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Individual Liability under Title VII: What Did Congress Mean by "Employer"?

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Essay

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Your assistant accuses you of sexual harassment. She[1] files a charge with the Equal Employment Opportunity Commission (E.E.O.C.), naming both you, personally, and the corporation for which you work as responsible for an alleged violation of federal law. You are neither an officer nor a director of the corporation.[2] Should you start moving your assets into relatives' names? The short answer is that it depends upon where in the country your accuser sues you.

If your accuser brings the lawsuit in the Fourth or Sixth Circuits,[3] you may be personally liable for any judgment that the court enters in favor of your accuser. However, if the lawsuit is brought in the Second,[4] Fifth,[5] Seventh,[6] Ninth,[7] or Eleventh[8] Circuits,[9] the court will

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1. Characterization of the hypothetical accuser as female (and harassers as generally male) throughout this article is done to reflect the gender combination in the majority of cases brought, not in disregard of the occurrence of harassment of men by women.
2. An individual person may be liable in an official capacity. The issue addressed by this article is whether a typical manager, who has no corporate (or partnership) equity or voting power, can be held personally liable for his harassment of an employee.
3. Maryland, North Carolina, South Carolina, Virginia, West Virginia; Kentucky, Michigan, Ohio, Tennessee.
4. Tomka v. Seiler Corp., 66 F.3d 1295, 1313-17 (2d Cir. 1995).
5. Grant v. Lone Star Co., 21 F.3d 649, 653 (5th Cir. 1994), *cert. denied*, 115 S. Ct. 574 (1994). *But see* Garcia v. Elf Atochem North America, 28 F.3d 446, 451 (5th Cir. 1991)(Supervisors who exercise an employer's traditional rights may be liable under Title VII.).
6. Williams v. Banning, 72 F.3d 552, 555 (7th Cir. 1995).
7. Greenlaw v. Garrett, 59 F.3d 994, 1001 (9th Cir. 1995).
8. Cross v. Alabama, 49 F.3d 1490, 1504 (11th Cir. 1995).
9. The Eighth Circuit has not formally addressed the question of individual liability under Title VII, but has rejected individual liability in a case interpreting a statute which is similarly worded. Lenhardt v. Basic Inst. of Tech., 55 F.3d 377, 380-

order only your employer to pay. In at least one circuit, whether you will be personally liable may depend on the district court in which your accuser files the lawsuit.[10] Even though you may not be financially liable to the plaintiff under federal workplace law,[11] you may still lose your job or receive other sanctions from your employer.[12]

This inconsistency among the federal courts on the issue of individual liability results from a lack of consensus on the correct interpretation of Title VII,[13] which outlaws various varieties of workplace discrimination, including sexual harassment.[14] To date, the United States Supreme Court has declined to resolve the split in the circuits.[15] The lack of a Supreme Court resolution has inspired many commentators to critique the reasoning of the various courts that have grappled with the statutory language[16] and to engage in an analysis of the legislative history of Title VII in an attempt to identify the drafters' intent.[17] In general, these commentators agree with the courts that hold that imposing individual liability is consistent with the goals of Title VII, is desirable to further those goals, and, indeed, was intended by Congress.[18] However, this commentator respectfully disagrees and expects that the Supreme Court, when it chooses to resolve the inconsistency, will concur with the courts which hold that Title VII should not be construed to impose individual liability on sexual harassers.[19]

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81 (8th Cir. 1995)(interpreting Missouri Human Rights Act by analogy with Title VII).

10. The Tenth Circuit has sent mixed messages. *Compare* Sauers v. Salt Lake City, 1 F.3d 1122, 1124-25 (10th Cir. 1993)(rejecting individual liability) *with* Ball v. Renner, 54 F.3d 664, 668 (10th Cir. 1995)(individual liability under Title VII approved in theory, but considered an "open question").
11. Employees may, nonetheless, be liable for such violations of state tort law as intentional infliction of emotional distress. *See, e.g.*, Williams v. Banning, 72 F.3d 552, 555 (7th Cir. 1995); Grant v. Lone Star Co., 21 F.3d 649, 651 n.3 (5th Cir. 1994), *cert. denied*, 115 S. Ct. 574 (1994)(mem.); Paroline v. Unisys Corp., 879 F.2d 100, 113 (4th Cir. 1989).
12. *See, e.g.*, Williams v. Banning, 72 F.3d 552, 555 (7th Cir. 1995); Miller v. Maxwell's Int'l Inc., 991 F.2d 583, 588 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 1049 (1994)(mem.).
13. Civil Rights Act of 1964, 42 U.S.C. §§ 2000e-2000e-17 (1989 & Supp. III 1994).
14. 29 C.F.R. § 1604.11(a)(1995).
15. Grant v. Lone Star Co., 115 S. Ct. 574, 574 (1994)(mem.); Miller v. LaRosa, 114 S. Ct. 1049, 1049 (1994)(mem.).
16. *See* Christopher Greer, *Who me?: A Supervisor's Individual Liability for Discrimination in the Workplace*, 62 FORDHAM L. REV. 1835, 1839-45 (1994); Phillip L. Lamberson, *Personal Liability for Violations of Title VII: Thirty Years of Indecision*, 46 BAYLOR L. REV. 419, 422-25 (1994).
17. *See* Greer, *supra* note 16, at 1836-38; Lamberson, *supra* note 16, at 426-28.
18. *See generally* Greer, *supra* note 16; Lamberson, *supra* note 16.
19. *See* Grant v. Lone Star Co., 21 F.3d 649, 651-53 (5th Cir. 1994), *cert. denied*, 115 S. Ct. 574 (1994)(mem.); Miller v. Maxwell's Int'l Inc., 991 F.2d 583, 587-88 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 1049 (1994)(mem.).

The disagreement among the courts centers on an allegedly ambiguous definition of "employer" as used in two critical sections of Title VII.[20] The confusion stems from the following simple phrase: Title VII imposes liability for illegal discrimination upon "employers" and defines "employer" to be a "person [which is elsewhere defined as "one or more individuals, governments, . . . partnerships, . . . corporations . . ."][21] engaged in an industry affecting commerce . . . *and any agent of such a person. . . .*"[22] The controversy over the interpretation is rooted in the inclusion of the language "and any agent" in the definition of "employer." Some hold that this language exists merely to incorporate into Title VII the common law concept of respondeat superior. Others insist that the phrase adds another class of defendants that is subject to liability under Title VII.

Support for the respondeat superior construction comes from the notion that Title VII is entirely a creation of statute. Since Title VII is not a mere codification of common law, explicit incorporation of the common law concept of respondeat superior was necessary to make it clear that a violation occurs when either an institutional employer or an agent of such an employer discriminates.[23] This reasoning is sound. Indeed, in the absence of a common law precedent, statutory silence on discrimination by an agent would have resulted in a shield for institutional employers from liability for unsupervised actions of individual managers. That "agent" was included in the definition of "employer" to ensure against such a shield is a logical construction of the plain meaning of the term of art "agent" and wholly consistent with Title VII's goals.[24]

Nonetheless, a complication for this position does arise because the term "employer" is also used in the remedy section of Title VII, where appropriate remedies are listed as "reinstatement or hiring of employees, with or without back pay (payable by the *employer*, employment agency, or labor organization, as the case may be, *responsible for the unlawful employment practice*)."[25] Proponents of the personal liability construction read this section to impose liability on both institutional employers and "agents" who qualify as employers by earlier definition.[26] Simply stated, substitution of the term "agent" for "em-

20. 42 U.S.C. §§ 2000e(b), 2000e-5(g) (1989 & Supp. III 1994).
21. *Id.* at § 2000e(a).
22. *Id.* at § 2000e(b) (emphasis added).
23. Miller v. Maxwell's Int'l Inc., 991 F.2d 583, 587 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 1049 (1994)(mem.). *Accord* Williams v. Banning, 72 F.3d 552, 652 (7th Cir. 1995); Tomka v. Seiler Corp., 66 F.3d 1295, 1316 (2d Cir. 1995).
24. The primary goal of Title VII was to instill in corporate America a policy of nondiscrimination in the workplace. 110 CONG. REC. 13,169 (1964). *See* Williams v. Banning, 72 F.3d 552, 555 (7th Cir. 1995).
25. 42 U.S.C. § 2000e-5(g) (1989 & Supp. III 1994)(emphasis added).
26. *See* Lamberson, *supra* note 16, at 428 n.51.

ployer"—as allowed by the liability section of Title VII to determine if a compensable violation has occurred—results in a remedy "payable by the [agent] . . . [who is] responsible for the [harassment]."

The confusing use of the defined term "employer" in the remedy section has caused two federal appeals courts to indicate a willingness to impose Title VII liability on individuals, although neither court actually imposed such liability.[27] The Sixth Circuit asserted in 1986 that "individuals may be held liable . . . as 'agents' of an employer under Title VII."[28] The court made this pronouncement, however, in a context where no individual supervisor—or any "employer" for that matter—was actually held liable or ordered to pay anything.[29] In *Jones v. Continental Corp.*, the Sixth Circuit addressed an appeal by a losing plaintiff who had been assessed costs and ordered to pay the attorney's fees incurred by a wrongly accused employer.[30] The court reversed the award of attorney's fees because it concluded that the plaintiff's complaint, albeit unfounded, was sufficiently clear as to the statutory basis for the allegations against the individual (as opposed to the institutional) defendants since, in its view, the law is clear that individuals may be held liable under both 42 U.S.C. § 1981 *and* Title VII.[31]

The plaintiff in *Jones* had brought both Title VII and 42 U.S.C. § 1981 employment discrimination claims against her supervisors and her corporate employer. One ground for awarding attorney's fees to the vindicated employer was that the plaintiff's complaint failed to specify under which statute the individual defendants were being sued, thereby causing unreasonable and vexatious multiplication of the lawsuit by burdening the employer's counsel with unnecessary research. Since the court construed Title VII to permit liability for agents, it held that no such undue burden was placed on the employer's counsel because it was "obvious that Jones' counsel were intentionally and properly seeking recovery against the individuals under both statutes."[32]

Similarly, in 1989, the Fourth Circuit in *Paroline v. Unisys Corp.* boldly stated that "[a]n individual qualifies as an 'employer' under Title VII if he or she serves in a supervisory position and exercises significant control over the plaintiff's hiring, firing or conditions of employment."[33] However, the court used this rule only as a justification for reversing the lower court's grant of summary judgment

27. Paroline v. Unisys Corp., 879 F.2d 100 (4th Cir. 1989); Jones v. Continental Corp., 789 F.2d 1225 (6th Cir. 1986).
28. Jones v. Continental Corp., 789 F.2d 1225, 1231 (6th Cir. 1986).
29. *Id.* at 1233.
30. *Id.* at 1231.
31. *Id.*
32. *Id.*
33. Paroline v. Unisys Corp., 879 F.2d 100, 104 (4th Cir. 1989).

against a sexual harassment plaintiff.[34] The plaintiff had raised a genuine issue of material fact as to whether the individual sued, although not plaintiff's designated immediate supervisor, had exercised sufficient supervisory authority over her to qualify as an employer under Title VII.[35] The reversal of summary judgment did not result in the actual imposition of any individual liability.[36]

The holdings of *Jones* and *Paroline* leave open the issue of whether a Title VII back pay award against an individual supervisor would survive Supreme Court scrutiny. Furthermore, it is unclear whether even these courts would sanction such a result. The courts' language quoted and discussed above *may* indicate the potential for imposition of personal liability. Conversely, the courts' language may only extend to the alleged harasser's status as an agent of the corporate employer, such that respondeat superior would apply if he were found to have harassed the plaintiff. In other words, to paraphrase the *Paroline* court, "an individual qualifies as [one who creates a compensable violation when] he . . . serves [as a] supervisor"—who actually does the compensating remains a separate and unresolved issue.[37] This explanation is bolstered by the fact that other courts have understood an "agent" to be liable only in an "official" capacity.[38]

In light of these incomplete holdings, commentators who characterize individual liability as the majority rule[39] give a false impression of the legal landscape. Although a handful of district courts have held individuals liable under Title VII,[40] there is no consensus even within those districts.[41] In addition, and more importantly, an imposition of personal liability has not yet been upheld by a federal appeals court.

In contrast, when federal appeals courts have been called upon to assess directly the propriety of imposing Title VII judgments against individuals, five courts unequivocally have rejected a construction of Title VII which would allow for such an outcome: in 1995, *Williams v. Banning* in the Seventh Circuit,[42] *Tomka v. Seiler Corp.* in the Second Circuit,[43] and *Cross v. Alabama* in the Eleventh Circuit;[44] in 1994,

34. *Id.*
35. *Id.*
36. *Id.* at 113.
37. *See id.* at 104.
38. *See, e.g.*, Harvey v. Blake, 913 F.2d 226, 227 & 228 n.2 (5th Cir. 1990); Weiss v. Coca-Cola Bottling Co., 772 F.2d 407, 410-11 (N.D. Ill. 1991)(a person liable in her official capacity is liable only as a surrogate for the employer).
39. *See* Greer, *supra* note 16, at 1840, 1845; Lamberson, *supra* note 16, at 422.
40. *See, e.g.*, Lamirande v. Resolution Trust Corp., 834 F. Supp. 526, 529 (D.N.H. 1993); Hendrix v. Fleming Cos., 650 F. Supp. 301, 302-03 (W.D. Okla. 1986); Duva v. Bridgeport Textron, 632 F. Supp. 880, 882 (E.D. Pa. 1985).
41. *See, e.g., supra* note 10.
42. Williams v. Banning, 72 F.3d 552, 555 (7th Cir. 1995).
43. Tomka v. Seiler Corp., 66 F.3d 1295, 1313 (2d Cir. 1995).
44. Cross v. Alabama, 49 F.3d 1490, 1504 (11th Cir. 1995).

Grant v. Lone Star Co. in the Fifth Circuit;[45] and in 1993, *Miller v. Maxwell's Int'l Inc.* in the Ninth Circuit.[46] In the latter two cases, the Supreme Court refused the plaintiffs' request for review.[47] In *Grant*, the Fifth Circuit reversed a district court order directing an individual to pay the plaintiff back pay for his own harassment of her.[48] The *Grant* court relied, in significant part, on the *Miller* court's reasoning.[49] In *Miller*, the Ninth Circuit upheld a district court's refusal to allow the plaintiff to pursue a Title VII claim against the individual sexual harassers.[50]

The *Miller* case involved a plaintiff who pursued both sex and age discrimination claims against six defendants in their individual capacities. The plaintiff accused various restaurant managers of the hostile environment variety of sexual harassment.[51] The district court dismissed plaintiff's complaint, *inter alia*, for failure to state a claim. The appellate court upheld the district court's ruling, agreeing that individual harassers have no personal liability under Title VII.[52]

In analyzing the issue of personal liability, the *Miller* court first reviewed its own precedent, *Padway v. Palches*,[53] in which it held that individual defendants cannot be held liable for back pay under Title VII. In *Padway*, an elementary school principal alleged sex discrimination in her reassignment and termination.[54] She brought suit

45. Grant v. Lone Star Co., 21 F.3d 649 (5th Cir. 1994), *cert. denied*, 115 S. Ct. 574 (1994)(mem.).
46. Miller v. Maxwell's Int'l Inc., 991 F.2d 583 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 1049 (1994)(mem.).
47. Grant v. Lone Star Co., 21 F.3d 649 (5th Cir. 1994), *cert. denied*, 115 S. Ct. 574 (1994)(mem.); Miller v. Maxwell's Int'l Inc., 991 F.2d 583 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 1049 (1994)(mem).
48. Grant v. Lone Star Co., 21 F.3d 649, 653 (5th Cir. 1994), *cert. denied*, 115 S. Ct. 574 (1994)(mem.).
49. *Id.* at 652-53.
50. Miller v. Maxwell's Int'l Inc., 991 F.2d 583, 587-88 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 1049 (1994)(mem.).
51. 29 C.F.R. § 1604.11(a)(3)(1995).
52. Miller v. Maxwell's Int'l Inc., 991 F.2d 583, 587 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 1049 (1994)(mem.).
53. 665 F.2d 965 (9th Cir. 1982).
54. *Id.* at 966. The plaintiff worked for a public school system, making her supervisors *public* employees. In deciding *Padway*, the Ninth Circuit relied on a similar case out of the Fifth Circuit, *Clanton v. Orleans Parish School Board*, 649 F.2d 1084 (5th Cir. 1981). In *Clanton*, seven black female school teachers alleged race and gender discrimination in the school board's maternity policy. *Id.* at 1086. The district court held that the board and the individual defendants were both liable for back pay. *Id.* However, the court of appeals held that only the board was liable for back pay because it "f[ou]nd no authority for holding public officials personally liable for back[ ]pay under Title VII." *Id.* at 1099. The Ninth Circuit's decision in *Miller* dealt with private rather than public employees, but the court did not distinguish its decision from *Padway* on this ground. Thus, the *Miller* Court implicitly extended the *Padway* decision to private employees when it

against a variety of defendants, including the five members of the Board of Trustees, in both their individual and official capacities.[55] The court eliminated any claim against the Board members in their individual capacities by summarily concluding that under Title VII "individual defendants cannot be held liable for back pay."[56] The *Miller* court relied on its earlier decision in *Padway* but explained its reasoning in more detail.

The *Miller* court agreed with the district court's finding that Congress intended to impose Title VII liability only against an employer.[57] Acknowledging that "some courts have reasoned that supervisory personnel and other agents of the employer are themselves employers for purposes of liability,"[58] the court nonetheless concluded that *Padway* "announced the better rule." The *Padway* court's holding was consistent with the district court's reasoning that the purpose of Title VII's agent provision was not to extend liability to individual agents, but rather to incorporate respondeat superior liability into the statute.[59] The *Miller* court noted that "[t]his conclusion is buttressed by the fact that many of the courts that purportedly have found individual liability under the statute actually have held individuals liable only in their *official* capacities and not in their individual capacities."[60]

The Fifth Circuit in its 1994 *Grant* decision explicitly agreed with the *Miller* court's reasoning and conclusion when it struck down a back pay award against an individual.[61] In *Grant*, a female employee alleged that she was sexually harassed in that she was subjected to a hostile work environment created by the conduct of male employees and supervisors. She sued her employer and her supervisors. At trial, all defendants except one supervisor, Mitchell Murray, were found not liable.[62]

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stated, "this court's ruling in *Padway* that individual defendants cannot be held liable for damages under Title VII is good law." Miller v. Maxwell's Int'l Inc., 991 F.2d 583, 587 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 1049 (1994)(mem.).

55. Padway v. Palches, 665 F.2d 965, 966 (9th Cir. 1982).

56. *Id.* at 968 (relying on Clanton v. Orleans Parish Sch. Bd., 649 F.2d 1084, 1099 (5th Cir. 1981)).

57. Miller v. Maxwell's Int'l Inc., 991 F.2d 583, 587 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 1049 (1994)(mem.).

58. *Id.*

59. *Id. Accord* Williams v. Banning, 72 F.3d 552, 652 (7th Cir. 1995); Tomka v. Seiler Corp., 66 F.3d 1295, 1316 (2d Cir. 1995); Cross v. Alabama, 49 F.3d 1490, 1504 (11th Cir. 1995).

60. *Id. See also* Weiss v. Coca-Cola Bottling Co., 772 F. Supp. 407, 411 (N.D. Ill. 1991).

61. Grant v. Lone Star Co., 21 F.3d 649, 652-53 (5th Cir. 1994), *cert. denied*, 115 S. Ct. 574 (1994)(mem.).

62. *Id.* at 650-51.

Murray was held liable for sexual harassment "not as an employer, but personally because he participated directly and engaged in acts in addition to condoning and encouraging the acts of other workers that contributed to a hostile working environment."[63] The district court ordered Murray to pay the plaintiff back pay. Murray appealed, contending that back pay awards under Title VII cannot be assessed against individuals.[64] The *Grant* court agreed with Murray's contention. It adopted the *Miller* court's respondeat superior statutory construction[65] and extended its own *Clanton* precedent, which held individuals liable only in an official capacity,[66] to include private as well as public employees.[67]

Both the *Miller* and *Grant* courts justify the respondeat superior statutory construction with the fact that Congress limited Title VII liability to employers with fifteen or more employees.[68] Statutory construction of unclear language requires an assessment of congressional intent. By following this principle of statutory construction, both courts persuasively conclude that Congress could not have intended to impose personal liability because it would be inconceivable for Congress "to protect small entities"[69] and then to allow for the imposition of liability against individual employees, "the smallest of legal entities."[70]

The *Miller* and *Grant* courts correctly construe Title VII. A broader reading of the "employer" who must compensate a harassment victim goes too far. One must construe statutory language and its limitations objectively, without political bias. The language can

63. *Id.* at 651.
64. *Id.*
65. *Id.* at 652.
66. Clanton v. Orleans Parish Sch. Bd., 649 F.2d 1084, 1099 (5th Cir. 1981).
67. Grant v. Lone Star Co., 21 F.3d 649, 651-53 (5th Cir. 1994), *cert. denied*, 115 S. Ct. 574 (1994)(mem.). *Cf.* Harvey v. Blake, 913 F.2d 226, 228 (5th Cir. 1990) (holding that a city official's liability for back pay was in her official capacity only).
68. Miller v. Maxwell's Int'l Inc., 991 F.2d 583, 587 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 1049 (1994)(mem.); Grant v. Lone Star Co., 21 F.3d 649, 652 (5th Cir. 1994), *cert. denied*, 115 S. Ct. (1994)(mem.). *Accord* Williams v. Banning, 72 F.3d 552, 553-54 (7th Cir. 1995); Tomka v. Seiler Corp., 66 F.3d 1295, 1314 (2d Cir. 1995).
69. Miller v. Maxwell's Int'l Inc., 991 F.2d 583, 587 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 1049 (1994)(mem.).
70. Grant v. Lone Star Co., 21 F.3d 649, 652 (5th Cir. 1994), *cert. denied*, 115 S. Ct. 574 (1994)(mem.). One commentator disputes the notion that Congress' intent was to spare small employers the expense of Title VII judgments, but his alternative explanation of the fifteen-employee minimum supports an intention to preclude all small entities, including individuals, from liability. Lamberson, *supra* note 16, at 427 (finding a rationale for the fifteen-employee minimum in a senator's statement that larger businesses generally have a more substantial effect on commerce and lack the intimacy associated with small businesses).

only mean what Congress intended it to mean, not what one might like it to mean.

Those in favor of extending Title VII liability to individuals urge that punishing the actual perpetrators of discrimination is an effective tool in eradicating workplace discrimination.[71] They assume that since Congress intended Title VII to create a "national policy of nondiscrimination,"[72] it must have intended to impose individual liability on those who discriminate in the workplace.[73] This is an unsubstantiated, albeit tempting, leap of faith.

Congress did not intend Title VII as a legitimization of every measure that might help to eliminate workplace discrimination. This greatly overstates Title VII's basic goal. The basic goal was to create corporate accountability for the egregious workplace discrimination that existed in 1964.[74]

In fact, an examination of the congressional debate surrounding the adoption of Title VII indicates an intent for a commonsense definition of "employer" and a goal focused entirely on creating a remedy against businesses. These assertions are supported by the fact that no detailed debate occurred regarding the statutory language defining "employer." In addition, the primary concerns that *were* expressed in the congressional debate were broad and generally related to whether the legislation should be enacted *at all* due to the potential financial impact on *businesses*. To the extent that the range of coverage was discussed, it was to reassure worried senators that the statute's language did not extend *too far*.[75]

Title VII, as popularly understood, sought to hold corporate America responsible for both institutional and individual acts of workplace discrimination. This was all Title VII sought to accomplish, albeit it was a sweeping piece of legislation for its time. In fact, as both the *Grant* and *Miller* courts point out, if Congress wanted to impose personal liability on individual managers, it could easily have done so, especially since it amended Title VII in 1991 precisely for the purpose of clarifying its intentions and ensuring that these were met.[76] In-

71. *See* Greer, *supra* note 16, at 1836-38; Lamberson, *supra* note 16, at 426-28.

72. *See* 110 Cong. Rec. 13,169 (1964).

73. *See* Greer, *supra* note 16, at 1836-38; Lamberson, *supra* note 16, at 426-28.

74. Workplace discrimination based on race was so widespread and acceptable that discrimination based on gender was not meant to be included in the statute. Its eventual inclusion was the result of a last-minute effort to prevent the bill's passage.

75. *See* 110 Cong. Rec. 6831-34,6997 (1964). *See also* Tomka v. Seiler Corp., 66 F.3d 1295 (2d Cir. 1995).

76. Williams v. Banning, 72 F.3d 552, 553-54 (7th Cir. 1995); Grant v. Lone Star Co., 21 F.3d 649, 652-53 (5th Cir. 1994), *cert. denied*, 115 S. Ct. 574 (1994)(mem.); Miller v. Maxwell's Int'l Inc., 991 F.2d 583, 587-88 n.2 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 1049 (1994)(mem.). *See also* Greer, *supra* note 16, at 1837.

deed, "[t]he absence of specific language making a non-employer individual liable for these damages, when Congress has included such language in other contexts [for example, 42 U.S.C. §§ 1981, 1983, 1985, 1986], indicates that Congress did not intend to impose individual liability for back-pay damages under Title VII. . . ."[77]

Moreover, it is unclear whether the imposition of personal liability would significantly further Title VII's goals. First, the issue of individual liability tends to arise only in those few cases where the institutional employer is unable to pay the entire judgment.[78] Secondly, in terms of its deterrent value, the threat of losing one's job or severely damaging one's career is as effective as the threat of personal liability for most employees. Indeed, "[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."[79] Finally, a Title VII shield from personal liability is not a license to sexually harass with impunity because private employees are still subject to state common law tort and contract claims.[80]

Fear of inadvertent harassment has already had a chilling effect on many activities in the workplace. Personalizing Title VII liability would only make well-meaning individuals even more paranoid and resentful. In addition, sexual harassers[81] who persist in the face of today's widespread awareness of Title VII are unlikely to be deterred by additional legal threats. The better focus, as Congress anticipated, is to encourage institutional employers: to implement training programs in order to mount sufficient peer pressure to modify the workplace behavior of Title VII violators;[82] to respond to complaints promptly; and, where investigation corroborates a complaint, to take swift steps to remedy a sexual harassment situation.[83]

77. Grant v. Lone Star Co., 21 F.3d 649, 653 (5th Cir. 1994), *cert. denied*, 115 S. Ct. 574 (1994)(mem.).

78. However, an institutional employer is not strictly liable under Title VII for the discriminatory acts of its agents, Meritor Savings Bank v. Vinton, 477 U.S. 57, 72 (1986), and can avoid liability by swift and appropriate response to a complaint. 29 C.F.R. §§ 1604.11(c),(d) (1995). *See* Williams v. Banning, 72 F.3d 552, 555 (7th Cir. 1995) (an employer is responsible for the acts of its agents and supervisory employees even if those acts are forbidden by the employer, but only when the employer knew or should have known of their occurrence and failed to take appropriate remedial action).

79. Miller v. Maxwell's Int'l Inc., 991 F.2d 583, 588 (9th Cir. 1993), *cert. denied*, 114 S. Ct. 1049 (1994)(mem.).

80. Williams v. Banning, 72 F.3d 552, 555 (7th Cir. 1995); Grant v. Lone Star Co., 21 F.3d 649, 651 n.3 (5th Cir. 1994), *cert. denied*, 115 S. Ct. 574 (1994)(mem.); Paroline v. Unisys Corp., 879 F.2d 100, 113 (4th Cir. 1989).

81. Throughout this article, sexual harassment has been used as an exemplar of the various types of discrimination that are illegal under Title VII.

82. *Cf.* 29 C.F.R. § 1604.11(f) (1995)(encouraging preventative measures).

83. Williams v. Banning, 72 F.3d 552, 555 (7th Cir. 1995).