meanings."[83]

5. District of Columbia

The District of Columbia Human Rights Act[84] makes it unlawful for an employer to discriminate against an individual with respect to that individual's compensation, terms, conditions, or privileges of employment.[85] The term "employer" is defined as "any person who, for compensation, employs an individual, except for the employer's parent, spouse, children or domestic servants, engaged in work in and about the employer's household; any person acting in the interest of such employer, directly or indirectly; and any professional association."[86] The District of Columbia Court of Appeals noted that federal anti-discrimination statutes differ from the D.C. Human Rights Act in a few critical respects, which the court used as a justification to permit individual liability under D.C. law.[87]

First, Title VII's definition of "employer" does not contain the phrase "any person acting in the interest of such employer, directly or indirectly."[88] Second, the Human Rights Act makes it an unlawful discriminatory practice for any person to "aid, abet, incite, compel, or coerce the doing of any of the acts forbidden under the provisions of this chapter or to attempt to do so."[89] Third, the court acknowledged that the Human Rights Act does not include an exception for small employers, such as the minimum employee requirement under federal law.[90]

In sum, the differences between federal and state anti-discrimination laws have resulted in conflicting determinations of liability under employment discrimination law. Based on courts' interpretations of the laws, it appears that Congress believes that

---

[82] *Id.* § 729.4.

[83] *Vivian*, 601 N.W.2d at 875.

[84] D.C. CODE ANN. § 2-1401.01 (2001 & Supp. 2003).

[85] *Id.* § 2-1402.11(a)(1).

[86] *Id.* § 2-1401.02(10).

[87] Wallace v. Skadden, Arps, Slate, Meagher & Flom, 715 A.2d 873, 889 (D.C. 1998). The case discusses the former codification of the Human Rights Act, at D.C. CODE ANN. § 1-2501 *et seq.* (1992 & Supp. 1998). The current codification cited in this Note is identical in all material respects.

[88] *Id.*; *see supra* text accompanying note 15 (defining "employer" under Title VII).

[89] D.C. CODE ANN. § 2-1402.62; *cf.* 42 U.S.C. § 2000e (2000) (containing no provision proscribing aiding and abetting).

[90] *Wallace*, 715 A.2d at 889 (noting that if an employer who employs only a single individual is subject to the act, then it is unlikely that the Council intended to protect individuals from liability).

vicarious, or enterprise, liability alone is adequate, while many states think that individual liability is necessary. In an attempt to determine how and why the federal and state laws were adopted in their current form, Part II explores the purpose and history of employment discrimination law in the United States.

II. THE PURPOSE AND HISTORY OF EMPLOYMENT DISCRIMINATION LAW IN THE U.S.

Beginning in the late nineteenth century, the state and federal governments sought to regulate the employment relationship through statutes intended to alleviate the plight of workers unable to protect themselves from exploitation in the workplace.[91] The newest attempts gave rise to the law of employment discrimination, including Title VII, the ADEA, and the ADA. These laws restrain employers by prohibiting discriminatory actions based on race, color, sex, national origin, age, religion, or disability.[92] The overall structure of state and federal employment discrimination laws is the same: "[I]ndividuals or members of an EEO commission may complain to the commission that an employer, a labor union, or an employment agency has discriminated against them."[93] However, the individual provisions in state and federal statutes, such as those pertaining to liability coverage, are not always similar. The reason for this discrepancy is unclear and, as the next subsection shows, legislative history at the state level provides limited guidance on the issue.

A. The History of State Anti-Discrimination Law

The earliest post-Reconstruction statutory efforts to end employment discrimination were state laws. State concerns about threats to the rights and privileges of its citizens, domestic discord, and the undermining of the foundations of a free democratic state, prompted the majority of the proposed equal employment opportunity bills.[94] "The enactment of [most state fair employment practice bills has been] described variously as an exercise of police power, as a fulfillment of the provisions of the state constitution,

---

[91] JOEL WM. FRIEDMAN & GEORGE M. STRICKLER, JR., THE LAW OF EMPLOYMENT DISCRIMINATION 1 (5th ed. 2001).

[92] The law also restrains labor unions and employment agencies from discriminating, but this Note focuses on employers only.

[93] PAUL BURSTEIN, DISCRIMINATION, JOBS, AND POLITICS: THE STRUGGLE FOR EQUAL EMPLOYMENT OPPORTUNITY IN THE UNITED STATES SINCE THE NEW DEAL 18 (1985).

[94] Note, *Fair Employment Practices—A Comparison of State Legislation and Proposed Bills*, 24 N.Y.U. L. REV. 398, 399 (1949).

as a declaration of public policy or as a combination of two or more such bases."[95]

Commencing in the 1940s, a number of states enacted fair employment practice statutes to combat discrimination in employment.[96] As of 1963, twenty-two states barred racial discrimination in private employment in one form or another.[97] These statutes took one of two forms: (1) those that expressed a public policy against discrimination in employment, but contained no remedial provision; and (2) those that defined prohibited employment practices and provided an enforcement mechanism.[98] New York state, which defined unlawful discrimination to include an employer's refusal to hire or decision to discharge an individual from employment because of his or her race, color, or creed,[99] enacted a series of statutes that typified the second form.[100] The laws provide for enforcement by a State Commission for Human Rights, which, upon the filing of a discrimination complaint, is to investigate and, if a violation is found, to order reinstatement, backpay, and compensatory damages.[101] The New York form exemplifies the current structure of most state employment discrimination statutes.[102]

The issue of coverage, in particular the number of employees required to hold the employer liable, resulted in much debate and numerous legislative proposals among the states.[103] Based on the bills enacted, the minimum number of employees needed before the law applied varied from one to fifty, but the most common figure was six or eight.[104] Unfortunately, the broad overview of the history of state employment discrimination law fails to illuminate

---

[95] *Id.* at 398.

[96] FRIEDMAN & STRICKLER, *supra* note 91, at 14.

[97] DUANE LOCKARD, TOWARD EQUAL OPPORTUNITY: A STUDY OF STATE AND LOCAL ANTI-DISCRIMINATION LAWS 24 (1968). The states included: New York, New Jersey, Massachusetts, Connecticut, New Mexico, Oregon, Rhode Island, Washington, Michigan, Minnesota, Pennsylvania, Wisconsin, Colorado, California, Ohio, Delaware, Illinois, Kansas, Missouri, Alaska, Indiana, and Hawaii.

[98] FRIEDMAN & STRICKLER, *supra* note 91, at 15.

[99] The Supreme Court upheld New York employment discrimination law in *Railway Mail Ass'n v. Corsi*, 326 U.S. 88, 94 (1945), declaring that there was "no constitutional basis for the contention that a state cannot protect workers from exclusion solely on the basis of race, color, or creed by an organization."

[100] Such laws included: N.Y. CIV. RIGHTS LAW §§ 40-43 (McKinney 1992 & Supp. 2004); N.Y. EXEC. LAW §§ 290-301 (McKinney 2001 & Supp. 2004); N.Y. LAB. LAW § 220-e (McKinney 2002).

[101] N.Y. EXEC. LAW §§ 295-297.

[102] *See, e.g.*, D.C. CODE ANN. § 2-1401.01 (2001 & Supp. 2003); IOWA CODE ANN. § 216.6 (West 2000); MASS. GEN. LAWS ANN. ch. 151B, § 4 (West 1996 & Supp. 2003); OHIO REV. CODE ANN. § 4112 (West 2001); WASH. REV. CODE ANN. § 49.60 (West 2002).

[103] Note, *supra* note 94, at 400-01 (citations omitted).

[104] LOCKARD, *supra* note 97, at 82.

the rationale behind the various figures and does not explain why the statutes took their current form. As the Iowa Supreme Court in *Vivian v. Madison*[105] stated, "there is surprisingly little to discover with regard to legislative history of the ICRA. Our only sources of interpretive guidance come from [section] 216.18, which states that the chapter should be construed broadly . . . ."[106] That court went on to infer that the Iowa legislature intended the ICRA to be broad enough to embrace individual liability because it included an aiding and abetting provision and specifically prohibited discrimination by "any person."[107]

The failure of many states to pass or enforce anti-discrimination laws,[108] and an increase in congressional support for a federal employment discrimination statute shifted attention to the federal level.[109] The civil rights movement caused a steady increase in legislative support, and following the 1963 March on Washington by over 200,000 people, Congress responded by enacting the Civil Rights Act of 1964.[110] Among its provisions was Title VII, which marked the beginning of the modern era of employment discrimination law in the U.S.[111]

B. The History of Federal Anti-Discrimination Law (Title VII)

On July 24, 1964, President Johnson signed Title VII, which states: "It shall be an unlawful employment practice for an employer (1) to fail or refuse to hire or to discharge any individual, or otherwise discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."[112] Title VII has been the focus of more litigation and wide-ranging judicial and academic scrutiny than any other federal statute designed to promote the goal of equal employment opportunity.[113] The issue of liability is particularly contentious. Cover-

---

[105] 601 N.W.2d 872 (Iowa 1999).

[106] *Id.* at 874.

[107] *Id.* at 877; IOWA CODE ANN. §§ 216.6(1), 216.11 (West 2000); *see also* Brown v. Scott Paper Worldwide Co., 20 P.3d 921, 927 (Wash. 2001) (relying on similar provisions, rather than legislative history, to infer the legislature's intent to permit individual liability).

[108] The southern states refused to pass state anti-discrimination laws, and the more liberal states worried that the passage of EEO laws would encourage businesses to move elsewhere. BURSTEIN, *supra* note 93, at 64.

[109] *See id.* at 65.

[110] *Id.* at 69.

[111] Title VII became law twenty years after the Supreme Court declared that the Constitution does not prevent the states from enforcing laws to protect workers from racial discrimination.

[112] 42 U.S.C. § 2000e-2 (2000).

[113] This section will focus more on Title VII than the other federal statutes due to the vast

age received more attention than virtually any other aspect of the proposed statute; the House and Senate voted twenty-four times on amendments affecting coverage.[114]

Courts often look to legislative history to guide their interpretation of certain laws, and Title VII is no exception.[115] Federal courts generally utilize legislative history to support their decision to exclude individual liability under Title VII. The Second Circuit, in *Tomka v Seiler Corp.*,[116] found that most of the comments directed at the minimum employee threshold refer only to employer-entities, implying that Congress did not contemplate agent liability under Title VII. A letter from the minority membership of the House Committee on the Judiciary stated that "[c]overage [of Title VII] is limited to businesses and labor organizations affecting commerce."[117] Moreover, the floor debate over Title VII indicates that the costs associated with defending against discrimination claims were a factor in the decision to implement a minimum employment requirement.[118] The *Tomka* court also emphasized the noticeable absence of any mention of agent liability during the debates.[119] In *Jendusa v. Cancer Treatment Centers of America, Inc.*,[120] the U.S. District Court for the Northern District of Illinois also acknowledged that legislative history regarding the limit on the size of employers covered under Title VII does reflect a concern about the ability of small businesses to bear litigation costs.[121]

Moreover, as amended, Title VII and the ADA permit recovery of punitive damages for intentional discrimination engaged in with malice or reckless indifference.[122] According to *Horney v. Westfield Gage Co.*,[123] the accompanying legislative history indicates that those remedies were meant to provide an additional de-

---

amount of case law available and because Title VII is the model for the other laws.

[114] BURSTEIN, *supra* note 93, at 25.

[115] *See, e.g.*, Meritor Sav. Bank v. Vinson, 477 U.S. 57, 75 n.1 (1986) (Marshall, J., concurring); Tomka v. Seiler Corp., 66 F.3d 1295, 1314 (2d Cir. 1995); Horney v. Westfield Gage Co., 95 F. Supp. 2d 29, 34-35 (D. Mass. 2000); Jendusa v. Cancer Treatment Ctrs. of Am., Inc., 868 F. Supp. 1006, 1013 n.11 (N.D. Ill. 1994) (all discussing the legislative history of Title VII).

[116] 66 F.3d 1295 (2d Cir. 1995).

[117] 110 CONG. REC. 6566 (1964).

[118] *See Tomka*, 66 F.3d at 1314 (citing 110 CONG. REC. S13,092 (1964) (remarks of Sen. Cotton); 110 CONG. REC. S13,088 (1964) (remarks of Sen. Humphrey); 110 CONG. REC. S13,092-93 (1964) (remarks of Sen. Morse)). It should be noted that there were also other factors considered by Congress in enacting Title VII, including the protection of intimate and personal relations existing in small businesses, and potential effects on competition and the economy. *Id.* (citing 110 CONG. REC. S7088 (1964) (remarks of Sen. Stennis); 110 CONG. REC. S7207-17 (1964) (remarks of Sen. Clark)).

[119] *Id.*

[120] 868 F. Supp. 1006 (N.D. Ill. 1994).

[121] *Id.* at 1013 n.11 (citing 110 CONG. REC. S13,092 (1964) (remarks of Sen. Cotton)).

[122] 42 U.S.C. § 1981a (2000).

[123] 95 F. Supp. 2d 29 (D. Mass. 2000).

terrent to employers, not individuals. Legislative history states that "[m]aking employers liable for all losses—economic and otherwise—which are incurred as a consequence of prohibited discrimination . . . will serve as a necessary deterrent to future acts of discrimination."[124] Congress emphasized that employers must prevent the discriminatory conduct before it occurs: "[M]onetary damages simply raise the cost of an employer's engaging in intentional discrimination, thereby providing employers with additional incentives to prevent intentional discrimination in the workplace before it happens."[125]

Other courts, acknowledging a lack of available legislative history regarding liability coverage under any of the federal statutes, have looked elsewhere to determine Congress's intent.[126] The National Labor Relations Act ("NLRA"),[127] on which Title VII was modeled,[128] does include such legislative history, and has thus been examined.[129] The definition of "employer" under the NLRA was amended in 1947 from including any person "acting in the interest of an employer"[130] to covering "any person acting as an agent of an employer."[131] Professor Rebecca Hanner White explains the purpose behind the definition change:

> Under the [original version], employers had been held liable for the actions of persons who were not acting within the scope of their authority, and those cases prompted employers to demand that the statutory language be amended. At the same time, Congress was reluctant to allow employers to evade vicarious liability by claiming that their employees' acts were not authorized or ratified. Thus, in amending the NLRA to include "agents" within the statutory definition, Congress made clear its intent not only to absolve employers from liability for actions of persons who were not their

---

[124] H.R. REP. NO. 102-40(I), at 69 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 607.

[125] *Id.* at 603.

[126] *See* Vinson v. Taylor, 753 F.2d 141, 148 (D.C. Cir. 1985) ("The legislative history of Title VII is virtually barren of indications, one way or the other, of a vicarious responsibility for employers."); *see also* 2A NORMAN J. SINGER, STATUTES AND STATUTORY CONSTRUCTION § 51.01 (6th ed. 2000) ("Other statutes dealing with the same subject as the one being construed . . . [comprise] another form of extrinsic aid useful in deciding questions of interpretation.").

[127] 29 U.S.C. §§ 141-187 (2000).

[128] Meritor Sav. Bank v. Vinson, 477 U.S. 57, 75 n.1 (1986) (Marshall, J., concurring).

[129] *See id.*; Albemarle Paper Co., v. Moody, 422 U.S. 405, 419-20 (1975); Low v. Hasbro, Inc., 817 F. Supp. 249, 250 (D.R.I. 1993) (all cases examining legislative history of the NLRA to interpret congressional intent regarding Title VII).

[130] H.R. 3020, 89th Cong. (1947).

[131] 29 U.S.C. § 152(2) (2000).

> agents but also to hold employers liable, using the common law of agency, for the acts of those who were.[132]

The court in *Low v. Hasbro, Inc.*[133] also concluded that "when Congress included 'any agent' in the NLRA it was an attempt to limit the employer's liability rather than to grant a new cause of action against all agents or employees of an employer."[134]

Additionally, the remedial scheme originally designed for Title VII, which allowed recovery of only equitable relief for a statutory violation, was also borrowed from the NLRA.[135] Absent vicarious liability, victims of discrimination would be denied this relief. There is not, however, an NLRA counterpart to the 1991 amendments permitting punitive and compensatory damages under Title VII.[136] The longstanding acceptance of vicarious liability under the NLRA may explain the lack of discussion by Congress or the courts concerning whether vicarious liability was allowed under the federal employment discrimination statutes. In sum, the legislative history available for Title VII assists in determining how and why the federal statutes came to be adopted in their current form imposing vicarious liability and excluding individual liability.

III. ARGUMENTS SUPPORTING VICARIOUS LIABILITY

Vicarious liability is generally defined as the imposition of liability upon one party for the wrong committed by another.[137] One of the most common forms of vicarious liability is the infliction of liability on an employer for the wrong of an employee, based upon the principle of respondeat superior.[138] Federal employment discrimination law imposes such liability, holding employers legally responsible for the discriminatory acts of their agents under Title VII, the ADEA, and the ADA.[139] Although statutory construction supports this and opposes personal liability, the courts and com-

---

[132] Rebecca Hanner White, *Vicarious and Personal Liability for Employment Discrimination*, 30 GA. L. REV. 509, 538-39 (1996) (footnotes omitted).

[133] 817 F. Supp. 249 (D.R.I. 1993).

[134] *Id.* at 250 (quoting Friend v. Union Dime Sav. Bank, 24 Fair Empl. Prac. Cas. (BNA) 1307 (S.D.N.Y. 1980)).

[135] *See* 29 U.S.C. § 160 (2000); *see also* 42 U.S.C. § 2000e-5(g) (2000); Meritor Sav. Bank v. Vinson, 477 U.S. 57, 75 n.1 (1986) (Marshall, J., concurring).

[136] Compensatory and punitive damages are not available under the NLRA. 29 U.S.C. § 160 (2000).

[137] DOBBS, *supra* note 23, § 333.

[138] *Id.*

[139] White, *supra* note 132, at 509.

mentators have put forth additional arguments explaining why vicarious liability is necessary.[140]

A common argument holds that the employer is in the best position to remedy discrimination, and therefore vicarious liability is necessary to ensure that victims are fully compensated.[141] Judgment awards composed of backpay and compensatory and punitive damages may be uncollectible against individuals since most do not have the financial resources necessary to satisfy such awards. The Second Circuit stated that "a Title VII plaintiff will rarely file a suit against the agent alone, because the plaintiff has the best chance of recovering from the employing entity."[142] Also, only the employer can supply some meaningful remedies, such as reinstatement and promotion.

Additionally, courts have held that the statutes' deterrence objective would be undermined without vicarious liability.[143] An employer forced to pay damages due to the discriminatory acts of its agent has an incentive, and the means, to ensure that its agents do not discriminate. The Seventh Circuit held that individual liability is unnecessary because "the employing entity is still liable, and that entity . . . [has] the proper incentives to adequately discipline [discriminatory] employees, as well as to instruct and train employees to avoid actions that might impose liability."[144] Thus, the employer is in the best position to deter agents from discriminating by providing programs to educate employees on employment discrimination law and enforcing anti-discrimination policies that threaten punishment for violators.

---

[140] *See, e.g.*, EEOC v. AIC Sec. Investigations, Ltd., 55 F.3d 1276, 1282 (7th Cir. 1995); Horn v. Duke Homes, 755 F.2d 599, 605 (7th Cir. 1985); Bramesco v. Drug Computer Consultants, 834 F. Supp. 120, 123 (S.D.N.Y. 1993) ("[E]xposure of [agents] to personal liability may interfere with the functions of their employers . . . ."); Archer v. Globe Motorists Supply Co., 833 F. Supp. 211, 214 (S.D.N.Y. 1993) (discussing the negative impact that holding individual personnel liable for an entity's misconduct can have on the ability of the entity to perform its functions); Alan Q. Sykes, *The Boundaries of Vicarious Liability: An Economic Analysis of the Scope of Employment Rule and Related Legal Doctrines*, 101 HARV. L. REV. 563, 605-07 (1988) (arguing that vicarious liability is economically efficient); White, *supra* note 132, at 543.

[141] *See, e.g.*, Albemarle Paper Co. v. Moody, 422 U.S. 405, 418-22 (1975); White, *supra* note 132, at 516 (suggesting that recognizing individual liability might discourage courts from holding employers liable and therefore depriving plaintiffs of their most likely and effective source of redress).

[142] Tomka v. Seiler Corp., 66 F.3d 1295, 1315 (2d Cir. 1995).

[143] *Albemarle Paper Co.*, 422 U.S. at 417; *AIC Sec. Investigations, Ltd.*, 55 F.3d at 1282 (rejecting the argument that without individual liability discrimination will be unpunished and undeterred); *Horn*, 755 F.2d at 605 (arguing that "discrimination can best be eradicated by enforcing a strict liability rule that ensures compensation for victims and creates an incentive for the employer to take the strongest possible affirmative measures to prevent the hiring and retention of [discriminators]").

[144] *See AIC Sec. Investigations, Ltd.*, 55 F.3d at 1282 (stating that Congress has "struck a balance between deterrence and societal cost").

Finally, it is the employer's delegation of authority to the agent who has "caused" the wrong and thus, the employer should be held vicariously liable.[145] As one commentator observed, "[i]t is the delegation of power from the employer to the individual supervisor that enables one individual to inflict a statutory harm on another."[146] Absent an employment relationship, there is no statutory violation because the actions of an individual outside the workplace do not violate any employment discrimination law.[147]

These arguments are persuasive in justifying vicarious liability under employment discrimination statutes; however, they do not justify refusing to impose personal liability as well. Imposing individual liability in employment discrimination cases will not weaken the justifications for employer liability, and will in fact enhance them.[148]

IV. ARGUMENTS SUPPORTING INDIVIDUAL LIABILITY

Despite the circuit courts' general agreement that federal employment discrimination statutes prohibit individual liability, state courts take the opposite view regarding some state employment discrimination laws.[149] Beyond the statutory language differences, state courts have also presented additional justifications.[150] First, a common argument holds that individual liability is essential to the satisfaction of employment discrimination law's deterrence function.[151] Individuals are less inclined to discriminate knowing that their actions will be punished. The district court in *Jendusa v. Cancer Treatment Centers of America, Inc.*[152] held that the threat of a sizeable monetary penalty is essential in deterring discrimina-

---

[145] Meritor Sav. Bank v. Vinson, 477 U.S. 57, 76-77 (1986) ("[I]t is the authority vested in the supervisor by the employer that enables him to commit the wrong . . . .").

[146] White, *supra* note 132, at 543.

[147] *Id.*

[148] *See infra* Part V (discussing the advantages of recognizing both employer and individual liability).

[149] *See, e.g.*, Wallace v. Skadden, Arps, Slate, Meagher & Flom, 715 A.2d 873, 888 (D.C. 1998); Vivian v. Madison 601 N.W.2d 872, 874 (Iowa 1999); Genaro v. Cent. Transp., Inc., 703 N.E.2d 782, 785-86 (Ohio 1999); Schram v. Albertson's, Inc., 934 P.2d 483, 488 (Or. Ct. App. 1997); Brown v. Scott Paper Worldwide Co., 20 P.3d 921, 928 (Wash. 2001) (all finding individual liability under state employment discrimination laws).

[150] The state courts rely on the lower federal courts that, although not followed by higher courts, make persuasive arguments in favor of personal liability under employment discrimination law. *See supra* note 11 (listing lower federal courts that favor the imposition of individual liability).

[151] *See* Jendusa v. Cancer Treatment Ctrs. of Am., Inc., 868 F. Supp. 1006, 1011 (N.D. Ill. 1994) ("[T]he prospect of individual liability is essential if the antidiscrimination statutes are to have their full deterrent effect."); *see also Wallace*, 715 A.2d at 889 (finding individual liability necessary in some circumstances to prevent future discrimination).

[152] 868 F. Supp. 1006 (N.D. Ill. 1994).

tory conduct among employees, especially those who are not in high-salaried positions.[153] In addition, direct personal liability ensures that the discriminator is reprimanded, whereas vicarious liability may not result in any punishment for the wrongdoer if the employer fails to impose disciplinary action.[154] The Washington Supreme Court, in *Brown v. Scott Paper Worldwide Co.*,[155] held that the state law's strong commitment to deter discrimination implies that the individual discriminator should be held liable.[156] Similarly, the District of Columbia Court of Appeals, in *Wallace v. Skadden, Arps, Slate, Meagher & Flom*,[157] held that in order to "secure an end . . . to discrimination," the individual who denied the plaintiff equal employment opportunity must be held liable.[158]

Second, courts and commentators argue that personal liability vindicates victims of discrimination more effectively than vicarious liability.[159] A monetary judgment against an employer is insufficient to fully compensate the injured party. It is necessary to hold the wrongdoer accountable for his or her unlawful acts before the victims can feel vindicated.[160] The court in *Wallace*, favoring personal liability, cautioned that following the federal laws' imposition of vicarious liability would result in a plaintiff's inability to secure relief against an individual who willfully denied the plaintiff equal employment opportunity.[161] The chance of victim redress will also increase because the injured parties are more likely to sue if personal liability is recognized.[162] Moreover, the imposition of vicarious liability may discourage victims from filing law-

---

[153] *Id.* at 1012.

[154] *See id.* (contending that many employers fail to discipline supervisors after a court finding that the supervisor did discriminate).

[155] 20 P.3d 921 (Wash. 2001).

[156] *Id.* at 927.

[157] 715 A.2d 873 (D.C. 1998).

[158] *Id.* at 889.

[159] *See, e.g.*, Johnson v. Univ. Surgical Group Assocs., 871 F. Supp. 979, 986 (S.D. Ohio 1994); Vakharia v. Swedish Covenant Hosp., 824 F. Supp. 769, 784-86 (N.D. Ill. 1993); *see also* Tracy L. Gonos, *A Policy Analysis of Individual Liability—The Case for Amending Title VII to Hold Individuals Personally Liable for Their Illegal Discriminatory Acts*, 2 N.Y.U. J. LEGIS. & PUB. POL'Y 265, 291 (1999) (stating that psychological vindication should not be undervalued); Phillip L. Lamberson, Comment, *Personal Liability for Title VII: Thirty Years of Indecision*, 46 BAYLOR L. REV. 419, 420-21 (1994) (stating that the harasser must be joined in the suit as a defendant before plaintiff can feel fully vindicated).

[160] *See* Scott B. Goldberg, Comment, *Discrimination by Managers and Supervisors: Recognizing Agent Liability Under Title VII*, 143 U. PA. L. REV. 571, 584 n.60 (1994) ("Congress's goal is to compensate victims in fact, not merely to provide an opportunity for compensation that may be undesirable to victims.").

[161] *Wallace*, 715 A.2d at 889.

[162] Goldberg, *supra* note 160, at 584.

suits because it may jeopardize the ability of the employer to stay in business and to provide jobs.[163]

Finally, the individual who acts unlawfully should be punished for his or her wrongdoing.[164] Placing the blame on the individual discriminator, rather than the employing entity, better serves the interests of public policy and justice. As one commentator states:

> [A]gents who discriminate are usually deemed more blameworthy than their employers, who are merely vicariously exposed to liability for the violations of their agents. . . . [R]ecognizing employer liability without recognizing agent liability would be anomalous as a legal doctrine. As such, the blameworthiness theory of tort liability also requires that victims be allowed to sue agents who discriminate.[165]

The Washington Supreme Court, in *Brown*, emphasized that "[t]he more incongruous position here would be that the Legislature declared such a broad public policy against discrimination while at the same time protecting supervisors who directly discriminate against the employees they oversee."[166] The Ohio Supreme Court, in *Genaro v. Central Transportation, Inc.*,[167] agreed, stating that "[b]y holding supervisors and managers liable for their discriminatory actions, the antidiscrimination purposes of [Ohio's law] are facilitated, thereby furthering the public policy goals of this state regarding workplace discrimination."[168]

Although convincing, the arguments for the implementation of personal liability fail to justify adequately the exclusion of vicarious liability. Proponents on both sides of the issue present credible arguments, but neglect to acknowledge that vicarious and personal liability are not mutually exclusive. Recognizing individual and vicarious liability is the most logical method of imposing liability under employment discrimination law because it takes advantage of the benefits that each side offers.

---

[163] *Id.*

[164] Bishop v. Okidata, Inc., 864 F. Supp. 416, 424 (D.N.J. 1994); Strzelecki v. Schwarz Paper Co., 824 F. Supp. 821, 829 n.3 (N.D. Ill. 1993).

[165] Goldberg, *supra* note 160, at 589.

[166] Brown v. Scott Paper Worldwide Co., 20 P.3d 921, 927-28 (Wash. 2001).

[167] 703 N.E.2d 782 (Ohio 1999).

[168] *Id.* at 785.

V. THE MOST EFFECTIVE WAY TO ACCOMPLISH THE OBJECTIVES OF EMPLOYMENT DISCRIMINATION LAW IS TO HOLD BOTH EMPLOYERS AND INDIVIDUALS LIABLE

Authority to hold both individuals and employers liable can be found at common law. Specifically, common law agency principles are consistent with recognizing individual and employer liability.[169] The Restatement (Second) of Agency states that "[p]rincipal and agent can be joined in one action for a wrong resulting from tortious conduct of an agent . . . and a judgment can [be rendered] against each."[170] The employer is not liable because of its negligence, but is vicariously liable because of its legal relationship to the employee.[171] Although employment discrimination claims are statutory claims, rather than common law claims, state courts have generally followed the principle of respondeat superior when imposing both individual and vicarious liability.[172] In *Brown v. Scott Paper Worldwide Co.*,[173] the Washington Supreme Court reasoned that under the theory of respondeat superior, employer liability is not based on fault, but on social and economic policy reasons such as the employer's authority over the employee and the employer's deep pockets.[174] The fault rests with the wrongdoer, who is also liable.

Furthermore, holding both the individual perpetrators and their employers liable is the most effective way to accomplish employment discrimination law's dual purpose: to deter discrimination in the workplace and to compensate the victims.[175]

---

[169] *See* Jendusa v. Cancer Treatment Ctrs. of Am., Inc., 868 F. Supp. 1006, 1012-13 (N.D. Ill. 1994).

[170] RESTATEMENT (SECOND) OF AGENCY § 359C(1) (1957).

[171] DOBBS, *supra* note 23, § 170.

[172] *See, e.g.*, Genaro v. Cent. Transp., Inc., 703 N.E.2d 782, 785 (Ohio 1999) ("[Ohio's] definition of employer including 'any person acting directly or indirectly in the interest of an employer' . . . is meant only to ensure that employers cannot escape respondeat superior or agency liability."); Brown v. Scott Paper Worldwide Co., 20 P.3d 921, 927 n.3 (Wash. 2001) (discussing theory of respondeat superior).

[173] 20 P.3d 921 (Wash. 2001).

[174] *Id.* at 927 n.3.

[175] Albemarle Paper Co. v. Moody, 422 U.S. 405, 417, 422 (1975); Vakharia v. Swedish Covenant Hosp., 824 F. Supp. 769, 785 (N.D. Ill. 1993) ("Title VII has always served two purposes: to compensate the victims of discrimination . . . and to deter discrimination . . . ."); Gonos, *supra* note 159, at 277. Under some circumstances, a victim may not want to sue both the employer and the individual. The proposed scheme of liability allows the victim to have this choice. *See* Goldberg, *supra* note 160, at 583 (discussing when a plaintiff may be reluctant to hold both the individual and the employer liable).

A. *Employment Discrimination Is More Likely to Be Deterred if the Individual and the Employer Are Both Liable*

A strong commitment to the deterrence and elimination of employment discrimination suggests that both the individual who discriminates and the employer for whom he or she works should be held liable.[176] Under a scheme of both employer and individual liability, anti-discrimination statutes deter discrimination in two ways: agents fear direct liability, and they fear employer repercussions due to the employer's exposure to vicarious liability.[177] Making the individual discriminator directly liable through the court system, and indirectly liable through employer ramifications, is the most effective means to deterring and ultimately eliminating employment discrimination.

1. Discriminators Fear Liability

Arguably, one of the most powerful deterrents of employment discrimination is the threat of personal bankruptcy, which can occur when individuals are held directly liable for their unlawful conduct.[178] Commonly, the employees involved in discrimination cases are not highly compensated executives, but rather mid-level employees.[179] "For them, being forced to even pay a portion of the litigation costs and damages in [an employment discrimination] action could be financially ruinous."[180] Direct liability also threatens an individual's reputation because of the stigma that attaches.[181] Discriminators may have difficulty obtaining alternative employment if potential employers discover the past discrimination. Additionally, employer-enforced anti-discrimination policies and subsequent repercussions for violators are also strong deterrents. Employers that are vicariously liable for the unlawful conduct of employees are encouraged to enforce policies that may threaten a discriminator with demotion or discharge. Absent either the direct or the indirect liability, employment discrimination is less likely to be deterred.

---

[176] *Brown*, 20 P.3d at 928 ("[E]nabling employees to sue [individuals] who have discriminated against them is consistent with the broad public policy to eliminate all discrimination in employment."); Lamberson, *supra* note 159, at 428 (stating that the best way to stop discrimination is to hold both the institutional employer and the individual who actually committed the discriminatory acts liable).

[177] Goldberg, *supra* note 160, at 584-85.

[178] Sykes, *supra* note 140, at 567 n.9; Goldberg, *supra* note 160, at 585.

[179] Lamberson, *supra* note 159, at 421.

[180] *Id.*

[181] *See id.* (stating that in addition to monetary liability, a guilty verdict against an individual "would be stigmatizing and would likely have adverse consequences on future employment or promotions").

Workplace anti-discrimination programs and the threat of employer discipline are insufficient to deter discrimination absent personal liability. There is no guarantee that the employer will enforce programs and policies designed to prevent and punish discrimination. Circumstances exist where an employer forced to take responsibility for an employee's unlawful conduct either fails to inflict punishment on that individual or an individual subjected to the employer's discipline is not negatively affected. It is plausible that an employer forced to go to court on behalf of the alleged discriminatory actions of its agent may choose to focus its anger after a loss on the injustice that occurred in the courtroom and not on the agent.[182] The district court in *Jendusa v. Cancer Treatment Centers of America, Inc.*,[183] found that employers more often than not neglect to punish employees for discriminatory conduct, especially if the employee is a high-ranking individual whom the employer may view as essential to the operation of the business.[184] Moreover, an employer's deterrence measures, such as discharge, lower compensation, or reduction of advancement opportunities,[185] are not always effective, particularly if the discriminating employee is nearing retirement or will otherwise be terminating his employment. As a result, indirect liability will not sufficiently affect individuals who fall into any of these categories to aid in deterring employment discrimination.

Conversely, direct individual liability alone is inadequate to deter employment discrimination. Repercussions by employers, such as discharge and demotion, are strong financial deterrents, and in some respects may have an impact similar to personal bankruptcy. Individuals may even consider the risk of a court-ordered damage award less threatening than the chance of losing their jobs and ultimately their source of income. Furthermore, without vicarious liability, employers will lose the monetary incentive to institute anti-discrimination programs and policies, which not only punish known perpetrators, but also help discourage future acts by potential discriminators:

---

[182] *See* Jendusa v. Cancer Treatment Ctrs. of Am., Inc., 868 F. Supp. 1006, 1012 (N.D. Ill. 1994) ("[E]mployers who lose an employment discrimination suit walk away . . . believing that an injustice has been worked against them at the hands of a jury sympathetic to a disabled, aged, or minority plaintiff. The court does not believe that these employers . . . will . . . discipline the responsible supervisory personnel.").

[183] 868 F. Supp. 1006 (N.D. Ill. 1994).

[184] *Id.* at 1012.

[185] *See* Goldberg, *supra* note 160, at 585 n.67 (discussing sanctions an employer may impose).

> [T]he employer is in the best position to institute and post workplace prohibitions on discrimination, put grievance procedures in place, inform workers of their rights, and investigate and eradicate discriminatory conduct. Thus, it is crucial that the economic incentives that do exist for employers to deter discrimination are not weakened or eliminated altogether.[186]

In addition, without vicarious liability, the threat of a tainted reputation that results from being held liable for discrimination will no longer be an incentive for the employing entity to aid in eliminating discrimination.

2. Victims Will Take More Legal Action

Imposing employer and individual liability creates another path of deterrence: Victims of employment discrimination are more likely to sue. The Seventh Circuit, which ruled that individuals cannot be held liable under the ADA, acknowledged that "increasing the number of potentially liable defendants would increase deterrence, as businesses put more resources into avoiding liability and plaintiffs saw more potentially liable parties and had a greater incentive to sue."[187] The addition of individual liability provides victims of discrimination the opportunity to sue as a means of allocating blame. Thus, under the dual liability regime, victims reluctant to sue knowing that the discriminator, whom they hold to be more responsible than the employer for their injuries, cannot be held accountable by the courts will have an added incentive. Presumably, there is no doubt that an increase in the number of lawsuits filed by victims of employment discrimination will result in a decrease in discriminatory conduct.[188]

B. Individual and Employer Liability Are Both Necessary to Fully Compensate Employment Discrimination Victims

In order for victims of employment discrimination to feel truly compensated for their injuries, the actual discriminator, as well as his or her employer, should be held jointly and severally liable.[189] After examining the purposes of its state anti-

---

[186] Gonos, *supra* note 159, at 292.

[187] EEOC v. AIC Sec. Investigations, Ltd., 55 F.3d 1276, 1282 (7th Cir. 1995).

[188] *See* Goldberg, *supra* note 160, at 583-84 (arguing that agent liability is needed to encourage litigation-shy victims to sue). Encouraging victims to sue also furthers the congressional goal of redressing employment discrimination. *See infra* Part V.B.2 (discussing the effect of individual liability on victim compensation).

[189] DOBBS, *supra* note 23 (discussing the principle of respondeat superior, in which employers are generally jointly and severally liable, along with the employee, for torts committed

discrimination law, the Ohio Supreme Court, in *Genaro v. Central Transportation, Inc.*,[190] held that a supervisor should be held jointly and severally liable with his or her employer for the discriminatory conduct of the supervisor in violation of state employment discrimination law.[191] When individual and vicarious liability are both recognized, successful plaintiffs receive compensation through monetary damage awards and personal vindication.

1. The Receipt of Monetary Compensation

As discussed previously, damage awards, although capped, can be substantial; an individual defendant is unlikely to possess sufficient funds to satisfy a judgment.[192] Rather, "[i]n a majority of cases, it will be the employer that has the financial resources to provide the most complete [monetary] compensation."[193] Additionally, aside from the monetary awards, a judgment for the plaintiff may include remedies, such as reinstatement and promotion, which are necessary to put the victim in the position he or she would have been in had the discrimination never occurred. Again, individuals are not capable of providing such relief, and thus, absent employer liability, those remedies would not be feasible.[194]

Holding employers economically liable for the unlawful actions of their employees does not, however, guarantee that victims will always be compensated. Rare instances may exist where the employer's pockets are not deep enough and it is unable to pay any or a fraction of the judgment award.[195] "The effect of joint and several liability is to provide the plaintiff with more than one source of funds but not more than one complete satisfaction."[196] Under a system of joint and several liability, each defendant is subject to liability for all of the plaintiff's damages.[197] The plaintiff can obtain a judgment against all defendants and then enforce it against any one of them, or partly against one and partly against another.[198] This system may prove especially effective in cases where the employer is bankrupt or no longer in existence. The vic-

---

by the employee).

[190] 703 N.E.2d 782 (Ohio 1999).

[191] *Id.* at 787-88; *see also* Gonos, *supra* note 159, at 292-93 (arguing that Title VII should be amended to provide for joint and several liability).

[192] *See supra* Part V.A.1 (noting that the employees involved in discrimination cases generally are not highly compensated executives, but rather mid-level employees); *supra* note 39 (discussing the damage caps that Title VII places on employers).

[193] Gonos, *supra* note 159, at 292.

[194] *See supra* notes 35-36 and accompanying text.

[195] Lamberson, *supra* note 159, at 420.

[196] DOBBS, *supra* note 23, § 385.

[197] *Id.*

[198] *Id.*

tim of discrimination does not have a means of recourse if the only defendant is insolvent.[199] Additionally, joint and several liability may assist in full recovery when the employer is only able to satisfy a fraction of the judgment amount. These situations reaffirm the argument that the victim should be entitled recourse from the individual perpetrator as well.[200]

Additionally, in some instances, without individual liability, discriminatory acts go unpunished, because, as the district court ruled in *Tomka v. Seiler Corp.*,[201] unless it can be shown that the defendant was working in his capacity as an agent of the employer, rather than his personal capacity, the employer will not be held liable either.[202] Thus, it is necessary to recognize both individual and vicarious liability to ensure that victims in all circumstances receive the monetary recourse that they are entitled.

2. *Victims Deserve Vindication and a Sense of Justice*

An express purpose of the Civil Rights Act of 1991 was "to strengthen existing remedies to . . . ensure compensation commensurate with the harms suffered by victims of intentional discrimination."[203] This should not be construed to limit compensation to economic recovery, because monetary relief alone is often inadequate to make a victim completely whole again, especially when that monetary relief is not coming from the actual perpetrator, but from a third party, the employer.[204] For many plaintiffs, retribution, rather than financial gain, may be the motivating factor for bringing an employment discrimination lawsuit. Victims may not feel vindicated unless the individual who committed the discrimination is joined as a defendant in the suit.[205] At the very least, vic-

---

[199] *See* Vakharia v. Swedish Covenant Hosp., 824 F. Supp. 769, 786 (N.D. Ill. 1993) (recognizing that employment discrimination plaintiffs are sometimes unable to sue because their employers are bankrupt); Goldberg, *supra* note 160, at 583 (noting that "agent liability helps realize the congressional goal of full compensation for unlawful discrimination by giving victims the option of suing an additional defendant who may be solvent").

[200] *See* Gonos, *supra* note 159, at 290-91 (noting that "[w]hile it is true that employers will generally have a 'deeper pocket' than individuals, this will not always be the case . . . . Amending Title VII to include a cause of action against individuals would give victims an additional avenue of recourse . . . ."); *see also* Archer v. Globe Motorist Supply Co., 833 F. Supp. 211, 214 (S.D.N.Y. 1993) (acknowledging the need to reconsider its decision rejecting individual liability if the employer was undercapitalized).

[201] 66 F.3d 1295 (2d Cir. 1995).

[202] *Id.* at 1303 (holding that the employer was not liable because Tomka failed to prove that her supervisor used his actual or apparent authority as Seiler's agent to accomplish the rape, and rejecting her argument that the supervisor used his power to require her to attend a business dinner).

[203] H.R. REP. NO. 102-40(I), at 18 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 556.

[204] *See* Gonos, *supra* note 159, at 291 (stating that the goal of compensating victims should not be construed in a narrow economic sense).

[205] Lamberson, *supra* note 159, at 420-21.

tims of employment discrimination deserve to have a sense that justice has been served.[206]

As explained in the previous section, victims are more likely to sue if both the individual and employer are liable.[207] The financial difficulties may hinder victims of employment discrimination from recovering full judgments and result in a reluctance to sue. Holding both the individual and employer liable will help eliminate some of the hesitance victims have filing lawsuits by providing them an alternative source of recourse. Therefore, by encouraging victims to sue, holding agents as well as their employers liable furthers the goal of rectifying employment discrimination.

CONCLUSION

The imposition of vicarious liability is an unquestioned component of federal employment discrimination law.[208] The circuit courts ruling on the issue unanimously agree that employers alone are legally responsible under the statutes for the discriminatory acts of their employees.[209] Some state courts interpreting state employment discrimination laws, have deviated from their federal counterparts and have imposed individual liability. While initially the issue of individual liability for employment discrimination was a matter of statutory interpretation, the fundamental question has become why individuals should or should not be held liable.

The credible arguments on both sides of the issue illustrate that the weaknesses of one form are the strengths of the other. Recognizing both individual and employer liability simultaneously is the most effective means to satisfying employment discrimination law's objectives: The likelihood that victims will be redressed and that discrimination will be deterred is substantially increased. Therefore, by using the construction of the state laws as a guide, the federal employment discrimination statutes should be rewritten to permit individual, as well as enterprise, liability.

TAMMI J. LEES[†]

---

[206] *See* Gonos, *supra* note 159, at 291 (stating that "holding an individual personally responsible for their illegal acts is crucial to our sense of legal and moral justice").

[207] *See supra* Part V.A.2.

[208] White, *supra* note 132, at 509.

[209] Horney v. Westfield Gage Co., 95 F. Supp. 2d 29, 33 (D. Mass. 2000) (stating that every circuit court that has addressed the issue has found that there is no individual liability under Title VII).

[†] J.D. Candidate, 2004, Case Western Reserve School of Law. I would like to thank my family for its never-ending support and encouragement and Jonathan L. Entin for his assistance.