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1996]

## Notes

### NO INDIVIDUAL LIABILITY FOR MANAGERS UNDER THE AMERICANS WITH DISABILITIES ACT OF 1990: *EEOC v.* *AIC SECURITY INVESTIGATIONS, LTD.*

#### I. INTRODUCTION

The Americans with Disabilities Act (ADA),<sup>1</sup> a recent addition to a growing list of anti-discrimination statutes, proscribes discrimination against persons on the basis of a disability.<sup>2</sup> Title I of the ADA addresses

1. Americans with Disabilities Act of 1990 (ADA), Pub. L. No. 101-336, 104 Stat. 327 (1990) (codified as amended at 42 U.S.C. §§ 12101-12189 (1994)).

2. 42 U.S.C. §§ 12101(b), 12112(a). The drafters set out the purpose of the legislation as follows:

It is the purpose of this [Act]—(1) to provide a clear and comprehensive national mandate for the elimination of discrimination against individuals with disabilities; (2) to provide clear, strong, consistent, enforceable standards addressing discrimination against individuals with disabilities; (3) to ensure that the Federal Government plays a central role in enforcing the standards established in this chapter on behalf of individuals with disabilities; and (4) to invoke the sweep of congressional authority, including the power to enforce the fourteenth amendment and to regulate commerce, in order to address the major areas of discrimination faced day-to-day by people with disabilities.

*Id.* § 12101(b). In enacting the ADA, Congress observed that the disabled were historically isolated and segregated, and that such behavior continues today. *Id.* § 12101(a)(2), (3). The drafters also noted that the disabled usually had little legal recourse for their mistreatment. *Id.* § 12101(a)(4).

Because the power of Congress to regulate businesses arises under the United States Constitution, the ADA only covers those entities which affect interstate commerce. See JAMES LEDVINKA & VIDA G. SCARPELLO, *FEDERAL REGULATION OF PERSONNEL AND HUMAN RESOURCE MANAGEMENT* 1-22 (1992) (outlining constitutional limits on congressional regulation of employment practices). While most observers agree with the drafters that the ADA provides comprehensive protections, there is no consensus on how "clear" the statute is. See Ellen O'Connell, *Employment Issues Under the ADA*, N.J. LAWYER, THE MAGAZINE, July 1995, at 13 (noting number of "puzzling" court decisions regarding scope of "protected handicaps").

The ADA is only one of many employment anti-discrimination statutes. See, e.g., The Age Discrimination in Employment Act (ADEA), 29 U.S.C. §§ 621-634 (1994) (prohibiting employment discrimination based on age); Civil Rights Act of 1964 (Title VII), 42 U.S.C. § 2000e (1994) (prohibiting employment discrimination based on race, religion, gender, color and national origin). This Note will use the term "anti-discrimination statutes" when referencing the ADA, the ADEA and Title VII collectively, as they all use a similar definition of "employer." Compare 29 U.S.C. § 630(b) (ADEA), and 42 U.S.C. § 2000e(b) (Title VII), with 42 U.S.C. § 12111(5)(A) (ADA). A more recent employment anti-discrimination statute is the Family and Medical Leave Act of 1993 (FMLA). 29 U.S.C. § 2601 (prohibiting employment discrimination based on need of temporary leave for childbirth, adoption or family illness). For a comprehensive analysis of an employer's duties

the rights of the disabled in the employment context.<sup>3</sup> Under this Title, employers are prohibited from discriminating against a qualified individual with a disability in the hiring, employment or termination processes.<sup>4</sup>

under the FMLA, see RICHARD L. MARCUS, FAMILY AND MEDICAL LEAVE: POLICIES AND PROCEDURES (1994). Also of note is the Rehabilitation Act of 1973 (Rehabilitation Act), which was the precursor to the ADA and in part concerned the rights of the disabled in the employment context. 29 U.S.C. § 701; see also PETER DANZIGER, REPRESENTING PEOPLE WITH DISABILITIES: NEW YORK STATE AND FEDERAL LAW 14-23 (1991) (outlining framework of Rehabilitation Act). The Rehabilitation Act prohibits employment discrimination against the disabled by federal agencies or federal contractors. 29 U.S.C. § 794. Because the definition of "employer" is much more limited under the Rehabilitation Act than the ADA, this Note will not include a discussion of the earlier Rehabilitation Act. The Rehabilitation Act, however, may be helpful in interpreting other provisions of the ADA. Much of the ADA is drawn from the Rehabilitation Act, as well as Title VII. See RESEARCH INSTITUTE OF AMERICA, ANALYSIS OF THE AMERICANS WITH DISABILITIES ACT AND IMPLEMENTING REGULATIONS 3 (1991) ("The ADA borrows much of its substantive framework from § 504 of the Rehabilitation Act and much of its coverage and procedural framework from Title VII of the Civil Rights Act of 1964."). The Fair Housing Act Amendments of 1988 (FHAA) also address the rights of the disabled, but in the context of a landlord-tenant relationship. 42 U.S.C. §§ 3601-3619. Because the ADA, the Rehabilitation Act and the FHAA all concern the rights of the disabled, there is some overlap. See JOHN PARRY, THE AMERICANS WITH DISABILITIES ACT MANUAL: STATE AND LOCAL GOVERNMENT SERVICES, EMPLOYMENT, AND PUBLIC ACCOMMODATIONS 4 (1992) ("The legislation builds on existing federal laws."). All three statutes use essentially the same definition of disability, so case law regarding the two earlier statutes may be helpful in determining the scope of the definition of disability. *Id.* at 4-5. Traditionally, courts have applied a liberal interpretation of "disability," thus insuring a broad scope of protection. *Id.* at 4. The ADA is farther reaching in its coverage than the Rehabilitation Act or the FHAA. *Id.* ("For example, unlike section 504 of the Rehabilitation Act, the ADA's coverage is not limited to employers or public entities that receive federal funds."). Despite the overlap, the ADA leaves intact the rights and duties required under the previous statutes. *Id.* A discussion of the myriad of state and local statutes and ordinances regarding the rights of the disabled is beyond the scope of this Note.

3. 42 U.S.C. §§ 12111-12117 (Title I). Title II addresses public services and their accessibility to the disabled. *Id.* §§ 12131-12165. Title III concerns public accommodations and the duties of private entities in providing services to the public. *Id.* §§ 12181-12189. Title IV discusses telecommunication services. *Id.* §§ 255-611. Title V contains miscellaneous provisions. *Id.* §§ 12201-12213.

Under the ADA, a person is disabled if he or she suffers from a:

(2) Disability. The term "disability" means, with respect to an individual—

- (A) a physical or mental impairment that substantially limits one or more of the major life activities of such individual;
- (B) a record of such an impairment; or
- (C) being regarded as having such an impairment.

*Id.* § 12102.

4. *Id.* § 12112(a).

The definition of a "qualified individual with a disability" under the ADA is: The term "qualified individual with a disability" means an individual with a disability who, with or without reasonable accommodation, can perform the essential functions of the employment position that such individual holds or desires. For the purposes of this subchapter, consideration shall be given to the employer's judgment as to what functions of a job are essential, and if an employer has prepared a written description before

The ADA has attracted great public attention because the protections of the ADA may extend to as many as 49 million Americans.<sup>5</sup> In the first three years of the statute's enforcement, the Equal Employment Opportunity Commission (EEOC) reported almost 50,000 charges under the ADA's employment provisions, with the majority alleging discriminatory employment termination.<sup>6</sup>

As with any new statute, courts have been presented with the challenge of clarifying various aspects of the ADA, thereby defining its scope and coverage.<sup>7</sup> In doing so, the scope of the term "employer" has arisen as one of the more uncertain and controversial areas.<sup>8</sup> The definition of

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advertising or interviewing applicants for the job, this description shall be considered evidence of the essential functions of the job.

*Id.* § 12111(8).

5. Barbara S. Dimmitt, *ADA: Revealing the Legal Impact, Shaping Employer Tactics*, 13 BUS. & HEALTH 27, 27 (1995). It is important to note that while the number of disabled Americans is about 49 million, the number of disabled persons in the work force is less. *Id.* The number of Americans between the ages of 16 and 67 who reported having some sort of work related disability is 19.5 million. *Id.*

6. Testimony of EEOC Commissioner Paul S. Miller to the U.S. Senate, July 26, 1995 available at 1995 WL 449209, at \*1 (F.D.C.H.). The percentage of EEOC's ADA charges involving employment charges is higher than that of Title VII. *Id.* at \*13. The majority of charges are brought by current or terminated employees, as opposed to job applicants. Dimmitt, *supra* note 5, at 27. The largest share of complaints that are filed with the Equal Employment Opportunity Commission (EEOC) concerns back problems (19%) and the second largest are neurological disorders (11%). *Id.* For a comprehensive guide to mental disorders and their coverage under the ADA, see generally DEBORAH ZUCKERMAN ET AL., *THE ADA AND PEOPLE WITH MENTAL ILLNESS: A RESOURCE MANUAL FOR EMPLOYERS* (1993). Commissioner Miller declared that "EEOC enforcement of the ADA has been largely successful." Testimony of EEOC Commissioner Paul S. Miller, *supra* note 6, at \*8. The EEOC has resolved 29,000 of the 50,000 employment discrimination charges brought and has managed to achieve benefits for the charging parties in greater proportions than for age, gender, national origin and race discrimination charges. *Id.*

7. See, e.g., William C. Taussig, Note, *Weighing in Against Obesity Discrimination: Cook v. Rhode Island, Dep't of Mental Health, Retardation, and Hospitals and the Recognition of Obesity as a Disability Under the Rehabilitation Act and the Americans with Disabilities Act*, 35 B.C. L. REV. 927, 934-39 (reporting controversy surrounding coverage of ADA's and Rehabilitation Act's definitions of disability). Besides the issue of what constitutes a disability, other definitions also are unclear and are continuing to be resolved by case law. See Peter M. Panken, *The Disabled and Work*, C108 ALI-ABA 221, 244 (June 1, 1995) (predicting increase in litigation as to definition of "essential functions" of job).

8. Joel E. Cohen, *Individual Corporate Officer Liability*, CORP. COUNS., Aug. 7, 1995, at S1 ("One of the hottest topics in employment law is whether officers, managers, or supervisors at a company may be held individually liable for their conduct in violation of the employment discrimination statutes . . ."). The definition of "employer" under the ADA reads:

(A) In general

The term "employer" means a person engaged in an industry affecting commerce who has 15 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding calendar year, and any agent of such person, except that, for two years following the effective date of this subchapter, an employer means a person engaged in

“employer” is crucial to the application of the ADA and other employment anti-discrimination statutes because it defines the entities from which a plaintiff can recover.<sup>9</sup> Although the ADA uses virtually the same definition of “employer” as Title VII of the Civil Rights Act of 1964 (Title VII) and the Age Discrimination in Employment Act (ADEA), there is disagreement under those two statutes about the scope of the “employer” definition.<sup>10</sup> In addition, the Civil Rights Act of 1991 (“CRA of 1991”) granted

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an industry affecting commerce who has 25 or more employees for each working day in each of 20 or more calendar weeks in the current or preceding year, and any agent of such person.

(B) Exceptions

The term “employer” does not include—

- (i) the United States, a corporation wholly owned by the government of the United States, or an Indian tribe; or
- (ii) a bona fide private membership club (other than a labor organization) that is exempt from taxation under section 501(c) of title 26.

42 U.S.C. § 12111(5) (emphasis added).

This Note will use the term “individual liability” to mean the personal liability of individuals who do not independently fit the definition of employer. See *EEOC v. AIC Sec. Investigations, Ltd.*, 55 F.3d 1276, 1280 n.2 (7th Cir. 1995) (stating that there is no dispute that individuals who personally employ 15 persons would be employer under ADA). Those individuals who manage or supervise employees are referred to as “agents” in the ADA. 42 U.S.C. § 12111; see also EEOC, EEOC TECHNICAL ASSISTANCE MANUAL FOR THE AMERICANS WITH DISABILITIES ACT I-2 (1992) [hereinafter EEOC TECHNICAL ASSISTANCE MANUAL] (giving examples of agents as “managers, supervisors, foremen, or others who act for the employer”). While an “agent” might itself be an employing entity such as a corporation, this Note will focus on individual persons in their capacity as agents.

There are also other questions regarding the definition of employer, other than individual liability. See Panken, *supra* note 7, at 247 (predicting increase in litigation as to definition of “essential functions” of job). One example is a case in which the United States Court of Appeals for the First Circuit had to decide whether “a self funded medical reimbursement plan that provides insurance to cover its . . . employees could be considered an employer covered by the ADA.” *Id.* (citing *Carparts Distrib. Ctr., Inc. v. Automotive Wholesaler’s Ass’n of New England, Inc.*, 37 F.3d 12 (1st Cir. 1994)). The court stated that an entity that is created to provide services like medical insurance to an employer’s work force is “intertwined” with the employer, and thus covered within the scope of the ADA. *Id.*

9. See, e.g., *Miller v. Maxwell’s Int’l, Inc.*, 991 F.2d 583, 588 (9th Cir. 1993) (holding plaintiff cannot bring Title VII claim against individual defendant because defendant was not employer under Title VII definition), *cert. denied*, 114 S. Ct. 1049 (1994). An aggrieved party can only recover from a manager if he is within the scope of “employer” under the ADA. *Id.* Therefore, the definitional scope of employer has implications for the millions of Americans with managerial positions who may be potential defendants, especially for those higher up on the corporate chain of command who have numerous employees under their supervision. See *Jendusa v. Cancer Treatment Ctr. of Am., Inc.*, 868 F. Supp. 1006, 1011-12 (N.D. Ill. 1994) (supporting policy that any employee with supervisory status should be held liable under ADA). For the definition of employer under the ADA, see *infra* note 10 and accompanying text.

10. Compare 42 U.S.C. § 2000e(b) (Title VII), and 29 U.S.C. § 630(b) (ADEA) with 42 U.S.C. § 12111(5)(A) (ADA) (showing all three statutes use same linguistic definition of “employer”). The issue of individual liability under Title VII has been well documented, with most of the commentators in favor of individual liability.

additional remedies to aggrieved parties in employment discrimination cases, further complicating the process of determining the intent of the drafters of the ADA in delineating the term "employer."<sup>11</sup>

The United States Court of Appeals for the Seventh Circuit was the first circuit to address the issue of individual liability under the ADA.<sup>12</sup> In *EEOC v. AIC Security Investigations, Ltd.* ("AIC Security"),<sup>13</sup> the EEOC urged the Seventh Circuit to adopt a policy that would hold individual managers and owners of companies personally liable for employment decisions that

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See Janice R. Franke, *Does Title VII Contemplate Personal Liability for Employee/Agent Defendants?*, 12 HOFSTRA LAB. L.J. 39, 39 (1994) ("This article . . . urges that individual liability is appropriate given considerations of both law and policy."); Phillip L. Lamberson, *Personal Liability for Violations of Title VII: Thirty Years of Indecision*, 46 BAYLOR L. REV. 419, 430 (1994) ("The correct interpretation of Title VII is that it does allow for the imposition of personal liability upon individuals."); Douglas L. Williams, *Individual Liability and Defending Individual Co-Defendants (Defendant's Perspective)*, C463 ALI-ABA 205, 218 (1989) ("The better view is that supervisors and managers should be personally liable for backpay so as to further the purposes of Title VII."); Scott B. Goldberg, Comment, *Discrimination by Managers and Supervisors: Recognizing Agent Liability Under Title VII*, 143 U. PA. L. REV. 571 (1994) (advocating adoption of individual liability under Title VII); Christopher Greer, Note, "Who, Me?": *A Supervisor's Individual Liability for Discrimination in the Workplace*, 62 FORDHAM L. REV. 1835, 1850 (1994) ("To further advance the goals of Title VII and the ADEA . . . individuals who act within their supervisory positions to render discriminatorily motivated decisions [should be] held accountable.").

11. 42 U.S.C. § 1981a. The statute reads in pertinent part:

Damages in cases of intentional discrimination in employment

(a) Right of recovery. . . .

(2) Disability

In an action brought by a complaining party under the powers, remedies, and procedures set forth in . . . the Civil Rights Act of 1964 (as provided in . . . the Americans with Disabilities Act of 1990 . . . , and [the Rehabilitation Act of 1973], respectively) against a respondent who engaged in unlawful intentional discrimination (not an employment practice that is unlawful because of its disparate impact) under [the Rehabilitation Act of 1973], or . . . the Americans with Disabilities Act of 1990 . . . , against an individual, the complaining party may recover compensatory and punitive damages as allowed in subsection (b) of this section, in addition to any relief authorized by . . . the Civil Rights Act of 1964 . . . , from the respondent.

*Id.* § 1981a(a)(2). For a discussion of the effect of the Civil Rights Act of 1991 (CRA of 1991), see *infra* notes 132-41.

12. *AIC Security*, 55 F.3d at 1280 ("[N]o Circuit has directly confronted the question of individual liability under the ADA . . ."). The EEOC guidelines are vague with regard to individual liability under the ADA. See EEOC TECHNICAL ASSISTANCE MANUAL, *supra* note 8, at I-2. The EEOC guidelines state that "[t]he definition of 'employer' includes persons who are 'agents' of the employer . . . . Therefore, the employer is responsible for actions of such persons that may violate the law." *Id.* The guidelines do not state, however, whether the agent is individually liable. *Id.*; see also 29 C.F.R. § 1620.8 (1991) (defining employer under EEOC regulations in same terms as ADA definition).

13. 55 F.3d 1276 (7th Cir. 1995).

violate the ADA.<sup>14</sup> The EEOC claimed that the language “a person . . . and any agent of such person” in the definition of “employer” includes individual owners within its scope.<sup>15</sup> The Seventh Circuit declined to adopt the EEOC’s interpretation, ruling that there is no individual liability under the ADA.<sup>16</sup> In support of its holding, the court cited both the language in the ADA that limits the “employer” definition to larger businesses and the weight of the case law regarding individual liability under the other employment anti-discrimination statutes.<sup>17</sup>

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14. Brief for the Appellee (Equal Employment Opportunity Commission) at 35-36, *EEOC v. AIC Sec. Investigations, Ltd.*, 55 F.3d 1276 (7th Cir. 1995) (No. 93-3839). *AIC Security* is the first ADA case in which the EEOC has itself filed suit. Michael Zablocki, Symposium, *Americans with Disabilities Act Update*, 15 WHITTIER L. REV. 177, 179 (1994). The EEOC is the government agency responsible for administering the ADA, as well as the other employment anti-discrimination statutes. LEDVINKA & SCARPELLO, *supra* note 2, at 35-36. The EEOC investigates charges of discrimination and determines whether there is probable cause to pursue the matter in question. *Id.* at 36. When the EEOC finds probable cause, the agency then attempts “conciliation,” a form of negotiation. *Id.* Even if conciliation fails, the EEOC usually will not litigate a matter itself unless the matter has “favorable prospects for the agency.” *Id.*

In *AIC Security*, the aggrieved party, Charles Wessel, first filed a complaint with the EEOC, and the EEOC continued its involvement as an actual plaintiff. *AIC Security*, 55 F.3d at 1279. Wessel then intervened, and was also a named plaintiff, but died soon after. *Id.* In Wessel’s brief, he adopted the arguments of the EEOC brief on the issue of individual liability. Brief for the Appellee/Cross Appellant (Charles H. Wessel) at 16, *EEOC v. AIC Sec. Investigations, Ltd.*, 55 F.3d 1276 (7th Cir. 1995) (No. 93-3839). Because Wessel brought the charges to the EEOC, and the EEOC litigated in the interest of Wessel and his survivors, the arguments of the EEOC and Wessel will be referred to jointly as those of the EEOC throughout this Note.

15. Appellee’s Brief at 37, *AIC Security* (No. 93-3839) (citing 42 U.S.C. § 12111(5)(A)). The EEOC stated that a plain language reading of the statute supported the proposition that “any agent of a covered corporation is considered an employer and a covered entity under the ADA.” *Id.* Under the EEOC theory, the individual defendant, Ruth Vrdolyak, was an agent of AIC Security Investigations, Ltd., and thus was a covered entity. *Id.* For a more complete discussion of the EEOC’s arguments, see *infra* notes 119-51.

16. *AIC Security*, 55 F.3d at 1288. The United States Court of Appeals for the Seventh Circuit also ruled on several other matters. *Id.* at 1278-79. Evidentiary issues arose as to the admission of a taped deposition taken of Wessel before his death, which the court refused to overturn as plain error. *Id.* at 1282-83. The court also ruled that the district court properly instructed the jury to limit the “direct threat” defense asserted by AIC Security to those direct threats that arise “in the performance of an essential function of [Wessel’s] job.” *Id.* at 1283-85. AIC Security successfully argued for a partial reduction of the award of attorney’s fees for Wessel’s private attorneys, but the court upheld the awards of back pay, compensatory damages and costs. *Id.* at 1285-88.

17. *Id.* at 1279-80. The court also noted that the ADA structure of restitution was evidence that the drafters did not intend to include individuals within its scope, even when the alterations of the CRA of 1991 were taken into account. *Id.* at 1281. The court’s holding was in line with the majority of circuit court cases under Title VII and the ADEA. *Id.* at 1280. For a discussion of these cases, see *infra* notes 23-50.

This Note examines the holding and rationale of the Seventh Circuit's decision in *AIC Security*.<sup>18</sup> Part II of this Note reviews background material including the circuit precedent concerning both Title VII and the ADEA, which have similar definitions of the term "employer."<sup>19</sup> Part II also outlines the split between district courts within the Seventh Circuit on the scope of the term "employer" under the anti-discrimination statutes and the Seventh Circuit's own indirect rulings in this area.<sup>20</sup> In Part III, this Note examines the Seventh Circuit's rationale in *AIC Security* and contrasts the Seventh Circuit's reasoning with that of the EEOC, other circuit court holdings and previous district court rulings within the Seventh Circuit.<sup>21</sup> Finally, Part IV of this Note concludes that the decision in *AIC Security* will play a beneficial role in providing a consistent and reasonable approach to individual liability under the ADA for other jurisdictions, as well as providing guidance for business owners and managers regulated by anti-discrimination statutes.<sup>22</sup>

## II. BACKGROUND: UNCERTAINTY FOR COURTS, MANAGERS AND OWNERS UNDER THE EMPLOYMENT ANTI-DISCRIMINATION STATUTES

### A. Circuit Court Rulings Under Title VII and the ADEA

The Seventh Circuit was the first circuit court to directly confront the issue of individual liability under the ADA.<sup>23</sup> Circuit courts, however, previously had ruled on individual liability under Title VII and the ADEA.<sup>24</sup>

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18. See *AIC Security*, 55 F.3d at 1282 (holding "individuals who do not otherwise meet the statutory definition of 'employer' cannot be held liable under the ADA").

19. For a discussion of the circuit court decisions regarding individual liability under the anti-discrimination statutes, see *infra* notes 23-50 and accompanying text.

20. For a discussion of how the Seventh Circuit district courts have handled the issue, as well as the varying results under Seventh Circuit review, see *infra* notes 51-98 and accompanying text.

21. For a discussion of the rationale underlying the Seventh Circuit's opinion in *AIC Security* in light of previous rulings and persuasive authority, see *infra* notes 119-87 and accompanying text.

22. For a discussion of *AIC Security's* potential influence in the area of employment discrimination, see *infra* notes 188-98 and accompanying text.

23. *AIC Security*, 55 F.3d at 1280. The Seventh Circuit had previously indirectly confronted the issue. *Id.* For a discussion of the Seventh Circuit's varied results regarding individual liability, see *infra* notes 77-98 and accompanying text.

24. *AIC Security*, 55 F.3d at 1280 (citing *Miller v. Maxwell's Int'l, Inc.*, 991 F.2d 583, 587-88 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 1049 (1994)). The ADEA and Title VII have the same definition of employer as the ADA; thus, rulings on the scope of the term "employer" under the first two statutes are often used as persuasive authority for interpreting the ADA. See *Miller*, 991 F.2d at 587 (noting that liability claims under Title VII and ADEA are "essentially the same in aspects relevant to [individual liability]").



The majority of the circuit courts have found that there is no individual liability under those statutes.<sup>25</sup>

In *Miller v. Maxwell's International, Inc.*,<sup>26</sup> the United States Court of Appeals for the Ninth Circuit held that there was no individual liability under Title VII or the ADEA.<sup>27</sup> The plaintiff, Phyllis Miller, alleged age and sex discrimination against her employer, Maxwell's International, and six individual defendants.<sup>28</sup> The court dismissed the charges against the

25. *AIC Security*, 55 F.3d at 1280. The *AIC Security* court tallied the score at four circuit courts finding for individual liability and one against. *Id.*

26. 991 F.2d 583 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 1049 (1994).

27. *Id.* at 588. The court affirmed the dismissal of Title VII and ADEA claims against defendants sued in their individual capacity. *Id.* *But see id.* at 588-90 (Fletcher, J., dissenting) (arguing in favor of imposing individual liability). The *Miller* dissent advanced that the majority's "over broad language" would cloud the issue of whether the CRA of 1991 has altered the scope of employer under Title VII. *Id.* at 589 (Fletcher, J., dissenting). The dissent also stated that the ADEA's scope of remedies at the time of its enactment was much broader than Title VII, because it already provided the same remedies as the CRA of 1991 added to Title VII. *Id.* (Fletcher, J., dissenting).

The *Miller* court was also confronted with a jurisdictional issue, as the plaintiff, Miller, had failed to file a timely notice of appeal under the Federal Rules of Appellate Procedure. *Miller*, 991 F.2d at 585-86 (citing FED. R. APP. P. 4(a)(1), (5)). The court decided that Miller's delay was based upon an erroneous ruling by the district court and thus, should not preempt Miller's action. *Id.* at 585. The court also had to determine whether the district court had properly dismissed the ADEA claims as time barred. *Id.* at 586. The court held that the ADEA claims were not time barred because Miller had sufficiently alleged willful conduct in violation of the ADEA and thus the time limits for filing a claim were extended. *Id.* The Equal Pay Act, however, charges that Miller brought in addition to the Title VII and ADEA claims were barred because Miller had not shown those violations to be willful. *Id.*; *see also* 29 U.S.C. §§ 206(d) (1994) (codifying Equal Pay Act regarding sex discrimination in wages). Moreover, the state law tort claim of intentional infliction of emotional distress was barred by the state statute of limitations and lack of evidentiary support showing outrageousness. *Miller*, 991 F.2d at 586 (relying on RESTATEMENT (SECOND) OF TORTS § 46 cmt. d (1965)). The state law tort claim of emotional distress allows for individual liability. *Id.* Because the tort claim was barred, however, the plaintiff's only hope to collect against the individual defendants was under Title VII and the ADEA. *Id.* at 587.

28. *Miller*, 991 F.2d at 584. Miller was employed at Maxwell's Plum ("Plum"), a restaurant corporately owned by Maxwell's International, Inc. *Id.* Miller alleged that when she was first hired, she was assured that she would be promoted. *Id.* Miller, however, was never promoted. *Id.* She claimed it was due to her sex and age. *Id.* Miller also alleged that she worked in the capacity of a manager of a section of the restaurant, but was not paid accordingly. *Id.* Furthermore, Miller claimed that Stewart, the general manager of the restaurant, subjected her to a hostile work environment and reduced her work hours. *Id.*

After Miller complained to her union about these actions, Plum fired Miller. *Id.* Miller then filed charges with the EEOC and the National Labor Relations Board (NLRB). *Id.* After the NLRB intervened, Plum reinstated Miller. *Id.* Miller then alleged that the second general manager, Glazzo, further harassed her in retaliation for the EEOC and NLRB claims. *Id.* She was again terminated. *Id.* After Glazzo and Stewart refused to write letters of recommendation, Miller filed new charges with the EEOC. *Id.* Plum rehired Miller for a third time, but again fired her. *Id.* Once again, Miller claimed there were retaliatory and discriminatory motives for her termination. *Id.*

individual defendants for failure to state a claim upon which relief could be granted.<sup>29</sup> The court stated that the statutory text of both Title VII and the ADEA limit civil liability to the employer.<sup>30</sup> Additionally, the court noted that the definition of "employer" under Title VII and the ADEA limits the scope of coverage to employers with at least fifteen employees, indicating that Congress did not intend to expose individuals to liability.<sup>31</sup> Moreover, the court highlighted that the CRA of 1991 not only expanded the forms of available restitution under the ADA, but also instituted a "sliding cap system" that would limit the award based upon the size of the

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After the EEOC granted Miller a right-to-sue letter, she filed an action in the United States District Court for the Northern District of California. *Id.* at 585. Miller named six individuals as defendants. *Id.* at 584. One individual was the CEO of Maxwell's International, Inc., two were managers of the restaurant itself and three were lower level employees. *Id.* The district court gave her four opportunities to present facts that stated a claim against the defendants, and after her third amended complaint, the charges were dismissed. *Id.* at 585. The court then improperly granted her an extension to alter or amend the judgment, which she filed. *Id.* These later claims were also dismissed. *Id.*

29. *Id.* at 588. The District Court for the Northern District of California had stated that it was unlikely that individuals were meant to be held liable under Title VII or the ADEA. *Id.* at 587. The district court, however, refused to dismiss the claim on that basis without more direct guidance from the circuit court. *Id.* The United States District Court for the Ninth Circuit treated the question of individual liability as settled. *Id.* (relying on *Padway v. Palches*, 665 F.2d 965, 968 (9th Cir. 1982)). In *Padway*, the court had determined that defendants could not be held liable in their individual capacity for back pay under Title VII. *Padway*, 665 F.2d at 968. The *Miller* court, however, did not discuss the issue further, noting that, although fairly settled in the Ninth Circuit, the rule "conflicts with the reasoning of some courts." *Miller*, 991 F.2d at 587.

30. *Miller*, 991 F.2d at 587 (citing 29 U.S.C. § 626(b) (1988) and 42 U.S.C. § 2000e 5(g) (1988)). The majority stated that the term "agent" was included in the definition of "employer" so as "to incorporate respondeat superior liability into the statute." *Id.* (relying on *Padway*, 665 F.2d at 986). The court noted that although the argument that the term "agent" includes individual liability was not without merit, the court was "bound" by the *Padway* decision that precludes individual liability for the types of remedies that Title VII originally provided. *Id.*; *Padway*, 665 F.2d at 986. The court believed that the *Padway* decision was the better rule, independent of its preclusive effect. *Miller*, 991 F.2d at 587; *Padway*, 665 F.2d at 986. *But see Miller*, 991 F.2d at 589 (Fletcher, J., dissenting) (stating that expansion of remedies under CRA of 1991 to include damages may permit individual liability). While the *Padway* court held that there is no individual liability for back pay under Title VII, the *Padway* decision took place before Congress enacted the CRA of 1991. *Id.* at 587; *Padway*, 665 F.2d at 986. The *Miller* court, however, stated that, even with the changes, the *Padway* decision was "still good law." *Miller*, 991 F.2d at 587.

31. *Miller*, 991 F.2d at 587. The court said that Congress's efforts to protect small business owners are incompatible with the interpretation that an individual employee may be held liable under the statute. *Id.* The court reasoned that Congress had intended to protect "small entities [from] the costs associated with litigating discrimination claims." *Id.* Because individuals usually have "limited resources," the rationale for protecting small employers carries over to protect individuals as well. *Id.*

employer, thus retaining the original protections for small employers.<sup>32</sup> The court concluded by noting that the lack of individual liability under Title VII and the ADEA would not lessen the existing disincentives for managers to discriminate, even though the plaintiff argued that implementing individual liability would further the purpose of the anti-discrimination statutes.<sup>33</sup>

Other circuit courts have held similarly to the *Miller* court.<sup>34</sup> In *Smith v. Lomax*,<sup>35</sup> the United States Court of Appeals for the Eleventh Circuit held that individuals do not fall within the definition of "employer" in

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32. *Id.* at 587 n.2. The CRA of 1991 does not mention individuals in the sliding cap system. *Id.* (citing 42 U.S.C. § 1981a(b)(3)(A)-(D) (Supp. IV 1992)). The sliding cap system limits the largest possible award that a plaintiff can collect against an employer under the CRA of 1991 remedy structure. *Id.* The sliding cap system follows this schedule:

<u>Number of Employees:</u>	<u>Damages Will Not Exceed:</u>
15 - 100	\$ 50,000
101 - 200	\$100,000
201 - 500	\$200,000
500 and more	\$300,000

EEOC TECHNICAL ASSISTANCE MANUAL, *supra* note 8, at X-8.

33. *Miller*, 991 F.2d at 588. The court stated that because the employer is held liable under the statute, supervisory personnel would be discouraged from discriminating in violation of Title VII and the ADEA. *Id.* The court noted that "[a]n employer that has incurred civil damages because one of its employees believes he can violate Title VII with impunity will quickly correct that employee's erroneous belief." *Id.* The court therefore disagreed with the holding in *Hamilton v. Rodgers*, 791 F.2d 439 (5th Cir. 1986). *Miller*, 991 F.2d at 588. In *Hamilton*, the court stated that releasing supervisors from individual liability would encourage supervisors to violate Title VII. *Hamilton*, 791 F.2d at 443. The United States Court of Appeals for the Fifth Circuit has since changed its position, and more recently stated that there is no individual liability under the ADEA. See *Grant v. Lone Star Co.*, 21 F.3d 649, 653 (5th Cir.) (holding that agent cannot be individually liable under ADEA), *cert. denied*, 115 S. Ct. 574 (1994).

34. *EEOC v. AIC Sec. Investigations, Ltd.*, 55 F.3d 1276, 1280 (7th Cir. 1995). The *AIC Security* court stated that "five Circuits have explicitly addressed individual liability under Title VII and the ADEA . . . . One Circuit has recognized individual liability." *Id.* But see Brief for the Appellee (Equal Employment Opportunity Commission) at 37-38, *EEOC v. AIC Sec. Investigations, Ltd.*, 55 F.3d 1276 (7th Cir. 1995) (No. 93-3839) (citing *Levendos v. Stern Entertainment, Inc.*, 909 F.2d 747, 752 (3d Cir. 1990) (recognizing case that grants individual liability at circuit level); *Paroline v. Unisys Corp.*, 879 F.2d 100, 104 (4th Cir. 1989) (suggesting possible individual liability for Title VII sexual harassment as agent's actions not of delegable nature)).

35. 45 F.3d 402 (11th Cir. 1995).

Title VII and the ADEA.<sup>36</sup> In *Birkbeck v. Marvel Lighting Corp.*,<sup>37</sup> the United States Court of Appeals for the Fourth Circuit held that under the ADEA, "agents" are not individually liable for discrimination against employees even if the agent has decision-making power.<sup>38</sup> Likewise, in *Grant v. Lone Star Co.*,<sup>39</sup> the United States Court of Appeals for the Fifth Circuit said an agent is not individually liable under Title VII.<sup>40</sup> In *Grant*, the court be-

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36. *Id.* at 403. The plaintiff, Alice Smith, was a white female, employed as a clerk for the Board of County Commissioners of Fulton County ("Board"). *Id.* The Board voted to replace her at the end of her six-year term with an African-American female. *Id.* Smith sued the Board for violating Title VII and the ADEA. *Id.* She also sued two African-American members of the Board in their individual capacity under 42 U.S.C. § 1983 (1988), claiming they had denied her equal protection under the Fourteenth Amendment. *Smith*, 45 F.3d at 403. The court stated that the amended complaint also brought suit against the two individuals under Title VII and the ADEA. *Id.* at 403-04 n.4. The court did not allow the Title VII and ADEA claims to be brought against the individuals. *Id.* The court reasoned that because Fulton County was her employer, the two individuals could not also be her employer. *Id.* (citing *Busby v. City of Orlando*, 931 F.2d 764, 772 (11th Cir. 1991)). While the court released the individuals from liability under Title VII and the ADEA, the court did not grant the individuals either legislative or qualified immunity from the § 1983 claims. *Id.* at 404-05. The § 1983 charges concern the liability of legislative persons, and not those private individuals who fit the traditional supervisor or owner definition in the private sector employer/employee context. Therefore, an in depth discussion of § 1983 is beyond the scope of this Note.

37. 30 F.3d 507 (4th Cir. 1994).

38. *Id.* at 510-11. The plaintiffs were two former supervisors at the employing entity Marvel Lighting Corp. *Id.* at 509. Both were laid-off by a vice-president of Marvel. *Id.* They alleged that their age was the major factor in the decision, because they were both the oldest supervisors on the floor of the plant. *Id.* The managers sued their former employer, Marvel, and the vice-president as an individual, for violating the ADEA. *Id.* The jury did not find that the defendants willfully violated the ADEA, and the trial court therefore ruled in favor of the defendants on a motion for judgment as a matter of law. *Id.* On appeal, the United States Court of Appeals for the Fourth Circuit first addressed the issue of whether the vice-president was a proper defendant under the ADEA. *Id.* at 510. The court decided that to hold individuals liable would "place a heavy burden on those who routinely make personnel decisions for enterprises employing twenty or more persons, and we do not read the statute as imposing it." *Id.*

39. 21 F.3d 649 (5th Cir. 1994).

40. *Id.* at 651. The plaintiff in *Grant* was a female sales representative at Lone Star Co. *Id.* at 650. She alleged that her manager, Mitchell Murry, and other male employees sexually harassed her. *Id.* at 651. She claimed that Murry, other employees and visitors to the offices made sexually explicit jokes, rude comments and engaged in other offensive behavior. *Id.* at 650. After the plaintiff received a right to sue letter from the EEOC, she sued the corporate entity, Lone Star, and amended the complaint to include various individuals as defendants in the suit. *Id.* at 651. A jury found only Murry liable as an individual. *Id.* The district court held Murry liable for back pay, attorney's fees and expenses totaling over \$70,000. *Id.* Murry appealed the ruling, challenging his individual liability under Title VII. *Id.* The Fifth Circuit agreed with Murry and refused to impose liability for private individuals under Title VII. *Id.* (citing *Clanton v. Orleans Parish Sch. Bd.*, 649 F.2d 1084 (5th Cir. 1981)). The court noted the amount of case law that supported such a holding. *Id.* at 652 (citing *Miller v. Maxwell's Int'l, Inc.*, 991 F.2d 583, 584 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 1049 (1994); *Busby*, 931 F.2d at 772; *Harvey v.*

lieved that employer liability insures that agents will not be permitted to discriminate with impunity.<sup>41</sup>

The sole circuit that presently recognizes individual liability under the anti-discrimination statutes is the United States Court of Appeals for the Sixth Circuit, as demonstrated in *Jones v. Continental Corp.*<sup>42</sup> Plaintiff Jones alleged racial and sexual discrimination in violation of Title VII by her employer, The Continental Corporation, and two individuals.<sup>43</sup> The trial court dismissed the case on the merits, concluding that the complaint failed to specify the legal foundation for the lawsuit against the individual defendants.<sup>44</sup> The trial court then assessed costs and attorney fees against

Blake, 913 F.2d 226, 227-28 (5th Cir. 1990); *Padway v. Palches*, 665 F.2d 965 (9th Cir. 1982)). The court also noted that the structure of Title VII does not include individuals and exempts small entities, thus supporting the concept of protecting individuals from liability. *Id.* at 653. The plaintiff pointed out that the individual defendant had the authority to hire, fire and keep employment records. *Id.* She stated that Murry should then be held liable as an employer under Title VII because he had the full power to act as the employer. *Id.* The court disagreed and stated "[n]ot all agents have the power to hire and fire, yet [T]itle VII contemplates employer liability for their behavior because they are agents. Thus, [the plaintiff's] reading would require us to treat some employees as both an employer and an employee. We reject this illogical reading." *Id.*

41. *Id.* The court stated that "[T]itle VII contemplates liability for the employer, which has the ability to discipline the employee." *Id.* (citing *Miller*, 991 F.2d at 588).

42. 789 F.2d 1225, 1231 (6th Cir. 1986). The United States Court of Appeals for the Sixth Circuit held that the trial court's award of attorney fees to the defendant was unwarranted. *Id.* at 1233. The defendant had claimed that the Title VII charges could not have been sustained against him in his individual capacity, and that the plaintiff should not have included him in the suit. *Id.* at 1229. The court held that it was possible to sue an individual under Title VII, and that "any award of attorney's fees based solely on failure to amend the complaint [to include a basis for individual liability] as requested was error." *Id.* at 1232.

43. *Id.* at 1227 n.1. The Continental Corporation was the corporate owner of the plaintiff's employer, The Continental Insurance Company. *Id.* The two individual defendants were "supervisory employees." *Id.* Plaintiff Jones, an African-American female, alleged violations of Title VII and § 1981. *Id.* at 1227. She had worked for The Continental Insurance Company for several years, during which she was steadily promoted from a clerk to an underwriter. *Id.* at 1228. Jones sued The Continental Insurance Company, alleging that her employer racially discriminated against her, denied her promotions repeatedly, did not allow her to sell products to other employees during work hours that white employees were allowed to sell and isolated her desk away from white employees. *Id.* The Continental Insurance Company fired Jones after she sent a letter to the company's largest local client, accusing the client of "hate and prejudice." *Id.* The district court found that Jones only proved a prima facie case with regard to the allegation that she was passed-over for a promotion in favor of a white transferee. *Id.* The district court dismissed the rest of the allegations on the merits. *Id.*

44. *Id.* at 1227. The complaint alleged violations of Title VII against the employer corporation, as well as the individual supervisors. *Id.* at 1227 n.1. The individual defendants argued that because individuals are not liable under Title VII, the plaintiff had failed to state a claim upon which relief could be granted. *Id.* at 1231.

Jones for litigating in bad faith.<sup>45</sup> Jones appealed the dismissal of her claim and sought reversal of the award of costs and attorney fees to the defendants.<sup>46</sup> In a previous ruling, the court had affirmed the dismissal on the merits.<sup>47</sup> Here, however, the Sixth Circuit reversed the award of attorney fees and costs to the defendants.<sup>48</sup> The court stated that because individuals could be held liable under Title VII and § 1981, the legal foundation for the suit against the individuals was the same as for the suit against the corporation.<sup>49</sup> Although the Sixth Circuit did not actually hold the defendants liable under Title VII, the court directly recognized individual liability under that statute.<sup>50</sup>

45. *Id.* at 1228. The trial court found that Jones had litigated in "bad faith" and that her counsel was "unreasonably and vexatiously multiplying the litigation." *Id.* The court ruled against Jones and her counsel under the guise of 42 U.S.C. § 1988 (1988) and 28 U.S.C. § 1927 (1988), respectively, and also under the court's "inherent powers to punish those who litigate in bad faith." *Continental Corp.*, 789 F.2d at 1228 (citing *Roadway Express, Inc. v. Piper*, 447 U.S. 752 (1980)). The court also assessed costs against the plaintiff. *Id.* The district court found that the evidence Jones offered was "insubstantial," and that the "plaintiff could be a quite petty person who assumed that anything that did not suit her was a product of racial prejudice." *Id.* at 1228 (relying on *Jones v. Continental Corp.*, No. 82-3572, slip op. at 4 (M.D. Tenn. June 29, 1984)).

46. *Id.* at 1227-28. Jones alleged that the district court's "failure to find disparate treatment was clear error." *Id.* at 1228.

47. *Id.* at 1227 n.1. The Sixth Circuit agreed with "the district court's conclusion that the only defendant with potential liability was the employer insurance company, and [affirmed] that court's dismissal of the claims against the other named [individual] defendants." *Id.* (citing *Jones v. Continental Corp.*, 785 F.2d 308 (6th Cir. 1986)).

48. *Id.* at 1233.

49. *Id.* at 1231. The district court partly relied on "the failure to specify under which statute the individual defendants (as opposed to the employer) were being sued" to justify granting the attorney fees to the defendant. *Id.* The Sixth Circuit stated "[s]ince the individual employees sued were at least arguably 'agents' of the employer, we think it obvious that Jones's counsel were intentionally and properly seeking recovery against the individuals under both [Title VII and § 1981]." *Id.* The defendants disputed the two charges as unclear, arguing that there is no individual liability under the statutes. *Id.*

50. *Id.* The court stated that:

[T]he law is clear that individuals may be held liable for violations of § 1981, e.g., *Taylor v. Jones*, 653 F.2d 1193, 1200 (8th Cir. 1981) ("Section 1981 applies to all types of racial discrimination, public or private"); *Faraca v. Clements*, 506 F.2d 956, 957 (5th Cir. 1975) (individual director held liable while corporation exonerated); *Vietnamese Fishermen's Assoc. v. Knights of Ku Klux Klan*, 518 F. Supp. 993, 1008 (S.D. Texas 1981) ("private citizens are proper defendants" in suits under § 1981), and as "agents" of an employer under Title VII.

*Id.* (citing *Owens v. Rush*, 636 F.2d 283 (10th Cir. 1980); *Robson v. Eva's Super Market, Inc.*, 538 F. Supp. 857, 862-63 (N.D. Ohio 1982); *Munford v. James T. Barnes & Co.*, 441 F. Supp. 459, 466 (E.D. Mich. 1977); *Compston v. Borden, Inc.*, 424 F. Supp. 157, 158 (S.D. Ohio 1976)). *Id.* It is important to note that the only circuit case the court cited in support of the proposition that Title VII includes individuals in its definition of employer, however, was a case from the United States Court of Appeals for the Tenth Circuit. *Id.* (citing *Owens*, 636 F.2d at 286 (holding individual "agent" can constitute employer for Title VII purposes)).

B. *Rulings Under the ADA, ADEA and Title VII Within the Seventh Circuit*

The issue of individual liability under the anti-discrimination statutes was an even greater point of conflict among the district courts in the Seventh Circuit than among the appellate courts.<sup>51</sup> For example, although numerous district courts granted individuals immunity from liability under Title VII, the ADEA and the ADA,<sup>52</sup> other district courts ruled that individuals are within the scope of the statutes.<sup>53</sup> Moreover, the Court of Appeals for the Seventh Circuit issued conflicting decisions regarding the matter.<sup>54</sup>

In *Jenusda v. Cancer Treatment Centers of America, Inc.* ("CTCA"),<sup>55</sup> the plaintiff brought an ADA suit following his termination after he reported to his employer that he had multiple sclerosis.<sup>56</sup> The United States Dis-

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The law regarding individual liability in the Tenth Circuit is unclear as of yet. See *EEOC v. AIC Sec. Investigations, Ltd.*, 55 F.3d 1276, 1280 n.4 (7th Cir. 1995) (relying on *Sauers v. Salt Lake County*, 1 F.3d 1122, 1125 (10th Cir. 1993)). The *AIC Security* court stated that the Tenth Circuit case of *Sauers v. Salt Lake County* brought the Tenth Circuit into line with the majority view, holding that there is no individual liability under Title VII. *Id.* The *AIC Security* court noted, however, that the question of individual liability may be unresolved in the Tenth Circuit. *Id.* (relying on *Ball v. Renner*, 54 F.3d 664 (10th Cir. 1995)). In *Ball*, the court determined that there might be liability for individual supervisors under Title VII. *Ball*, 54 F.3d at 667. The individual defendant in *Ball*, however, was held not to have a supervisory position over the plaintiff. *Id.* at 668. The Tenth Circuit stated that it "need not, and [does] not seek to resolve the open question." *Id.* Therefore, the Tenth Circuit itself does not believe that the question of individual liability is settled. *Id.*

51. *AIC Security*, 55 F.3d at 1280. The court stated that "[n]umerous district court decisions in this Circuit have addressed the question of individual liability under the ADA, Title VII, and the ADEA." *Id.* Although the Seventh Circuit had never explicitly ruled on individual liability, it upheld awards against individuals under the ADA, the ADEA and Title VII in previous rulings. *Id.* at 1280 n.3.

52. *Id.* at 1280 (citing *Hudson v. Soft Sheen Prod., Inc.*, 873 F. Supp. 132 (N.D. Ill. 1995); *Johnson v. Northern Ind. Pub. Serv. Co.*, 844 F. Supp. 466 (N.D. Ind. 1994)). For a discussion of *Soft Sheen* and *Johnson*, see *infra* notes 66-76 and accompanying text.

53. *AIC Security*, 55 F.3d at 1280 (citing *Jenusda v. Cancer Treatment Ctr. of Am., Inc.*, 868 F. Supp. 1006 (N.D. Ill. 1994); *Vakharia v. Swedish Covenant Hosp.*, 824 F. Supp. 769 (N.D. Ill. 1993)). For a discussion of *Jenusda* and *Vakharia*, see *infra* notes 55-65 and accompanying text. See also *Jenusda*, 868 F. Supp. at 1008-09 (listing Northern District of Illinois cases that demonstrate divisive split on issue).

54. *AIC Security*, 55 F.3d at 1280 n.3 (citing *DeLuca v. Winer Indus., Inc.*, 53 F.3d 793, 796 (7th Cir. 1995); *Price v. Marshall Erdman & Assoc.*, 966 F.2d 320, 324 (7th Cir. 1992); *Shager v. Upjohn Co.*, 913 F.2d 398, 404 (7th Cir. 1990); *Gaddy v. Abex Corp.*, 884 F.2d 312, 318-19 (7th Cir. 1989); *Huebschen v. Department of Health & Social Servs.*, 716 F.2d 1167, 1170 (7th Cir. 1983)). For a discussion of these cases, see *infra* notes 79-98 and accompanying text. See also *EEOC v. Vucitech*, 842 F.2d 936 (7th Cir. 1988) (upholding Title VII claims against individual while remaining silent on issue).

55. 868 F. Supp. 1006 (N.D. Ill. 1994).

56. *Id.* at 1008. Plaintiff *Jenusda* was the Vice President of Human Resources at Cancer Treatment Center of America ("CTCA"). *Id.* *Jenusda* had worked for CTCA for over three years when he informed the President of CTCA that he had multiple sclerosis and asked for his work week to be reduced to 40 hours on a

trict Court for the Northern District of Illinois permitted the employee to sue the owner of CTCA in his individual capacity.<sup>57</sup> In recognizing individual liability under the ADA, the court noted that a plain language reading of the statute includes "agents" in the definition of "employers," thus supporting individual liability.<sup>58</sup> The district court rejected the argument that the limitation of the definition of "employer" to those employing fifteen or more persons shows Congress's intent to limit liability against individuals.<sup>59</sup> The court, however, had difficulty explaining why the CRA of 1991 caps did not include individuals, but preferred to rely on the policy

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temporary basis. *Id.* Jenusda was fired two days later. *Id.* Jenusda sued CTCA and Midwestern Regional Medical Center, Inc. ("Midwestern"), its parent corporation, as well as Richard Stephenson in his individual capacity. *Id.* at 1007. Stephenson was the Board Chairman and principal owner of CTCA and Midwestern and had personally participated in Jenusda's firing. *Id.* at 1008. Stephenson moved for dismissal of the complaint against him under Federal Rule of Civil Procedure 12(b)(6), arguing that as an individual, he was not a covered entity under the ADA. *Jenusda*, 868 F. Supp. at 1007.

57. *Jenusda*, 868 F. Supp. at 1007. The court stated:

[T]he question of individual liability under these federal antidiscrimination statutes does not readily admit of any easy answers. [T]his court concurs with what appears to be the minority view in this district and finds that Congress' intent in enacting the ADA is best effectuated by holding that agents of an employer may be individually liable for engaging in unlawful discrimination.

*Id.* at 1010. The court pointed out that there are two situations in which the district courts have imposed individual liability. *Id.* at 1010 n.6 (citing *DeLuca*, 857 F. Supp. at 608). They are:

- (1) Where the individual was a decisionmaking employee with respect to the adverse employment action taken against the plaintiff and the adverse action was not mandated by company policy determined by somebody else; and
- (2) Where the individual defendant was, in effect, the employer or alter-ego of the employer.

*Id.* (citing *Janopoulos v. Harvey L. Walner & Assoc.*, 835 F. Supp. 459, 461 (N.D. Ill. 1993); *Vakharia*, 824 F. Supp. at 785).

58. *Id.* at 1010. The court stated that such an interpretation was consistent with Congress's intent to discourage discrimination. *Id.* The *Jenusda* court also pointed out that the Seventh Circuit had repeatedly interpreted Title VII broadly because of its remedial nature. *Id.* at 1011 (citing *Philbin v. General Elec. Capital Auto Lease, Inc.*, 929 F.2d 321, 323 (7th Cir. 1991)).

59. *Id.* at 1013. The court found that Congress considered many factors when creating the 15-person limitation, not just protecting small businesses. *Id.* at 1014. The court stated that it could not conclude that "the desire to protect small businesses from the costs of defending against a charge of discrimination was of paramount importance in defining the term 'employer.'" *Id.* The court stated that additional reasons for the exclusion of small businesses could have been "protecting the associational rights of 'mom and pop' or neighborhood businesses, or with not overburdening small businesses with administrative expenses." *Id.* The court also maintained that even if Congress intended to protect small businesses from the costs of litigating discrimination claims, the statute does not necessarily show that it intended to shield individuals in large companies from liability. *Id.*



reasons supporting broad interpretation.<sup>60</sup> The court held that under the ADA, an action may be maintained against "decisionmaking personnel."<sup>61</sup>

In *Vakharia v. Swedish Covenant Hospital*,<sup>62</sup> the same court held individuals liable under Title VII, the ADEA and § 1981 for their own discriminatory acts while acting as an agent for an institution.<sup>63</sup> The court stated that such an interpretation conforms with the statutes' goal of preventing discrimination.<sup>64</sup> Additionally, the court pointed out that permitting employees to sue managers in their individual capacity provides a remedy for victims of discrimination when the business entity has gone into bankruptcy.<sup>65</sup>

60. *Id.* at 1015. The court wrote:

This argument has given the court considerable pause; however, in the end—after considering the antidiscrimination statutes' broad remedial purposes and the importance of providing a meaningful deterrent to employment discrimination—the court finds the argument insufficient to justify eviscerating what we regard to be Congress' plain statement that "agents" [are individually liable].

*Id.* The court further noted that:

[I]n the almost thirty years since the enactment of the Civil Rights Act of 1964, there has been no significant decline in discrimination—although it may now manifest itself in more subtle forms. In fact . . . Congress has recognized that discrimination continues to plague the workplace by enacting additional antidiscrimination statutes . . . in its broad efforts to eradicate discrimination.

*Id.* at 1017 n.14.

61. *Id.* at 1017. The court, in holding the defendant liable in his individual capacity, noted that the individual defendant had "participated directly in Jenusda's termination" and, thus, was a decision-making agent. *Id.* at 1008.

62. 824 F. Supp. 769 (N.D. Ill. 1993).

63. *Id.* at 784-85. The plaintiff in *Vakharia* was a female anesthesiologist who was born in Bombay, India. *Id.* at 772. She worked at the defendant hospital for 15 years, but claimed that later in her career she was given fewer cases. *Id.* Her hospital privileges were eventually suspended. *Id.* Vakharia sued the hospital, the American Society of Anesthesiologists (ASA), 39 individuals "affiliated with the Hospital or the ASA" and unnamed members of the Hospital Board. *Id.* She sued all the defendants under Title VII, alleging discrimination against her based on color, race, gender and national origin, and sued under the ADEA alleging age discrimination. *Id.* at 772-73. She also sued the defendants under federal antitrust laws and state-law contract theory. *Id.* at 772. Vakharia twice amended her complaint, adding new defendants and new charges. *Id.* In a previous opinion in this case, the court held that "a defendant may be liable under Title VII and § 1981 even if the defendant is not the plaintiff's employer." *Id.* at 784 (citing *Vakharia v. Swedish Covenant Hosp.*, 765 F. Supp. 461, 463 (N.D. Ill. 1991)). In this proceeding, the court stated that the same rule applies to the ADEA, although the issue was not directly raised. *Id.* The court, in clarifying its previous opinion, also held that an individual may be liable "when the defendant was acting for someone else." *Id.*

64. *Id.* at 786. The court maintained that Title VII "always has served two purposes: to compensate the victims of discrimination (at least with back pay, if not with full compensatory damages), and to deter discrimination in the future." *Id.* at 785. The court reasoned that holding individuals liable would promote these purposes. *Id.*

65. *Id.* at 786. The court stated that "ordinarily personal liability is not of great consequence either to the plaintiff or to the individual defendant," presuma-

In *Hudson v. Soft Sheen Products, Inc.*,<sup>66</sup> two female employees brought Title VII sexual harassment charges against their employer and their supervisor in his individual capacity.<sup>67</sup> This time, the district court granted the supervisor's motion for judgment on the pleadings, finding that, as an individual, he was not subject to Title VII liability.<sup>68</sup> The district court focused on whether the CRA of 1991 altered the scope of the "employer" definition when it broadened the scope of the available remedies under Title VII.<sup>69</sup> The court agreed with the *Miller* court's reasoning that because the CRA of 1991 made no mention of expanding the scope of covered entities, it was unlikely that Congress intended to do so.<sup>70</sup> The court also rejected the notion that the court must interpret the term "employer" broadly to effectuate Title VII's purpose in eradicating discrimination, leaving resolution of this issue to the legislature.<sup>71</sup> Ruling in favor of the

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bly because of the deeper pockets of the employing entity. *Id.* at 785-86. The court, however, noted that individual liability would preserve the plaintiff's rights to recover when bankruptcy makes it impossible to recover from the employing entity. *Id.* at 786.

66. 873 F. Supp. 132 (N.D. Ill. 1995).

67. *Id.* at 133. The plaintiffs sued their supervisor, the Soft Sheen corporation and a Soft Sheen Products vice president for Title VII violations, negligent retention and battery. *Id.*

68. *Id.* at 138. The court only ruled on the Title VII charges against the individual supervisor. *Id.* The common law charges still stood against both the corporation and the individual. *Id.*

69. *Id.* at 134. The individual defendant, Allen, in arguing that Title VII does not expose him to individual liability, relied mainly on the ruling in *Weiss v. Coca-Cola Bottling Co.*, 772 F. Supp. 407 (N.D. Ill. 1991), where the court ruled that the "agent" language in Title VII served the sole purpose of insuring that respondeat superior would be incorporated into the statute. *Soft Sheen*, 873 F. Supp. at 134. One basis for the court's interpretation was that under the original ADA remedy structure, the remedies were those that an employer could grant, but not an individual supervisor. *Id.* Since this ruling, however, Congress has enacted the CRA of 1991 which altered the available remedies to include those that are available from individuals, such as damages. For a discussion on the expansion of remedies under the CRA of 1991, see *infra* notes 132-41 and accompanying text.

70. *Soft Sheen*, 873 F. Supp. at 135. The court also noted that the CRA of 1991 instituted a sliding cap system and that it made no mention of individual liability. *Id.* The plaintiffs argued that a broad reading of Title VII under the CRA of 1991 was necessary to effectuate the purpose of the anti-discrimination laws. *Id.* at 135-36. The court instead looked at the structure of the statute and its extensive legislative history. *Id.* at 138. The court said "we find that Congress made no reference to expanding Title VII liability to include individuals in their individual capacity. . . . Given the noise of the federal courts [on the issue of individual liability], we do not believe that Congress expected to change the law with silence." *Id.* The court also noted that those opposed to the bill made arguments against the bill in almost every way possible. *Id.* The court believed that the fact the opponents did not address the potentially divisive issue of individual liability indicated that the drafters did not intend to include such a provision. *Id.*

71. *Id.* at 136. The court stated that the effectiveness of Title VII is "a question for the legislature, not the courts, to answer." *Id.* The court, however, did not go so far as to say that such an interpretation was unnecessary, but rather left the decision to others. *Id.*

supervisor, the court flatly stated that "there is no individual liability under Title VII."<sup>72</sup>

In *Johnson v. Northern Indiana Public Service Co.*,<sup>73</sup> the United States District Court for the Northern District of Indiana stated that there is no individual liability under Title VII even though the defendant was an "agent," because inclusion of the term "agents" under the definition of "employer" was intended only to incorporate respondeat superior liability into Title VII.<sup>74</sup> The court used a textual analysis of the statute to support a finding that there was no liability for individuals under Title VII.<sup>75</sup> Furthermore, the court stated that because employers are already liable, there is little incentive for managers to discriminate even if they are not personally liable.<sup>76</sup>

The confusion amongst the district courts was predictable because the Court of Appeals for the Seventh Circuit provided little guidance.<sup>77</sup> In

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72. *Id.* The court went on, in dicta, to discuss the legislative history of Title VII. *Id.* In debating an earlier version of Title VII, neither the Senate majority nor the minority discussed individual liability under Title VII. *Id.* The House majority and minority, according to the *Soft Sheen* court, also failed to mention the issue of individual liability. *Id.*

73. 844 F. Supp. 466 (N.D. Ind. 1994).

74. *Id.* at 469. The plaintiff in *Johnson* was a part-time customer service representative for the employing entity defendant. *Id.* at 466-67. The plaintiff sued the employer, as well as her supervisor in her personal capacity, for terminating her on the basis of her race. *Id.* The defendants made various procedural objections, and the individual defendant argued she should not be held personally liable under Title VII. *Id.* at 467. The court agreed, relieving the individual from liability. *Id.* at 470.

75. *Id.* at 469. The court looked at the language of Title VII in the definition of employer. *Id.* The court noted that the use of the conjunctive "and" instead of "or" in the phrase "and any agent of such a person" supports the conclusion that the terminology was included to provide respondeat superior liability for employers. *Id.* The court stated that "[i]t has been held that the disjunctive 'or' usually, but not always, separates words or phrases in the alternate relationship, indicating that either of the separating words may be employed without the other." *Id.* (quoting NORMAN SINGER, STATUTES & STATUTORY CONSTRUCTION § 21.14 (5th ed. 1992)). The court, therefore, believed this suggested that the "agent" language was not meant to stand alone and create a new liable entity in individuals, but was rather tied to the employer's liability. *Id.* Moreover, the court found that the limitation of "employer" to those employing 15 or more also supported this reading because there was an intent to protect small entities and, presumably, individuals. *Id.* This further supported the court in avoiding the problem that the Seventh Circuit cautioned courts against: "rely[ing] too heavily on disjunctive form versus conjunctive form when deciding difficult issues." *Id.* (citing *Kelly v. Wauconda Park Dist.*, 801 F.2d 269, 270 n.1 (7th Cir. 1986)).

76. *Id.* The court emphasized that because the employer is liable under Title VII, it would not want to employ managers that would subject it to liability. *Id.* Thus, "potential termination from liable employers exists as an effective deterrent." *Id.*

77. *See Jenusda v. Cancer Treatment Ctr. of Am., Inc.*, 868 F. Supp. 1006, 1008-09 (N.D. Ill. 1994) (stating that "[i]n the absence of any clear guidance by the Court of Appeals, a split has developed with respect to this issue among the courts of the Northern District of Illinois"); *see also Soft Sheen*, 873 F. Supp. at 134 n.1 (noting that Seventh Circuit has not explicitly ruled on individual liability). For a

several cases, the Seventh Circuit, without directly addressing the issue, did not hold individuals liable under the anti-discrimination statutes.<sup>78</sup> In *DeLuca v. Winer Industries, Inc.*,<sup>79</sup> the plaintiff sued his employer and several managers for ADA violations.<sup>80</sup> The district court held that individuals were not liable under the ADA and dismissed the claim against the individual defendants.<sup>81</sup> The plaintiff did not appeal the district court's dismissal of the ADA charges against individuals.<sup>82</sup> As such, the Seventh Circuit did not comment on, nor disagree with, the district court's findings.<sup>83</sup>

In *Huebschen v. Department of Health and Social Services*,<sup>84</sup> the Seventh Circuit appeared to disagree with individual liability under Title VII.<sup>85</sup> Here, the parties agreed that the plaintiff could not sustain a Title VII suit

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discussion of the district court cases within the Seventh Circuit, see *supra* notes 55-76 and accompanying text.

78. *EEOC v. AIC Sec. Investigations, Ltd.*, 55 F.3d 1276, 1280 n.3 (7th Cir. 1995) (citing *DeLuca v. Winer Indus., Inc.*, 53 F.3d 793 (7th Cir. 1995); *Heubchen v. Department of Health and Social Servs.*, 716 F.2d 1167 (7th Cir. 1983)).

79. 53 F.3d 793 (7th Cir. 1995).

80. *Id.* at 796. In *DeLuca*, the plaintiff charged both the corporation and the senior managers in their individual capacity with violating the ADA by terminating him because of his multiple sclerosis. *Id.* The plaintiff had been a salesperson for the defendant employer. *Id.* at 795. He alleged that over the course of his illness, the managers created a hostile work environment, would not assist him in his job and eventually terminated him. *Id.* at 796.

81. *Id.*

82. *Id.* *DeLuca* only appealed the ruling of summary judgment in favor of the employing entity, Winer Industries. *Id.* *DeLuca* asserted that he had established a prima facie case against the employer. *Id.* at 797-98. The Seventh Circuit disagreed and concluded that *DeLuca* had not made out such a case. *Id.* at 798. To make out a "prima facie case," the plaintiff must show that: "(1) [plaintiff] is a member of a protected class; (2) [plaintiff's] work performance met the employer's legitimate job expectations; (3) [plaintiff's] employment was terminated"; and (4) plaintiff was treated less favorably in his termination, if there was a general down-sizing in effect. *Id.* at 797 (footnote omitted). This is the "McDonnell-Douglas test," developed for Title VII and applied here under the ADA. *Id.*; see *McDonnell-Douglas Corp. v. Green*, 411 U.S. 792, 802 (1973) (establishing requirements for prima facie case of Title VII discrimination and formulating burden-shifting method of proof). When an employee makes out a prima facie case against an employer, the burden shifts to the employer to show that there was a legitimate, nondiscriminatory reason for the plaintiff's termination. *DeLuca*, 53 F.3d at 797. If the employer can show this, the burden shifts back to the employee to show that the reason was not credible and was merely a pretext for discriminating against the plaintiff. *Id.*

83. *DeLuca*, 53 F.3d at 796. The Seventh Circuit merely stated that the dismissal of ADA claims against the individuals was a "decision *DeLuca* has not appealed." *Id.*

84. 716 F.2d 1167 (7th Cir. 1983).

85. *Id.* at 1170. Although the issue was not disputed, the court did independently state that individuals were not covered under Title VII. *Id.* The plaintiff brought suit under § 1983, based upon Title VII claims against his employer for sex discrimination, and the defendant claimed that only Title VII applied, not § 1983. *Id.* The court did not reach that question because it stated that to sue under § 1983 for a Title VII violation, the defendant must have been liable under

against an individual, as individuals were not included within the scope of "employer"; instead, the plaintiff brought a second § 1983 claim.<sup>86</sup> The Seventh Circuit, however, denied the plaintiff § 1983 recovery because § 1983 could not impose liability on those outside the scope of liability for Title VII.<sup>87</sup> The court concluded that because the individual defendants were not liable under Title VII, they were not liable under § 1983, implying that Title VII does not impose individual liability.<sup>88</sup>

The Seventh Circuit, however, had also upheld awards against individuals under the anti-discrimination statutes.<sup>89</sup> In *Price v. Marshall Erdman & Associates*,<sup>90</sup> the court affirmed damages against an individual under the ADEA.<sup>91</sup> The Seventh Circuit did not find it problematic that the jury had

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Title VII. *Id.* The court said the defendant "was not an employer and, thus, did not violate Title VII." *Id.* Therefore, the § 1983 claim could not stand alone. *Id.*

86. *Id.* The court noted that "[b]oth parties agree that Huebschen could not have maintained an action against [the individual defendant] under Title VII because she was not an 'employer' within the meaning of [Title VII]." *Id.* The plaintiff attempted instead to bring § 1983 charges against the individual defendant. *Id.*; 42 U.S.C. § 1983 (1994). Section 1983 does not grant any substantive rights to an employee. *Huebschen*, 716 F.2d at 1170 (citing *Chapman v. Houston Welfare Rights Org.*, 441 U.S. 600, 617-18 (1979)). The court outlined the requirements of a § 1983 action as a showing of "a deprivation of rights, privileges, or immunities 'secured by the Constitution and laws.'" *Id.* (quoting *Chapman*, 441 U.S. at 617-18). In *Huebschen*, the "substantive basis of the § 1983 claim [was] a violation of Title VII." *Id.* Therefore, § 1983 is not itself an employment law, but rather another way to sue under existing employment law. *Id.* Section 1983 has slightly different procedures for bringing an action, but the court stated that a cause of action under § 1983 must be the same as under the statute a plaintiff relies on for his or her substantive right. *Id.* The court noted that § 1983 does not expand the rights of an employee, and therefore, if an employee is unable to sue under Title VII, an employee is unable to sue under § 1983. *Id.*

87. *Huebschen*, 716 F.2d at 1170. The plaintiff had brought Title VII charges against the Department of Health and Social Services and § 1983 charges against the individuals. *Id.* at 1169. In agreeing with the district court that the individual defendants were not liable under Title VII, the court denied the plaintiff relief sought against the individual defendants under § 1983. *Id.* at 1170 (stating that § 1983 cannot provide relief if defendants are not covered under Title VII).

88. *Id.* The court specifically ruled that no individual liability exists under § 1983 when the parties do not dispute the lack of individual liability under Title VII. *Id.*

89. *EEOC v. AIC Sec. Investigations, Ltd.*, 55 F.3d 1276, 1280 n.3 (7th Cir. 1995) (citing *Price v. Marshall Erdman & Assoc.*, 966 F.2d 320 (7th Cir. 1992); *Shager v. Upjohn Co.*, 913 F.2d 398 (7th Cir. 1990); *Gaddy v. Abex Corp.*, 884 F.2d 312 (7th Cir. 1989)); *see also EEOC v. Vucitech*, 842 F.2d 936 (7th Cir. 1988) (remaining silent on issue of individual liability under Title VII where court ruled on individual defendants' violation of Title VII).

90. 966 F.2d 320 (7th Cir. 1992).

91. *Id.* at 324. The plaintiff was a salesperson for a construction firm. *Id.* at 322. He alleged that a manager, the individual defendant, illegally fired him in violation of the ADEA. *Id.* The plaintiff sued both the employing entity and the manager in his individual capacity. *Id.* The jury granted the plaintiff back pay and attorney's fees. *Id.* The Seventh Circuit was faced with determining whether the jury's decision applied to both the employing entity and the individual defendant. *Id.* at 324.

found both the employing entity and a manager, in his individual capacity, liable under the ADEA.<sup>92</sup> The court upheld the damages without much discussion.<sup>93</sup> In *Shager v. Upjohn Co.*,<sup>94</sup> the court mentioned in passing that it may have been possible for the plaintiff to recover from the individual supervisor under the ADEA, but did not directly rule on the issue.<sup>95</sup> Furthermore, in *Gaddy v. Abex Corp.*,<sup>96</sup> the Seventh Circuit upheld Title VII sex discrimination charges against an individual, again without directly ruling on the issue of individual liability.<sup>97</sup> The Seventh Circuit was, thus,

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92. *Id.* The court stated that separating the two defendants for the issue of willfulness was a "complication." *Id.* For either of the defendants to have been held liable under the ADEA, the defendant needed to have "willfully" violated the statute. *Id.* The acts of the manager were imputed to the company under the theory of respondeat superior. *Id.* Because the company had failed to notify the manager of the requirements of the ADEA, namely the age at which employees become part of the protected class, the employer had the requisite willfulness the statute demands. *Id.* Because the manager did not know of the statute's requirements, the court questioned whether he had the requisite "willfulness" under the ADEA. *Id.* The court avoided this issue, stating that the single brief filed by the two defendants, the employer and individual manager, did not differentiate between the two "so far as the willfulness of their violations is concerned." *Id.* Because the defendants treated themselves as one, the court held both of them liable. *Id.* Therefore, by affirming a jury decision that held an individual liable, the Seventh Circuit indirectly ruled on the issue of individual liability. *Id.*

93. *Id.*

94. 913 F.2d 398 (7th Cir. 1990).

95. *Id.* at 404. The plaintiff in *Shager* was a salesperson for the Asgrow Seed Co. *Id.* at 399. Asgrow was later acquired by Upjohn Co., and so Upjohn was a co-defendant. *Id.* The plaintiff alleged that his manager terminated him in violation of the ADEA. *Id.* The district court dismissed the case following a summary judgment motion by the defendant's companies. *Id.* The Seventh Circuit reversed. *Id.* at 407. In doing so, the Seventh Circuit discussed whether respondeat superior liability was included in the ADEA. *Id.* at 404-05. The court stated that the manager's actions in discriminating against the plaintiff were imputed to the employing entity. *Id.* at 405. In discussing the manager's actions, however, the court suggested that it might have held the manager individually liable if the plaintiff had included the manager in his complaint. *Id.* at 404. The court noted that the inclusion of the term "agent" in the definition of "employer" could have meant that the manager was himself liable along with the employing entity or even instead of the employing entity. *Id.* The court, therefore, hypothesized that the plaintiff could have sued the manager, but did not. *Id.*

96. 884 F.2d 312 (7th Cir. 1989).

97. *Id.* at 318-19. In *Gaddy*, the plaintiff had worked at the defendant's company in quality control. *Id.* at 314. Plaintiff alleged that the manager, who was the individual defendant in the case, sexually harrassed her and denied her request for overtime hours because she was a working mother. *Id.* The plaintiff was terminated and the EEOC issued a right-to-sue letter after she filed a charge of discrimination with the agency. *Id.* The plaintiff named both the employing entity and the manager as defendants. *Id.* At the second bench trial, the judge found for the plaintiff, granting her reinstatement, back pay, lost overtime, lost seniority, attorney's fees and injunctive relief. *Id.* at 313. The defendants appealed both the ruling and the judge's post-trial motions. *Id.* The court upheld most of the damages against the defendants. *Id.* at 318-19. The court did so, however, without noting that it was holding an individual liable under Title VII. *Id.*

unresolved as to the issue of individual liability under the anti-discrimination statutes, as it never had an opportunity to rule directly on the issue.<sup>98</sup>

### III. AN ANALYSIS OF *AIC SECURITY*

#### A. EEOC v. AIC Security Investigations, Ltd.

*AIC Security* presented the Seventh Circuit with an opportunity to resolve the division among the district courts regarding individual liability under the anti-discrimination statutes.<sup>99</sup> *AIC Security Investigations, Ltd.* ("AIC") was a private security firm owned by Victor Vrdolyak.<sup>100</sup> AIC employed about 300 people, including the plaintiff, Charles Wessel. Wessel worked as executive director of AIC for several years during which he suffered from lung cancer.<sup>101</sup> While Wessel continued to hold this top management post at AIC, he was diagnosed with a terminal form of brain cancer.<sup>102</sup> The defendant, Ruth Vrdolyak, took control of the company soon after Wessel's diagnosis and fired him.<sup>103</sup> On Wessel's behalf, the EEOC sued both AIC and Vrdolyak in her individual capacity.<sup>104</sup>

98. *EEOC v. AIC Sec. Investigations, Ltd.*, 55 F.3d 1276, 1280 n.3 (7th Cir. 1995) (noting that Seventh Circuit courts have awarded damages against individuals, but only when individual liability was not disputed).

99. *Id.* at 1280 (citing divisive district court rulings). For a discussion of the district court cases, see *supra* notes 55-76 and accompanying text.

100. *AIC Security*, 55 F.3d at 1279. AIC was a security company, providing private guards in the Chicago area. *Id.* AIC was a division of AIC International. *Id.* Victor Vrdolyak owned AIC International and, thus, also owned AIC, its subsidiary. *Id.* Victor Vrdolyak also ran AIC International and hired the plaintiff, Charles Wessel, to run AIC in 1986. *Id.*

101. *Id.* Wessel was employed from 1986 to July 1992. *Id.* In 1987, Wessel discovered he had lung cancer. *Id.* For the next five years, he continued his employment at AIC while he underwent various surgeries and treatments such as chemotherapy and radiation. *Id.* During this time, he suffered from the effects of both the illness and the treatments, including "shortness of breath from having parts of his lungs removed, nausea from radiation and chemotherapy, and somewhat reduced memory capacity due to the effects of brain tumors." *Id.* He continued "essentially full time" during the course of his employment. *Id.*

102. *Id.* Wessel discovered in April 1992 that he had, in addition to lung cancer, metastatic brain cancer, an inoperable form of terminal cancer. *Id.* Wessel's illnesses thus made him part of a protected class under the ADA. *Id.* For a discussion of the definition of disability under the ADA, see *supra* note 3 and accompanying text.

103. *AIC Security*, 55 F.3d at 1279. Victor Vrdolyak died in July 1992. *Id.* Ruth Vrdolyak, the defendant in this case, took sole ownership of AIC and AIC International soon after her husband's death. *Id.* She ran the company on a day-to-day basis and was aware of Wessel's illness. *Id.* She terminated Wessel on July 29, 1992. *Id.*

104. *Id.* After Vrdolyak fired Wessel, Wessel filed a charge with the EEOC. *Id.* The EEOC decided to sue instead of issuing a right-to-sue letter. *Id.* For a discussion of the EEOC process, see *supra* note 14. Wessel joined the action, intervening as a plaintiff in his own interest. *Id.* Because Wessel's brief adopts the arguments of the EEOC brief regarding individual liability for Vrdolyak, the EEOC and Wessel will be jointly referred to as "EEOC" where appropriate within this Note. See Brief for Appellee/Cross Appellant (Charles H. Wessel) at 16, *EEOC v. AIC Sec.*

A jury found in favor of Wessel, holding both Vrdolyak and AIC liable under the ADA.<sup>105</sup> The United States District Court for the Northern District of Illinois, ruling on post-judgment motions, limited some of the jury's awards.<sup>106</sup> The trial court, however, still held Vrdolyak and AIC jointly and severally liable.<sup>107</sup> Therefore, the district court held Vrdolyak, the manager and owner of the employing entity, individually liable in her personal capacity under the ADA.<sup>108</sup>

On appeal, Vrdolyak asserted the defense that she could not be held liable as an individual under the ADA.<sup>109</sup> The EEOC, however, contended that under a plain language reading of the ADA, the definition of an "em-

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Investigations, Ltd., 55 F.3d 1276 (7th Cir. 1995) (No. 93-3839) (adopting and incorporating EEOC brief).

105. *AIC Security*, 55 F.3d at 1279. The jury held that both AIC and Vrdolyak violated the ADA and awarded Wessel "\$22,000 in back pay, \$50,000 in compensatory damages, \$250,000 in punitive damages against AIC, and \$250,000 in punitive damages against Vrdolyak." *Id.* In addition, after post-trial motions, "[t]he district court granted injunctive relief against AIC, ordering a variety of measures to prevent future discrimination." *Id.* AIC had to pay the \$22,000 back pay, but both AIC and Vrdolyak were held jointly liable for \$50,000 in compensatory damages. *Id.*

106. *Id.* The district court limited the amount of the compensatory and punitive damages to \$200,000 as required by the CRA of 1991. *Id.*; see 42 U.S.C. § 1981a(b)(3)(C) (1994) (limiting punitive damages to \$200,000 for employers with more than 200 and fewer than 501 employees). For a discussion of the sliding scale approach used in the CRA of 1991, see *supra* note 32 and accompanying text. The court held AIC and Vrdolyak severally liable, but limited the punitive damages to \$75,000 each. *AIC Security*, 55 F.3d at 1279. Therefore, the total amount of damages awarded to Wessel was \$200,000, the maximum total amount under the CRA of 1991. *Id.*

107. *AIC Security*, 55 F.3d at 1279. The district court stated that "Ruth Vrdolyak directly participated in, and in fact made that decision [to fire Wessel] and ordered it to be carried out. Under these circumstances defendant Vrdolyak is not relieved of personal liability." *EEOC v. AIC Sec. Investigations, Ltd.*, No. 92-C7330, 1993 U.S. Dist. LEXIS 15025, at \*30 (N.D. Ill. Oct. 20, 1993).

108. *AIC Security*, 55 F.3d at 1279. The district court rejected the *Miller* court ruling as unpersuasive. *AIC Security*, 1993 U.S. Dist. LEXIS 15025, at \*29-30. For a discussion of the *Miller* holding, see *supra* notes 26-33. The court was more persuaded by the holding in *Vakharia v. Swedish Covenant Hosp.*, 824 F. Supp. 769 (N.D. Ill. 1993). *AIC Security*, 1993 U.S. Dist. LEXIS 15025, at \*29. For a discussion of the *Vakharia* holding, see *supra* notes 62-65. The court maintained that the policy concerns governing the ADA should result in individual liability:

This court agrees with [the *Vakharia* holding] that if the person most responsible for invidious discriminatory actions (that is, the employee who actually discriminates) were shielded from personal liability, that person may never be sufficiently punished or deterred. Employers, particularly large organizations, might not be able to accurately identify all those employees who engage in wrongful conduct. Failure to identify and punish such individuals may mean that a hostile and undeterred management will remain in place awaiting its next victim.

*AIC Security*, 1993 U.S. Dist. LEXIS 15025, at \*29.

109. *AIC Security*, 55 F.3d at 1279. AIC and Vrdolyak also appealed the three following issues: (1) admission of Wessel's videotaped deposition; (2) the jury instructions; and (3) the damages granted. *Id.* at 1282, 1283, 1285-88.



ployer" includes "any agent," and as such, individual managers and owners could be included in the scope of "employer."<sup>110</sup> The EEOC also argued that although the original remedies under the ADA are those usually obtainable only from an employing entity, the CRA of 1991 expanded the types of damages available to those usually obtainable from an individual.<sup>111</sup> In addition, the EEOC advanced the policy arguments that holding managers and owners individually liable would better effectuate the purpose of the ADA to discourage discrimination, as well as provide a remedy to aggrieved parties where the employing entity no longer has valuable assets.<sup>112</sup>

The Seventh Circuit rejected the EEOC's arguments, finding instead that the ADA and the anti-discrimination statutes do not impose liability on persons in their individual capacity.<sup>113</sup> The court stated that the inclu-

110. *Id.* at 1281. The EEOC relied on the "plain language" interpretation that any agent of an employer is included within the definition of "employer." *Id.* The EEOC argued that "[a] statute's plain meaning ordinarily determines its meaning." Brief for the Appellee (Equal Employment Opportunity Commission) at 36, *EEOC v. AIC Sec. Investigations, Ltd.*, 55 F.3d 1276 (7th Cir. 1995) (No. 93-3839) (citing *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 835 (1990) (relying on *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980))). Therefore, reading the employment anti-discrimination statutes from the EEOC perspective, any agent of a covered entity could be liable under the ADA, Title VII or the ADEA. *Id.* at 37. For the definition of "employer" under the ADA, see *supra* note 8. For the Seventh Circuit's treatment of the EEOC arguments, see *infra* notes 119-31.

111. *AIC Security*, 55 F.3d at 1281. The EEOC argued that the additional remedies that the CRA of 1991 tacked onto Title VII and the ADA are those that are typically obtainable from an individual. *Id.* Thus, the EEOC attempted to negate Vrdolyak's argument that because the ADA only granted remedies that an employing entity could give, such as back pay and reinstatement, the drafters did not intend to include individuals within the scope of ADA liability. *Id.* Although the CRA of 1991 expanded the scope of remedies to those that are obtainable from individuals, such as compensatory damages, it did so without discussing the liability of individuals. Appellee's Brief at 41, *AIC Security* (No. 93-3839). The EEOC acknowledged that "the reason for Congress's silence is far from clear." *Id.* The EEOC refocused the court's attention to the definition of "employer" under the ADA. *Id.* at 41-42.

112. *AIC Security*, 55 F.3d at 1282 n.9. The EEOC first asserted that anti-discrimination statutes "should be interpreted liberally to effectuate [their] remedial purposes." Appellee's Brief at 42, *AIC Security* (No. 93-3839) (citing *Owens v. Rush*, 636 F.2d 283, 287 (10th Cir. 1980); *Lamirande v. RTC*, 843 F. Supp. 526, 528 (D.N.H. 1993); *Wanamaker v. Colombian Rope Co.*, 740 F. Supp. 127, 135 (N.D.N.Y. 1990); *Burrell v. Truman Medical Ctr., Inc.*, 721 F. Supp. 230, 232 (W.D. Mo. 1989)). The EEOC continued to state that the reason Congress enlarged the scope of recovery against those who discriminate under Title VII and the ADA was because it knew that monetary damages deter discrimination. *Id.* at 42 n.16. The EEOC also pointed out that in cases of bankruptcy, there may not be any way to recover from the employing entity itself, and thus, the discriminating individual must shoulder the burden of remedying the plaintiff. *Id.* at 42-43 n.16.

113. *AIC Security*, 55 F.3d at 1282. The Seventh Circuit stated "[w]e hold that individuals who do not otherwise meet the statutory definition of 'employer' cannot be liable under the ADA." *Id.* The court noted that "our holding only applies directly to the ADA, though it obviously affects the resolution of the very similar

sion of the language "agent" in the definition of "employer" was to ensure respondeat superior liability for employers based upon their agents' discriminatory acts.<sup>114</sup> Moreover, the court disagreed with the proposition that the CRA of 1991 expanded the scope of "employer."<sup>115</sup> The Seventh Circuit reasoned that Congress still maintained protections for small businesses, and noted that there was a distinct lack of legislative discussion on the topic of individual liability where such an intended controversial change would have been likely to spark much debate.<sup>116</sup> In addition, the court dismissed the EEOC's policy arguments stating that the added protections for the disabled would be minor in light of strong disincentives for workplace discrimination already in existence.<sup>117</sup> On the whole, the Seventh Circuit determined that holding individuals liable under the ADA would upset the balance that Congress struck between protecting disabled employees and minimizing the regulatory costs to employers.<sup>118</sup>

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questions under Title VII and the ADEA." *Id.* at 1282 n.10 (citing *Birkbeck v. Marvel Lighting Corp.*, 30 F.3d 507, 510 n.1 (4th Cir. 1994)). For a discussion of the Seventh Circuit's reasoning in *AIC Security*, see *infra* notes 119-51 and accompanying text.

114. *AIC Security*, 55 F.3d at 1281. The court adopted this rationale from *Birkbeck* and *Miller*. *Id.* (citing *Birkbeck*, 30 F.3d at 510; *Miller v. Maxwell's Int'l, Inc.*, 991 F.2d 583, 587 (9th Cir. 1993), *cert. denied*, 510 U.S. 1109 (1994)). The court analyzed the structure of the statute and how the statute insulates small employers from its scope. *Id.* The court reasoned that if Congress meant to protect smaller entities from the costs of compliance and litigation, then it could not have intended to expose individuals to such costs. *Id.* Also, the court stated that because the original remedies under the ADA were equitable and those that employers traditionally provide, the drafters most likely did not intend to include individual agents as liable parties in ADA actions. *Id.* For a discussion of the holding in *Miller*, see *supra* notes 26-33 and accompanying text. For a discussion of the holding in *Birkbeck*, see *supra* notes 37-38 and accompanying text.

115. *AIC Security*, 55 F.3d at 1281. The court noted that the CRA of 1991's sliding cap system, which lowered damages for smaller employers, and the preservation of the exemption for employers with less than 15 employees, showed that Congress still maintained the protections for smaller entities. *Id.* Thus, in enacting the CRA of 1991, it would be unlikely that Congress simultaneously sought to enlarge the scope of "employer" to include individuals. *Id.*

116. *Id.* The court noted that there was no legislative discussion on the inclusion of individual liability in the CRA of 1991, in spite of the fact that such an issue would surely have caused controversy in both the Senate and the House. *Id.* The court concluded that these factors combined made it unlikely that the drafters of the CRA of 1991 intended such a departure from the original scope of "employer" under the ADA. *Id.*

117. *Id.* at 1282. The court noted that because the employing entity is still liable, the employing entity would still discourage discrimination regardless of the lack of liability for individual managers. *Id.* Instead, the employer will discipline a manager for discriminating, thus effectuating the purpose of the ADA to discourage discrimination. *Id.* The court maintained that holding individuals liable would not be tantamount to providing managers with the right to discriminate with impunity. *Id.*

118. *Id.* The court noted that the EEOC interpretation "upsets that balance and distorts the statutory framework" of the ADA between discouraging discrimination and avoiding burdensome regulations. *Id.* at 1281.

B. *The Seventh Circuit's Logic*1. *The Plain Meaning of "Employer" Under the ADA*

In *AIC Security*, the EEOC contended that under a plain meaning interpretation, the ADA's definition of "employer" included Vrdolyak.<sup>119</sup> The EEOC's conclusion stemmed from the premise that a "covered entity" is prohibited from discriminating based upon a disability under the ADA.<sup>120</sup> The definition of a "covered entity" includes an "employer."<sup>121</sup> An "employer," in turn, is defined as a "person engaged in an industry affecting commerce who has 15 or more employees . . . and any agent of such person."<sup>122</sup> The statutory definition of "person" includes corporations.<sup>123</sup> Therefore, the EEOC argued that: (1) Vrdolyak was an "agent" of AIC; (2) AIC was an "employer" under the ADA; (3) AIC was thus a "covered entity"; (4) Vrdolyak was then an "agent" of a "covered entity"; and (5) as an "agent" of a "covered entity," Vrdolyak was within the definition of "employer" and consequently could be held liable for her discriminatory acts.<sup>124</sup> The EEOC argued that the inclusion of the agency language is notable because under common law principals, the corporation would still be liable for an agent's discriminatory acts absent the language.<sup>125</sup> Thus, the EEOC reasoned that the drafters, conscious of this common law rule, must have intended that any agent of a corporation, such as Vrdolyak, would be a "covered entity" under the ADA and would be subject to liability in their individual capacity.<sup>126</sup>

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119. Brief for the Appellee (Equal Employment Opportunity Commission) at 36, *EEOC v. AIC Sec. Investigations, Ltd.*, 55 F.3d 1276 (7th Cir. 1995) (No. 93-3839). The EEOC stated that the plain meaning of a statute should control unless there is "clearly expressed legislative intention to the contrary." *Id.* (citing *Kaiser Aluminum & Chem. Corp. v. Bonjorno*, 494 U.S. 827, 835 (1990) (relying on *Consumer Prod. Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102, 108 (1980))). In the alternative, the EEOC argued that Vrdolyak was liable as AIC's alter ego. Appellee's Brief at 43, *AIC Security* (No. 93-3839). For a discussion of the court's handling of the alter ego theory and the possible loophole for district courts to circumvent the *AIC Security* ruling, see *infra* note 189.

120. Appellee's Brief at 37, *AIC Security* (No. 93-3839) (citing 42 U.S.C. § 12112(a) (Supp. IV 1992)). The statutory language is set forth *supra* note 4.

121. Appellee's Brief at 37, *AIC Security* (No. 93-3839) (citing 42 U.S.C. § 12111(2)).

122. *Id.* (citing 42 U.S.C. § 12111(5)(A) (Supp. IV 1992) (emphasis added)). For the statutory language of § 12111(5), see *supra* note 8.

123. Appellee's Brief at 37, *AIC Security* (No. 93-3839) (citing 42 U.S.C. §§ 2000e(a), 12111(7)).

124. *Id.*

125. *Id.* at 40 (citing *Shager v. Upjohn Co.*, 913 F.3d 398, 404-05 (7th Cir. 1990); *Levendos v. Levendos*, 909 F.2d 747, 752 (3d Cir. 1990). For a discussion of the common law theory of respondeat superior that courts impose on an employing entity for the actions of their employees, see *infra* note 128 and accompanying text.

126. Appellee's Brief at 37, *AIC Security* (No. 93-3839). The EEOC highlighted the various cases in which the Seventh Circuit had implicitly recognized individual liability under the anti-discrimination statutes. *Id.* at 38 (citing *Gaddy v. Abex Corp.*, 884 F.2d 312, 318-19 (7th Cir. 1989); *EEOC v. Vucitech*, 842 F.2d 936,

The Seventh Circuit disagreed with the EEOC's position.<sup>127</sup> The court stated that the purpose of the "agent" language was to insure that employers would be held liable for discriminatory acts by their employees, managers and agents under the respondeat superior doctrine.<sup>128</sup> The court found further support for this proposition in the structure of all three anti-discrimination statutes.<sup>129</sup> The three statutes limit the definition of "employer" to those employing a minimum of either fifteen or twenty persons.<sup>130</sup> Noting that the purpose of the limitation is to protect small businesses, the court found it unlikely that Congress would have intended to place the burden of liability on individuals.<sup>131</sup>

## 2. *The CRA of 1991's Expansion of Available Remedies*

The EEOC also argued that the CRA of 1991 expanded the ADA remedies to include those that usually can be obtained from individuals, thus

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944 (7th Cir. 1988)). Although the Seventh Circuit agreed that it had indirectly faced the issue of individual liability under the anti-discrimination statutes, in *AIC Security* the court treated the question as open. See *EEOC v. AIC Sec. Investigations, Ltd.*, 55 F.3d 1276, 1280 n.3 (7th Cir. 1995) (outlining inconsistency in previous Seventh Circuit rulings). For a discussion of these Seventh Circuit cases, see *supra* notes 77-98 and accompanying text.

127. *AIC Security*, 55 F.3d at 1279. The court joined "analogous decisions of [our] sister Circuits in holding that individuals who do not independently meet the ADA's definition of 'employer' cannot be held liable under the ADA." *Id.* As this was a question of law, the court reviewed the issue *de novo*. *Id.* (citing *Pilditch v. Board of Educ.*, 3 F.3d 1113, 1115 (7th Cir. 1993), *cert. denied*, 510 U.S. 1109 (1994)).

128. *Id.* at 1281 (citing *Birkbeck v. Marvel Lighting Corp.*, 30 F.3d 507, 510 (4th Cir. 1994); *Miller v. Maxwell's Int'l, Inc.*, 991 F.2d 583, 587 (9th Cir. 1993)). In arriving at this conclusion, the court engaged in little textual analysis. See *id.* (stating that "[C]ontrary to the EEOC's . . . argument, the actual reason for the 'and any agent' language . . . was to ensure that courts would impose *respondeat superior* liability upon employers for the acts of their agents" (citing *Birkbeck*, 30 F.3d at 510; *Miller*, 991 F.2d at 587)). Instead, the *AIC Security* court relied on the *Miller* and *Birkbeck* courts' analysis of the statute's definitional language. *Id.* For a discussion of these cases, see *supra* notes 26-38, 114 and accompanying text.

129. *AIC Security*, 55 F.3d at 1281. The court, while not delving into a lengthy textual analysis of the ADA, looked to areas of the ADA other than the definitional section in order to understand the full scheme of the statute. *Id.* The Seventh Circuit pointed out that all three of the anti-discrimination statutes provide for limited remedies which lends credibility to the theory that individuals were not to be included in the scope of "employer." *Id.*

130. *Id.* Under the ADA, the scope of "employer" was limited to those employing more than 14 employees. See 42 U.S.C. § 2000e(b) (Supp. VI 1992) (limiting scope of "employer" under Title VII to those employing over 14 persons); 29 U.S.C. 630(b) (1988) (limiting the scope of "employer" under ADEA to those employing over 19 persons).

131. *AIC Security*, 55 F.3d at 1281. The court stated that the exclusion of small businesses "struck a balance between the goal of stamping out all discrimination and the goal of protecting small entities from the hardship of litigating discrimination claims." *Id.* (citing *Birkbeck*, 30 F.3d at 510; *Miller*, 991 F.2d at 587).

making the individual liability theory available to plaintiffs.<sup>132</sup> Conversely, Vrdolyak argued that the CRA of 1991 favored her position that the ADA does not impose individual liability because it instituted a “sliding cap system” that further protected small businesses and it failed to mention individual liability.<sup>133</sup> The court adopted Vrdolyak’s interpretation of the CRA of 1991.<sup>134</sup>

The court first noted that the original remedies under the ADA were equitable in nature.<sup>135</sup> Because these remedies are typically not available from individuals, the court believed it was unlikely that Congress originally

132. *Id.* The EEOC noted that Congress must have been aware of the controversy surrounding individual liability under Title VII at the time of the enactment of the CRA of 1991. Brief for the Appellee (Equal Employment Opportunity Commission) at 42 n.15, *EEOC v. AIC Sec. Investigations, Ltd.*, 55 F.3d 1276 (7th Cir. 1995) (No. 93-3839) (citing *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990) (assuming Congress has knowledge of existing law); *Cannon v. University of Chicago*, 441 U.S. 677, 696-97 (1979) (same)). The EEOC reasoned that Congress’s failure to mention the issue was an implicit acceptance of decisions holding individuals liable. *Id.* at 42.

133. Brief Amicus Curiae of the Equal Employment Advisory Counsel in Support of Defendants-Appellants at 14-16, *EEOC v. AIC Sec. Investigations, Ltd.*, 55 F.3d 1276 (7th Cir. 1995) (No. 93-3839). The Equal Employment Advisory Counsel (EEAC) is a private association that represents corporations and employers in employment litigation. *Id.* at 2. The EEAC filed a brief on Vrdolyak’s behalf. *Id.* The EEAC first argued that the equitable remedies originally available under the ADA were proof that individual liability was not intended by the drafters. *Id.* at 14-15 (citing *Meritor Sav. Bank v. Vinson*, 477 U.S. 57, 75 (1986) (Marshall, J., concurring) (noting that equitable remedies of Title VII are type that run against employing entity); *Weiss v. Coca-Cola Bottling Co.*, 772 F. Supp. 407, 411 (N.D. Ill. 1991) (holding equitable remedies not intended to apply to liability of individuals)). The EEAC then dismissed the fact that the CRA of 1991 remedies are those that run against individuals and focused instead on the limitations of the sliding cap system that exempts small businesses. *Id.*; see also 42 U.S.C. § 1981a(b)(3)(A) (Supp. IV 1992) (stating that sum of amount of compensatory damages awarded in case of employer with between 15 and 100 employees is \$50,000). The lowest cap is set for employers with between 15 and 101 employees. Brief Amicus Curiae at 15, *AIC Security* (No. 93-3839). Therefore, the EEAC reasoned that individuals with no employees of their own are exempt from the CRA of 1991. *Id.* For a detailed discussion of the sliding cap system under the CRA of 1991, see *infra* notes 138-41 and accompanying text.

134. *AIC Security*, 55 F.3d at 1281. Specifically, the court determined “that the district court erred in not dismissing Vrdolyak as a defendant.” *Id.* at 1282. The court did not directly address the “alter ego” theory the EEOC put forth, because the EEOC did not assert it at the trial court level. *Id.* at 1282 n.11. The court did not find that line of reasoning persuasive, stating that if the corporate veil were pierced Vrdolyak might be held liable for corporate liability, but that it would not affect an analysis of individual liability. *Id.*

135. *Id.* at 1281; see also Brief Amicus Curiae at 14-15, *AIC Security* (No. 93-3839) (noting that original statute did not contemplate individual liability due to its remedy structure). Such remedies included back pay, reinstatement and other equitable relief. See 42 U.S.C. § 1981a (allowing for equitable relief); Brief Amicus Curiae at 14, *AIC Security* (No. 93-3839). The ADA not only adopted the Title VII “employer” definition but also the remedies that Title VII offered. *Id.*; see also 42 U.S.C. § 12117(a) (remedies include back pay and equitable relief such as reinstatement).

intended to include individual liability under the ADA.<sup>136</sup> While the CRA of 1991 did expand the remedies to those that may be collected from individuals, the legislature remained silent as to the issue of individual liability.<sup>137</sup> Also, in enacting the CRA of 1991, Congress instituted a “sliding cap system” which placed a ceiling on the amount of damages a plaintiff could recover.<sup>138</sup> The lowest cap is for employers retaining between fourteen and 101 employees.<sup>139</sup> Individuals were not mentioned at all in the “sliding cap system.”<sup>140</sup> Congress’s silence on the liability of individuals, as well as the lack of a set cap for individuals, persuaded the court that Congress did not intend to expand the scope of the “employer” definition under the ADA.<sup>141</sup>

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136. *AIC Security*, 55 F.3d at 1281. The court stated that the EEOC basically recognized that the original ADA/Title VII damages are not typically obtainable from individuals. *Id.* In its brief, however, the EEOC actually claimed that equitable relief is sometimes obtainable from an individual rather than the employing entity. Appellee’s Brief at 42 n.15, *AIC Security* (No. 93-3839) (citing *Meritor Sav. Bank*, 477 U.S. at 75 (Marshall, J., concurring) (recognizing court’s power to issue injunction against individuals); *EEOC v. Vucitech*, 842 F.2d 936, 939 (7th Cir. 1988) (permitting recovery of back pay against individual where recovery against company was impossible)).

137. *AIC Security*, 55 F.3d at 1281. The CRA of 1991 granted plaintiffs additional remedies such as compensatory and punitive damages. 42 U.S.C. § 1981a(a)(2). Despite the inclusion of additional remedies, the *AIC Security* court determined that silence on the part of Congress with regard to individual liability establishes that no major expansion of the scope of “employer” under Title VII and the ADA was intended by the expansion of remedies. *AIC Security*, 55 F.3d at 1281.

138. *AIC Security*, 55 F.3d at 1281; *see also* Brief Amicus Curiae at 16, *AIC Security* (No. 93-3839) (citing *Miller v. Maxwell’s Int’l, Inc.*, 991 F.2d 583, 587 n.2 (9th Cir. 1993)).

139. *AIC Security*, 55 F.3d at 1281. The sliding cap system limited liability to \$50,000 for employers who have between 14 and 101 employees. 42 U.S.C. § 1981a(b)(3)(A); Brief Amicus Curiae at 15-16, *AIC Security* (No. 93-3839). For a discussion of the damage caps for other employer sizes, *see supra* note 32.

140. *AIC Security*, 55 F.3d at 1281. The EEAC argued that if the CRA of 1991 made no such cap for entities employing less than 15 people, then an individual who has no employees (such as a manager) would have no liability. Brief Amicus Curiae at 15-16, *AIC Security* (No. 93-3839).

141. *AIC Security*, 55 F.3d at 1281. The EEOC countered this argument by stating that individuals are liable for any amount the jury awards because they were not included in the cap system. *Id.* at 1281 n.6; *see also* Appellee’s Brief at 41-42, *AIC Security* (No. 93-3839) (arguing that cap system applied only to employing entities and not to individuals). The EEOC argued that Congress’s intent is unclear, and that its concern may have been “calibrating liability” for businesses because awards against companies have “different implications for the nation’s economy than do large damages awards against wealthy individuals such as Vrdolyak.” *Id.* at 41. The court rejected the EEOC’s arguments as “highly improbable.” *AIC Security*, 55 F.3d at 1281 n.6. The EEOC did not address the potential liability of less wealthy lower-level managers that would be affected by a decision to expose managers to individual liability. *See* Brief Amicus Curiae at 17, *AIC Security* (No. 93-3839) (noting that individual managers without same resources as company with 15 or more employees could not likely afford costs of such litigation).

### 3. *The Anti-Discrimination Policy Governing the ADA*

Additionally, the EEOC made several policy arguments.<sup>142</sup> The EEOC contended that holding managers individually liable for their discriminatory acts would effectuate the intent of Congress in discouraging discrimination and would insure that those who discriminate will not go unpunished.<sup>143</sup> The EEOC also pointed out that holding managers individually liable would guarantee an aggrieved party proper restitution when the employing entity is no longer solvent.<sup>144</sup>

Conversely, Vrdolyak argued that individual liability would have negative effects on equal employment opportunity laws.<sup>145</sup> Vrdolyak claimed that individual liability would hamper managers' abilities to legitimately judge potential or current employees based upon their job-related abilities.<sup>146</sup> Vrdolyak further pointed out the unfairness of holding managers with limited resources to the same legal standard as large corporations.<sup>147</sup>

The Seventh Circuit did not find the EEOC's arguments compelling.<sup>148</sup> The court stated that individual liability is not needed to provide a

142. *AIC Security*, 55 F.3d at 1282; see also Appellee's Brief at 42-43 n.16, *AIC Security* (No. 93-3839) (attacking policy arguments made in Brief Amicus Curiae, *AIC Security* (No. 93-3839)).

143. *AIC Security*, 55 F.3d at 1282; see also Appellee's Brief at 42-43 n.16, *AIC Security* (No. 93-3839) (noting that discriminating party should pay, not "plaintiff who has been victimized").

144. Appellee's Brief at 42-43 n.16, *AIC Security* (No. 93-3839). The EEOC stated that "where a company is bankrupt, a victim of discrimination will be unable to recover at all unless recovery is available against the individual who discriminated." *Id.*

145. Brief Amicus Curiae at 16-18, *AIC Security* (No. 93-3839). The court did not directly accept these policy theories and avoided discussing them. *AIC Security*, 55 F.3d at 1282. The court instead discounted the EEOC's policy arguments and reserved its own analysis to primarily one of structural, and some textual, interpretation. *Id.* at 1279-82. The court also pointed out that its decision conformed to the great weight of existing case authority. *Id.* at 1281-82.

146. Brief Amicus Curiae at 17-18, *AIC Security* (No. 93-3839). Vrdolyak contended that the purpose of the anti-discrimination legislation is to force managers to evaluate employees based only on their qualifications and merits, rather than on "statutorily-protected characteristics—such as race, gender, and disabilities." *Id.* Vrdolyak's argument is based on the presumption that managers will be pressured into avoiding employment decisions that would make them individually liable when there is a threat of a discrimination suit. *Id.*

147. *Id.* at 17. Vrdolyak contended that many managers have no greater resources than the claimants themselves. *Id.* She also noted that litigation costs the plaintiff nothing if the suit is filed by the EEOC. *Id.* Even when a case is dismissed, the individual defendant may incur "substantial legal fees which cannot be recovered unless the case can be shown to have been 'frivolous, unreasonable, or without foundation.'" *Id.* (quoting *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978)).

148. *AIC Security*, 55 F.3d at 1282. The court rejected the EEOC's "Chicken Little-esque argument." *Id.* Conversely, the court made no mention of the more extensive policy arguments by Vrdolyak concerning the impact on managers' discretionary abilities. *Id.*; see Brief Amicus Curiae at 16-18, *AIC Security* (No. 93-3839) (making policy arguments against imposing individual liability).

disincentive for managers to discriminate.<sup>149</sup> It noted that the employing entity is still liable, and it can deter discriminatory behavior through training and disciplinary action.<sup>150</sup> The court found that although expanding the scope of liability may have some effect in discouraging discriminatory acts, the societal costs would upset the balance that Congress sought to achieve between protection for employees and discretion for managers.<sup>151</sup>

### C. *Clarity for the Seventh Circuit and a Model for Other Jurisdictions*

The Seventh Circuit has established a bright line rule that lends certainty to questions of individual liability under the ADA as well as other federal anti-discrimination statutes.<sup>152</sup> The approach taken by the court balances social and economic interests while relying on the structure of the statute for support rather than on vague policy arguments.<sup>153</sup> Such an approach is sure to guide other jurisdictions to an equally balanced resolution.<sup>154</sup>

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149. *AIC Security*, 55 F.3d at 1282. The court agreed with the EEOC that the inclusion of individual managers under ADA liability would further deter discrimination as the risk of litigation increased. *Id.* The court, however, stated that the increase in deterrence would be marginal, and that the costs to individual defendants would outweigh the benefits, upsetting the balance of the statute. *Id.* The court noted that regardless of these policy arguments, it should not interpret the statute in such a way that “flies in the face of [the statute’s] structure.” *Id.*

150. *Id.* The court said that an employing entity has the “proper incentives to adequately discipline wayward employees.” *Id.* (citing *Miller v. Maxwell’s Int’l, Inc.*, 991 F.2d 583, 588 (9th Cir. 1993)). The court, however, did not consider how individuals in top management positions, such as Vrdolyak, would discipline themselves. *See id.* at 1279 (describing Vrdolyak as owner and “sole shareholder” of AIC and its parent company and manager of its “day-to-day” operations).

151. *Id.* at 1282. In weighing policy considerations, the court considered that anti-discrimination statutes do have “broad remedial purposes and should be interpreted liberally.” *Id.* The court, however, decided that a “liberal construction does not mean one that flies in the face of the structure of the statute.” *Id.* (citing *Hudson v. Soft Sheen Prod., Inc.*, 873 F. Supp. 132, 136 (N.D. Ill. 1995)).

152. *Id.* at 1282 n.10 (“We emphasize that our holding only applies directly to the ADA, though it obviously affects the resolution of the very similar questions under Title VII and the ADEA.” (citing *Birkbeck v. Marvel Lighting Corp.*, 30 F.3d 507, 510 n.1 (4th Cir. 1994))). Courts have subsequently referenced the *AIC Security* holding as affecting Title VII and the ADEA. For a discussion of the influence of the *AIC Security* decision in the district courts under the anti-discrimination statutes, see *infra* notes 188-98 and accompanying text.

153. *AIC Security*, 55 F.3d at 1281. The court refused to upset the “balance between the goal of stamping out all discrimination and the goal of protecting small entities from the hardship of litigating discrimination claims.” *Id.* (citing *Birkbeck*, 30 F.3d at 510; *Miller*, 991 F.2d at 587). *See generally* PAUL BURNSTEIN, DISCRIMINATION, JOBS, AND POLITICS: THE STRUGGLE FOR EQUAL EMPLOYMENT OPPORTUNITY IN THE UNITED STATES SINCE THE NEW DEAL (1985) (outlining policy considerations that went into anti-discrimination employment law).

154. For a discussion of the impact of *AIC Security* on other jurisdictions, see *infra* notes 193-94 and accompanying text.



The *AIC Security* court properly looked to the ADA statutory provisions for guidance.<sup>155</sup> The court evaluated the plain meaning of the term "agent" in the definition of "employer" and determined that it existed in order to guarantee respondeat superior liability for agents' and employees' acts of discrimination.<sup>156</sup> Such a reading is appropriate in the context of discrimination legislation.<sup>157</sup> The anti-discrimination statutes limit liability to those entities employing a statutorily defined minimum number of employees.<sup>158</sup> As an individual, a manager has no employees personally, and thus, should not be included within the scope of the statute.<sup>159</sup>

Also, the original remedies available under the anti-discrimination statutes were typically forms of equitable relief, which are not obtainable from individuals.<sup>160</sup> Therefore, it is highly unlikely that an individual manager could be subject to liability given that the statute's form of remedies could not be obtained from individual managers.<sup>161</sup>

While the CRA of 1991 did alter the structure of remedies under the ADA and Title VII to include those that may possibly be obtained from an individual, there is no evidence that it intended to alter the scope of the statutes' coverage.<sup>162</sup> The court points out that such a change would not

155. *AIC Security*, 55 F.3d at 1281. For a discussion of the court's analysis in *AIC Security*, see *supra* notes 119-51 and accompanying text.

156. *AIC Security*, 55 F.3d at 1281 (citing *Birkbeck*, 30 F.3d at 510; *Miller*, 991 F.2d at 587). For a discussion of the Seventh Circuit's analysis of the term "employer" and its possible inclusion of "agents" in *AIC Security*, see *supra* notes 8-17 and accompanying text.

157. *AIC Security*, 55 F.3d at 1281.

158. *Id.* at 1279; 42 U.S.C. § 12111(5)(A) (Supp. IV 1992). The ADA presently limits the definition of "employer" to those entities employing more than 14 persons. *Id.* Note that the ADA exempted those employing less than 25 employees for its first two years, then phased in its lower employee requirement. *Id.* Title VII also limits its scope to those employing more than 14. *Id.* § 2000e(b). The ADEA exempts those employing less than 20 persons. 29 U.S.C. § 630(b) (1988).

159. See Brief Amicus Curiae of the Equal Employment Advisory Counsel in Support of Defendants-Appellants at 13, *EEOC v. AIC Sec. Investigations, Ltd.*, 55 F.3d 1276 (7th Cir. 1995) (No. 93-3839) (arguing that exemption of small employers shows that Congress had no intent to include individuals that had no employers themselves). If an individual personally employed 15 or more persons, he or she might, independently, fall under the definition of "employer." *AIC Security*, 55 F.3d at 1280 n.2. In *AIC Security*, Vrdolyak was not personally the employer of the plaintiff. *Id.* at 1279.

160. *AIC Security*, 55 F.3d at 1281; see also 42 U.S.C. § 2000e-5(g) (limiting remedies under Title VII to injunction, back pay and reinstatement); 42 U.S.C. § 12117(a) (Supp. IV 1992) (adopting remedies of Title VII for ADA).

161. *AIC Security*, 55 F.3d at 1281; see Brief Amicus Curiae at 14-15, *AIC Security* (No. 93-3839). The "make whole" remedies of the ADA and Title VII are generally not obtainable from individuals. *Id.* at 15. Therefore, the original remedial scheme of the statutes before the CRA of 1991 would not then have subjected individuals to liability. *AIC Security*, 55 F.3d at 1281.

162. *AIC Security*, 55 F.3d at 1281. For a discussion of various court opinions which noted the glaring lack of legislative history concerning the issue of individual liability, see *supra* notes 70-72. Note that the CRA of 1991 type remedies were available in the ADEA in its original form. ROBERT BELTON, REMEDIES IN EMPLOY-

have taken place without any congressional discussion.<sup>163</sup> Because such an expansion of coverage would affect a vast number of voters, there certainly would have been controversy between sponsors and opponents of the bill.<sup>164</sup> Therefore, the omission of individuals in the cap system is further evidence that Congress did not consider the possibility of including individuals under the anti-discrimination statutes.<sup>165</sup> Also, the CRA of 1991 continued the tradition of protecting smaller employers in its "sliding cap system" for damage awards.<sup>166</sup> If Congress intended to protect smaller employing entities due to their minimal resources, it is unlikely that Congress intended to subject individual managers, who may also have minimal resources, to liability.<sup>167</sup>

There may be some strong policy arguments that support individual liability, but more compelling legal arguments weigh in favor of protecting individual managers.<sup>168</sup> While the EEOC properly argues that traditionally courts have interpreted anti-discrimination legislation broadly, the overall statutory scheme should control when appropriate.<sup>169</sup> In the past,

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MENT DISCRIMINATION LAW 80-85 (1992). The ADEA adopted its remedies from the Fair Labor Standards Act of 1938, 29 U.S.C. §§ 201-219 (1988), which allowed compensatory and punitive damages. BELTON, *supra*, at 80-85. To recover these types of remedies, however, one must show a willful violation under the ADEA. *Id.*; see also *Price v. Marshall Erdman & Assoc.*, 966 F.2d 320, 324 (7th Cir. 1992) (noting that court cannot impose liability on defendant unless defendant acted willfully). For a discussion on *Price*, see *supra* notes 90-93 and accompanying text.

163. *AIC Security*, 55 F.3d at 1281. The court said that "[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." *Id.*

164. See, e.g., H.R. CONF. REP. NO. 101-485, pt.2, at 4-7 (1990); H.R. CONF. REP. NO. 101-485, pt.3, at 4-7 (1990); SEN. REP. NO. 101-116, at 2 (1989). These reports concern discussions surrounding the development of the ADA, but fail to address the issue of supervisor liability. *Id.*

165. *AIC Security*, 55 F.3d at 1281. The court stated that Congress's "omission implies it did not consider individuals liable." *Id.* (citing *Miller v. Maxwell's Int'l, Inc.*, 991 F.2d 583, 587 n.2. (9th Cir. 1993)); see also Brief Amicus Curiae at 15, *AIC Security* (No. 93-3839) (arguing that CRA of 1991 exempts individual managers). The EEAC observed that if the lowest cap is for entities employing over 14 persons, then individual managers who themselves have no employees are not subject to the provisions. *Id.*

166. *AIC Security*, 55 F.3d at 1281; see also 42 U.S.C. § 1981a(b)(3)(A) (Supp. IV 1992) (stating employer with between 15 and 101 employees is not required to pay more than \$50,000 in compensatory damages).

167. See Brief Amicus Curiae at 17, *AIC Security* (No. 93-3839). The EEAC noted that resources increase for employing entities as their size increases, but supervisors may still have almost equal resources as the plaintiff. *Id.*

168. *AIC Security*, 55 F.3d at 1282 (rejecting EEOC's "short parade of horrors" after noting EEOC was arguing against weight of case authority). For a discussion of the EEOC's policy arguments, see *supra* notes 142-44 and accompanying text.

169. See Appellee's Brief at 42, *AIC Security* (No. 93-3839) ("This statute, like other anti-discrimination statutes, should be interpreted liberally to effectuate its remedial purposes." (citing *Owens v. Rush*, 636 F.2d 283, 287 (10th Cir. 1980); *Lamirande v. RTC*, 834 F. Supp. 526, 528 (D.N.H. 1993); *Wanamaker v. Columbian Rope Co.*, 740 F. Supp. 127, 135 (N.D.N.Y. 1990); *Burrell v. Truman Medical*

courts have expanded anti-discrimination legislation when necessary to effectuate its intent.<sup>170</sup> Here, however, the only purpose in expanding the number of potential defendants is to give plaintiffs more options to obtain remedies.<sup>171</sup>

By its terms, the scope of the ADA is sufficiently broad in covering many employing entities.<sup>172</sup> Furthermore, the disincentives for managers to discriminate are already in place.<sup>173</sup> Employing entities are unlikely to tolerate behavior by managers that exposes them to liability, and so managers are unlikely to engage in acts that expose themselves to termination.<sup>174</sup> Moreover, there are already several existing common law principals which hold managers personally liable for their discriminatory acts.<sup>175</sup> Preventing employment discrimination does not require enforcing individual liability and doing so would only marginally increase the ADA's deterrent effects.<sup>176</sup>

While the benefits of individual liability in discouraging discrimination are minimal, the implications for managers and supervisors could be disastrous.<sup>177</sup> Educating and training managers and supervisors on the

Ctr., Inc., 721 F. Supp. 230, 232 (W.D. Mo. 1989)); see *AIC Security*, 55 F.3d at 1282 ("We do not doubt that the employment discrimination statutes have broad remedial purposes and should be interpreted liberally . . .").

170. See, e.g., *Griggs v. Duke Power Co.*, 401 U.S. 424, 431 (1971) (expanding Title VII's prohibited practices to those having disparate impact upon protected groups, as well as those practices having disparate treatment). In *Griggs*, one of the Supreme Court's most important employment law cases, the court ruled that employment tests that are facially neutral, but that have a disparate impact on a racial group, violate Title VII unless the defendant employer can show the test is a business necessity and related to evaluating job performance. *Id.*

171. *AIC Security*, 55 F.3d at 1281. A major benefit to plaintiffs in imposing individual liability for managers is that plaintiffs would still be able to recover even where the employing entity has gone bankrupt. See *id.* at 1281 n.9 (stating that this benefit is not strong enough to "upset the structure Congress has set up").

172. See JOHN PARRY, *THE AMERICANS WITH DISABILITIES ACT MANUAL 21* (1992) (outlining employer responsibilities under ADA). Parry notes that Title I of the ADA is similar to the other anti-discrimination statutes, but that it requires even more than Title VII and the ADEA in its provisions concerning "reasonable accommodations." *Id.* For a discussion of the "affirmative action" that employers must take to make the workplace accessible to those with disabilities, see GEORGE W. JOHNSTON, ET AL., *AFFIRMATIVE ACTION HANDBOOK 55-64* (1992).

173. *AIC Security*, 55 F.3d at 1282.

174. *Id.*

175. See *Grant v. Lone Star*, 21 F.3d 649, 651 n.3 (5th Cir. 1994) (noting that individuals could still be liable under state tort and contract law), *cert. denied*, 115 S. Ct. 574 (1994); see also William L. Kandel, *Financial Exposure of Managers for Personnel Decisions*, EMPLOYEE REL. L.J. (Sept. 22, 1993) (discussing tort liability for managers). For further discussion on the liability of managers under state tort theories, see *infra* note 192 and accompanying text.

176. *AIC Security*, 55 F.3d at 1282.

177. Brief Amicus Curiae of the Equal Employment Advisory Counsel in Support of Defendants-Appellants at 16-18, *EEOC v. AIC Sec. Investigations, Ltd.*, 55 F.3d 1276 (7th Cir. 1995) (No. 93-3839). The EEAC stated that many managers do not have the resources to adequately defend themselves against discrimination

requirements of equal employment opportunity law is the responsibility of the employing entity.<sup>178</sup> The burden for managers to comply with the myriad of federal regulations is daunting enough.<sup>179</sup> To also shift the burden of liability to them for work done on behalf of their employer would, as the court pointed out, upset the balance that Congress has clearly developed through its statutory scheme.<sup>180</sup>

The *AIC Security* ruling brings the Seventh Circuit into line with the majority trend in the circuit courts in protecting individuals from liability

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suits. *Id.* at 17. The EEAC was particularly bothered by the fact that unsupported claims would be costly to litigate. *Id.* The Seventh Circuit also noted that holding managers individually liable would increase litigation as "plaintiffs saw more potentially liable parties and had a greater incentive to sue in marginal cases." *AIC Security*, 55 F.3d at 1282.

178. See MARY GREEN MINER & JOHN B. MINER, *EMPLOYER SELECTION WITHIN THE LAW* 362-66 (1979) (advising managers in executing human resource functions under equal employment opportunity ("EEO") laws). The authors discuss how top management can design training and incentives for managers to set and reach their EEO goals. *Id.* The authors admit that "[t]he most difficult part of EEO training for managers is 'awareness' training, which attempts to sensitize managers to some of the barriers and stereotyped attitudes [about protected class employees]." *Id.* at 362. The authors believe, however, the benefits of educating employees to their duties under employment statutes outweigh the substantial costs. *Id.*

The Seventh Circuit has ruled that an employing entity that fails to educate its managers on EEO requirements thereby fulfills any "willfulness" requirement. See *Price v. Marshall Erdman & Assoc., Inc.*, 966 F.2d 320, 324 (7th Cir. 1992) (holding employing entity liable for willful violation of ADEA due to corporation's failure to warn manager of duties under ADEA). In *Price*, the Seventh Circuit reviewed a decision that held an employer liable for a willful violation of the ADEA by a manager. *Id.* The Seventh Circuit said that the "willfulness" requirement of the ADEA was fulfilled even though the agent himself may not have been aware of the ADEA requirements. *Id.* The court stated that "the employer's failure to inform [the manager] concerning the fundamental requirements of the age discrimination supplies, as we have just seen, the requisite willfulness." *Id.* The court did not need to reach the issue of "willfulness" for the manager himself, because they treated both the corporation and the manager as one entity, due to the fact that they filed only one brief. *Id.* If, however, the employer's failure to train the manager is actionable as willful, even where the manager's actions may not be willful, a natural conclusion follows that the employer has a duty to train his or her employees in EEO law. But see DANIEL R. LEVINSON, *PERSONAL LIABILITY OF MANAGERS AND SUPERVISORS FOR CORPORATE EEO POLICIES AND DECISIONS* 25-29 (1982) (noting that employer has no legal duty to train managers on EEO law, but that employer's best interests are served by doing so).

179. See ARTHUR GUTMAN, *EEO LAW AND PERSONNEL PRACTICES*, at xix (1993). In his foreword, Gutman states "[t]he human resource management field has been dominated for the past 30 years by the various Congressional mandates generally lumped together as 'civil rights legislation.' Nothing has come close to having the impact on personnel management practices as have the various segments of civil rights legislation dealing with employment practices." *Id.*

180. *AIC Security*, 55 F.3d at 1282; see Brief Amicus Curiae at 9-10, *AIC Security* (No. 93-3839) (stating that federal anti-discrimination statutes were not designed to hold managers "personally liable for actions committed within the scope of their duties on their employer's behalf").

under the employment anti-discrimination statutes.<sup>181</sup> Recent circuit court decisions have rejected plaintiffs' attempts to include individuals as defendants in Title VII and ADEA litigation.<sup>182</sup> The rationale used by all of these courts follows the *Miller v. Maxwell's International, Inc.* court's line of reasoning.<sup>183</sup> The Seventh Circuit has properly continued this trend by applying the *Miller* rationale to the ADA.<sup>184</sup> The anti-discrimination statutes are similar in nature, dictating a consistent interpretation of the statutes as a body of law.<sup>185</sup> Equally important is the need for consistent interpretation among jurisdictions.<sup>186</sup> Such an approach will enable employers to develop a uniform policy between their various offices and plants, especially when they are located throughout many regions of the nation and subject to the jurisdiction of numerous courts.<sup>187</sup>

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181. *AIC Security*, 55 F.3d at 1280 (“[F]our [circuit courts] have rejected individual liability . . . . One Circuit has recognized individual liability.”) (citations omitted).

182. *Id.* For an analysis of these circuit court decisions, see *supra* notes 23-50 and accompanying text. The most recent circuit court decision finding individual liability is the Sixth Circuit's *Jones* case in 1986. *AIC Security*, at 1280 (citing *Jones v. Continental Corp.*, 789 F.2d 1225, 1231 (6th Cir. 1986)). For a discussion of the holding of *Jones*, see *supra* notes 42-50 and accompanying text.

183. *AIC Security*, 55 F.3d at 1280-82; *Smith v. Lomax*, 45 F.3d 402, 403-04 n.4 (11th Cir. 1995); *Birkbeck v. Marvel Lighting Co.*, 30 F.3d 507, 510 (4th Cir. 1994); *Grant v. Lone Star Co.*, 21 F.3d 649, 652 (5th Cir. 1994); *Miller v. Maxwell's Int'l, Inc.*, 991 F.2d 583 (9th Cir. 1993). The *AIC Security*, *Lomax*, *Birkbeck* and *Grant* courts all rely on *Miller* as persuasive authority and quote from *Miller* extensively. See, e.g., *AIC Security*, 55 F.3d at 1280-82 (citing or quoting *Miller* eight times). For an analysis of the *Miller* court's holding, see *supra* notes 26-33 and accompanying text.

184. *AIC Security*, 55 F.3d at 1281. The court stated “we find the more recent and more detailed [circuit court] decisions persuasive.” *Id.*

185. See *id.* at 1280 (“Courts routinely apply arguments regarding individual liability to all three [discrimination] statutes interchangeably.”). The fact that the statutes all have essentially the same definition of “employer” lends credibility to the theory that the definitions should be interpreted uniformly. For a comparison of the three statutes' definitions of “employer,” see *supra* note 2 and accompanying text. Also, the EEOC is in charge of enforcing the provisions of all three statutes. See DAVID P. TWOMEY, LABOR AND EMPLOYMENT LAW, TEXT AND CASES 431 (9th ed. 1994) (discussing function and framework of EEOC). The EEOC is the regulatory body that enforces Title VII, The Equal Pay Act of 1963, the ADEA, Section 503 of the Rehabilitation Act and Title I of the ADA. *Id.* Therefore, it would be appropriate for courts to require the EEOC to apply a consistent “employer” definition between the statutes the EEOC enforces.

186. See Brief Amicus Curiae of the Equal Employment Advisory Counsel in Support of Defendants-Appellants at 16, *EEOC v. AIC Sec. Investigations, Ltd.*, 55 F.3d 1276 (7th Cir. 1995) (No. 93-3839) (proposing that uniformity in employment law is preferable to uneven decision-making prompted by fear of litigation).

187. *Id.* (asserting that discouraging discrimination “requires consistency and uniformity in the implementation of employment policies”). The EEAC stated that without uniformity, managers would, out of fear of litigation, fall back on judging employees by their disability, which the ADA was intended to discourage. *Id.* at 17.

IV. CALMING THE STORM OF EMPLOYMENT LITIGATION:  
THE IMPACT OF *AIC SECURITY*

*AIC Security* will have several beneficial effects in the Seventh Circuit and elsewhere.<sup>188</sup> First, *AIC Security* resolves the issue of individual liability under the ADA, as well as Title VII and the ADEA, in the Seventh Circuit.<sup>189</sup> The court appropriately made a broad ruling that lends clarity

188. See *Hardwick v. Curtis Trailers Inc.*, 896 F. Supp. 1037, 1039 (D. Or. 1995) (relying on *AIC Security* as persuasive authority for rejecting individual liability under ADA); *Lynam v. Foot First Podiatry Ctrs., P.C.*, 886 F. Supp. 1443, 1446 (N.D. Ill. 1995) (ruling that it is bound by precedent of *AIC Security* to dismiss Title VII charges against individual defendant).

189. *Lynam*, 886 F. Supp. at 1446. The United States District Court for the Northern District of Illinois strongly objected to the *AIC Security* ruling, but begrudgingly followed it. *Id.* ("Although this court continues to be of the opinion that Congress' intent to eradicate discrimination in the workplace is best served by recognizing individual liability under the anti-discrimination statutes, . . . we are mindful of our subordinate position as a district court . . ."). Despite its ruling, the court proceeded to outline the arguments in favor of finding individual liability. *Id.* at 1446-48.

In subsequent decisions, this district court adhered to the *AIC Security* ruling with less discussion. See *Weiler v. Household Fin. Corp.*, No. 93C6454, 1995 WL 452977, at \*8 (N.D. Ill. July 27, 1995) (dismissing ADA claim against individual supervisor); *Cameli v. O'Neal*, No. 95C1369, 1995 WL 398893, at \*1 (N.D. Ill. July 2, 1995) (rejecting individual liability under Title VII and ADEA); *Lynn v. Acme Metals, Inc.*, No. 94C5633, 1995 WL 370230, at \*5 (N.D. Ill. June 20, 1995) (rejecting individual liability under Title VII). *But see Curcio v. Chin Enters., Inc.*, 887 F. Supp. 190, 193-94 (N.D. Ill. 1995) (stating cause of action against restaurant employer on basis of "alter ego" theory). In *Curcio*, the district court refused to follow dicta in the *AIC Security* opinion that stated the Seventh Circuit would likely reject an "alter ego" argument by a plaintiff to include an individual defendant as the "alter ego" of the corporation. *Id.* (citing *AIC Security*, 55 F.3d at 1282 n.11). The district court stated that "[u]ntil such time as this issue has been fully developed and addressed by the Seventh Circuit," the district court would still hold individuals liable under the anti-discrimination statutes as long as they were the "alter ego" of the corporation that employed the plaintiff. *Id.* at 194 (citing *Fabiszak v. Will County Bd. of Comm'rs*, No. 94C1517, 1995 WL 698509, at \*3 (N.D. Ill. Dec. 12, 1995) (holding that individual who acts as more than supervisor and identical to employer may be held individually liable under Title VII)). In *Curcio*, the individual defendant was not only a supervisor, but also the "controlling shareholder and the main decision maker, and in effect left no avenue for the employees to object to his misconduct." *Id.* The district court then refused to dismiss the Title VII charges against the individual because he was "actually identical" to the employer. *Id.*

In *AIC Security*, however, the Seventh Circuit denied individual liability against an individual defendant who had recently taken over as "sole shareholder of AIC and [its corporate parent] . . . and began operating AIC on a day-to-day basis." *AIC Security*, 55 F.3d at 1279. In the footnote referenced as "dicta" by the district court, the Seventh Circuit stated:

In any case, we see no good reason why it should make any difference for our analysis whether Vrdolyak was AIC's alter ego. She might be effectively liable if the corporate veil were pierced, and as sole shareholder she will necessarily absorb the pinch from AIC's liability, but as to her individual capacity liability it does not matter even if she was AIC's alter ego.

*Id.* at 1282 n.11. For a further discussion of case law on liability of owners and shareholders under the alter ego theory, see Brief for the Appellee (Equal Employ-

and consistency to a previously muddled area of employment law.<sup>190</sup> Managers will be permitted to act without apprehension, which will lead to rational decision-making, decreased fear of liability and greater efficiency.<sup>191</sup> With disincentives already in place, there is little evidence that, without individual liability, managers will begin to discriminate with impunity.<sup>192</sup>

The holding in *AIC Security* will help guide other jurisdictions that have not faced the issue of individual liability under the ADA to a moderate balance between protection for the disabled and freedom of discretion for managers.<sup>193</sup> While there have been previous circuit rulings under Title VII and the ADEA, the *AIC Security* decision now provides persuasive circuit-level authority for other jurisdictions to continue this trend of mod-

ment Opportunity Commission) at 43-44, *EEOC v. AIC Sec. Investigations, Ltd.*, 55 F.3d 1276 (7th Cir. 1995) (No. 93-3839). See generally Milton Bordwin, *Piercing the Corporate Veil (Liability for Corporate and Contract Claims)*, 84 MGMT. REV. 8 (1995) (discussing how board members and owners may be held liable regardless of incorporated status of company).

190. For a discussion of the split between the district courts, see *supra* notes 51-76 and accompanying text.

191. See Francis A. Morris, *Legal Beat: Boss May Be Personally Liable if Firing Violates Disability Law*, WALL ST. J., May 2, 1995, at B1 (reporting on district court ruling in *AIC Security*). This newspaper article notes that holding managers personally liable will discourage risk-taking on the part of managers. *Id.* The article also predicts that "[s]upervisors will be reluctant to exercise their judgment in hiring, firing and promoting employees." *Id.* (quoting Douglas McDowell, General Counsel of the EEAC); see also Brief Amicus Curiae at 9, *AIC Security* (No. 93-3839) (stating that EEO law would be "frustrated, not furthered" by individual liability). The EEAC also noted that it would make "uniformity and consistency" difficult, as well as put "great pressure" on managers, in personnel decisions. *Id.*

192. See HENRY H. PERRITT, JR., *WORKPLACE TORTS: RIGHTS AND LIABILITIES* 12 (1991) (outlining common law actions applicable to employment practices). Examples of common law torts that a supervisor might be liable under include intentional interference with contractual relations, fraudulent misrepresentation, defamation and intentional infliction of emotional distress. *Id.* Even if managers were individually liable for their actions under the ADA, it may be possible that they could in turn sue their employer for indemnification for failing to properly train them to comply with the regulations. See DANIEL R. LEVINSON, *PERSONAL LIABILITY OF MANAGERS AND SUPERVISORS FOR CORPORATE EEO POLICIES AND DECISIONS* 25-29 (1978) (confirming, in EEAC publication, that employer has no legal duty to train employees and management on EEO law, but employer's best interests are served by doing so). The EEAC supported, as a matter of policy, the indemnification of EEO managers who "perform their responsibilities in good faith" but nonetheless face litigation from aggrieved employees. *Id.* at 25. The EEAC argued that this would encourage managers to "carry out duties and obligations with confidence." *Id.*

193. See, e.g., *Hardwick*, 896 F. Supp. at 1039 ("Based on the Ninth Circuit's reasoning in its analogous decision in *Miller*, and the Sixth Circuit's [sic] reasoning in [*EEOC v. AIC Security*], I am persuaded that the better rule is that individuals who do not otherwise meet the statutory definition of 'employer' cannot be liable under the ADA.").

eration to the ADA, lessening the substantial burden of employment regulations that managers face on a daily basis.<sup>194</sup>

Finally, the court has sent a strong message to the EEOC.<sup>195</sup> In *AIC Security*, the EEOC pushed for expansion of the ADA's coverage against the weight of the case authority.<sup>196</sup> In soundly rejecting the notion of individual liability under the employment anti-discrimination statutes, the Seventh Circuit has discouraged the agency from pursuing its own interpretation of the "employer" definition.<sup>197</sup> *AIC Security* will thus discourage costly, inefficient and unnecessary litigation.<sup>198</sup>

*William L. Morrissey, Jr.*

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194. *Id.* Courts have also recently relied on the holding of *AIC Security* to deny plaintiffs relief against individuals under statutes other than the ADA. See *Ball v. Cook County Sch. Dist.*, 889 F. Supp. 492, 493 (M.D. Ga. 1995) (rejecting individual liability under Title VII "[i]n light of the overwhelming authority on point") (citing *AIC Security*, 55 F.3d at 1281; *Smith v. Lomax*, 45 F.3d 402, 403 n.4 (11th Cir. 1995); *Busby v. City of Orlando*, 931 F.2d 764, 772 (11th Cir. 1991)); see also *Leykis v. NYP Holding, Inc.*, 899 F. Supp. 986, 990, 992 (E.D.N.Y. 1995) (citing *AIC Security* in dismissing ADEA claims against individual); *Bakal v. Ambassador Constr.*, No. CIV.A.94-0584, 1995 WL 447784, at \*4 (S.D.N.Y. July 28, 1995) (citing *AIC Security* in dismissing Title VII claims against individual). *AIC Security* may also be interpreted as rejecting a broad statutory interpretation of other definitions than employer. See *Neff v. American Dairy Queen Corp.*, 58 F.3d 1063, 1069 (5th Cir. 1995) ("Neff's argument in this case would require us to bend 'operates' too far beyond its natural meaning for us to rely on the canon of statutory interpretation requiring that we interpret civil rights legislation liberally." (citing *AIC Security*, 55 F.3d at 1281-82)), *cert. denied*, 116 S. Ct. 704 (1996).

195. See *AIC Security*, 55 F.3d at 1281 (holding individual liability is not permitted under ADA). After rejecting the EEOC's statutory interpretation, the court stated: "Lacking the support of the structure arguments, the EEOC and Wessel bring forth a short parade of horrors." *Id.* at 1282. The court then flatly rejected those EEOC policy arguments as "Chicken Little-esque." *Id.*

196. See *id.* at 1281. ("The EEOC and Wessel, fighting primarily against the weight of authority, rely primarily on their own 'plain language' interpretation of the ADA's definition of employer.")

197. *Id.* The definition of "employer" under the EEOC's own regulations does not specify whether individuals are liable under the anti-discrimination statutes. See 29 C.F.R. § 1630 (1991) (defining "employer" under EEOC and exceptions thereto). The EEOC's own manual is also lacking in the area of individual liability. EEOC TECHNICAL ASSISTANCE MANUAL, *supra* note 8, at I-2 (defining "employer" without mentioning liability of individual managers). Doubts remain as to the EEOC's desire to continue its attempts to expand the definition of "employer" to include individual managers. See *Supervisor Isn't Liable*, WALL ST. J., May 24, 1995, at B4 ("A spokesman for the EEOC said the agency was still reviewing the decision and it was too soon to determine if it would appeal.")

198. See *Shager v. Upjohn Co.*, 913 F.2d 398, 406 (7th Cir. 1990). In *Shager*, the Seventh Circuit noted that free market forces are strong enough to discourage discrimination, without the unnecessary costs of litigation. *Id.* The court said that if the defendant company discriminated against a good employee in its discharge process, the company "will pay a price in the competitive marketplace, and that the threat of such market sanctions deters age discrimination at lower cost than the law can do with its cumbersome and expensive machinery, its gross delays, its frequent errors, and its potential for rigidifying the labor market." *Id.* at 406-07. The court, regardless of its dim view of the legal system as a place for rectifying discrim-



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ination, upheld the plaintiff's ADEA rights against the employer, noting that "this sanguine view of the power of the marketplace was not shared by the framers and supporters of the [ADEA]." *Id.* at 407. Note that some critics say the ADA itself is ineffective. See Barbara S. Dimmitt, *ADA: Revealing the Legal Impact, Shaping Employer Tactics*, 13 BUSINESS & HEALTH 27 (1995) (citing increase in unemployment rate of disabled persons from 66% to 68% during 1994).