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Supervisors individually liable

Under the Iowa Civil Rights Act

*By Tory L. Lucas**

Tory L. Lucas

Until recently, the Iowa Supreme Court had never squarely decided whether a supervisory employee could be subjected to individual liability for employment discrimination under the Iowa Civil Rights Act of 1965. On 13 October 1999, the Court definitively ruled in Vivian v. Madison "that the Iowa Civil Rights Act does authorize the subjecting of a supervisory employee to individual liability."[1]

In Vivian, Wendy Vivian filed a multi-count complaint in federal court against her employer, United Parcel Service, and her supervisor, Gerry Madison, alleging racial and sexual harassment in violation of Title VII of the Civil Rights Act of 1964[2] (Title VII) and the Iowa Civil Rights Act of 1965[3] (ICRA).[4] Defendant Madison moved to dismiss the complaint against him on the ground that supervisory employees could not be held individually liable under the Iowa Civil Rights Act.[5] After noting that the federal courts in Iowa were split over the issue of supervisor liability under the ICRA and without unqualified precedent from the Iowa Supreme Court on which to base its decision, the United States District Court for the Southern District of Iowa, Judge Ronald E. Longstaff, certified the following question to the Iowa Supreme Court: "Is a supervisory employee subject to individual liability for unfair employment practices under Iowa Code section 216.6(1) of the Iowa Civil Rights Act?"[6]

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The Court gave a clear yes to the certified question. In determining that supervisory employees are subject to individual liability for unfair employment practices under the ICRA, the Iowa Supreme Court simply read and applied the statute's plain language. In reaching its holding, the Court distinguished the ICRA from Title VII, the legislation upon which the ICRA was modeled.[7]

The Plain Language

The Iowa Supreme Court and the federal courts in Iowa have consistently analyzed the ICRA against the backdrop of federal law.[8] When the debate turned to whether supervisors can be individually liable under the ICRA, however, federal law provided an unnecessary impediment as opposed to analytical guidance. As the Iowa Supreme Court stated in Vivian, Title VII "differs from the ICRA in several key respects."[9]

Iowa Code section 216.6(1)(a), entitled *Unfair Employment Practices*, makes it "an unfair or discriminatory practice for any ***person*** to refuse to hire, accept, register, classify, or refer for employment, to discharge any employee, or to otherwise discriminate in employment against any applicant for employment or any employee because of the age, race, creed, color, sex, national origin, religion, or disability of such applicant or employee."[10]

Person, as used in the ICRA, "means one or more individuals, partnerships, associations, corporations, legal representatives, trustees, receivers, and the state of Iowa and all political subdivisions and agencies thereof."[11]

The ICRA also states that "[i]t shall be an unfair or discriminatory practice for: (1) Any ***person*** to intentionally aid, abet, compel, or coerce another person to engage in any of the practices declared unfair or discriminatory by this chapter. (2) Any ***person*** to discriminate or retaliate against another person in any of the rights protected against discrimination by this chapter because such person has lawfully opposed any practice forbidden under this chapter, obeys the provisions of this chapter, or has filed a complaint, testified, or assisted in any proceeding under this chapter."[12]

Finally, the ICRA's relief mechanism, section 216.15, provides that "[a]ny person claiming to be aggrieved by a discriminatory or unfair practice may . . . file with the [civil rights] commission a . . . complaint which shall state the name and address of the ***person*** [or] employer . . . alleged to have committed the discriminatory or unfair practice of which complained."[13]

As seen by the ICRA's clear language, a discrimination claim can be brought under the ICRA against any person or employer who discriminates in an employment context. The ICRA simply does not require the person to be an employer. In fact, the ICRA expressly distinguishes between person and employer throughout the statute. The ICRA separately defines person and employer, revealing that person and employer are two distinct terms.[14] As discussed above, a number of sections apply to persons. Similarly, the ICRA also has sections that apply to employers.[15]

As the Iowa Supreme Court said, rules of statutory construction should "be

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applied only when the explicit terms of a statute are ambiguous."[16] In the ICRA's case, the Iowa Legislature chose to use both person and employer. Person and employer can, in no way, be read to mean exactly the same thing.[17] Therefore, the use of the term person in Iowa Code section 216.6(1)(a) does not, and cannot, mean employer as used in the statute. Although it sounds redundant and even patronizing, the term person means person as defined in the statute.

When the term person is used in the statute, as opposed to employer, the legislature's clear intent is that it meant to use person, as opposed to employer. As the Iowa Supreme Court has said, "The express mention of one thing in a statute implies the exclusion of others."[18] When the Iowa Legislature used the term *person* in sections 216.2(11), 216.6(1), 216.11 and 216.15, instead of the term employer, which was used elsewhere in the statute, we must interpret the statute based on that usage.[19]

The Iowa Supreme Court stated that "it is not the province of the court to speculate as to probable legislative intent without regard to the wording used in the statute, and any determination must be based upon what the legislature actually said, rather than what it might or should have said."[20] Although one could most certainly presume that the Iowa Legislature intended to hold only employers liable for employment discrimination – as Title VII does – the Iowa Legislature did not enact legislation that said so.

Finally, the ICRA itself mandates that it "shall be construed broadly to effectuate its purposes."[21] Similarly, the Iowa Supreme Court has said to "look to the object to be accomplished and the evils and mischiefs sought to be remedied in reaching a reasonable or liberal construction which will best effect its purpose rather than one which will defeat it."[22]

This statutory construction principle, along with the ICRA's own rule of construction and plain language, cries out for individual liability. If person were interpreted to mean employer and supervisors were not held individually liable under the ICRA, then the net result of such an interpretation would be an extremely narrow and restrictive construction of the ICRA. Clearly, this would violate cardinal rules of statutory construction and rupture the ICRA's own plain language and rule of construction.

If the ICRA's goal is to stamp out employment discrimination, how best could the Iowa Legislature accomplish this goal? As seen from the ICRA's plain language, providing a remedy against those individuals who actually discriminate would effectuate the ICRA's purposes far easier than attempting to use agency principles to hold the employer liable.[23]

The Stumbling Block

The biggest stumbling block to correctly deciding whether supervisors can be individually liable under the ICRA has been an over-reliance on Title VII. A simple reading of Title VII alongside the ICRA reveals that the two statutes simply do not say, and thus cannot mean, the same thing when addressing the issue of supervisor liability.

Title VII of the Civil Rights Act of 1964 makes it an "unlawful employment practice for an *employer* to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin."[24]

Title VII defines employer as "a person engaged in an industry affecting commerce who has fifteen or more employees . . . and any agent of such a person."[25]

Title VII defines person as including "one or more individuals, . . . partnerships, associations, corporations, legal representatives, . . . trusts, . . . trustees, . . . or receivers."[26]

Thus, only employers can be held liable for employment discrimination under Title VII's plain language. Unlike the ICRA, Title VII's plain language simply does not answer the question of whether a supervisory employee can be held individually liable for employment discrimination, though. The reason is Congress' use of the phrase "any agent of such a person" when defining employer. Thus, the debate has raged over whether Congress was simply codifying *respondeat superior* in Title VII or whether it intended to hold supervisory employees individually liable.

While the U.S. Supreme Court has not ruled on whether individuals can be held liable under Title VII, the vast majority of federal courts to hear the question have decided that supervisory employees are not liable under Title VII.

Given this backdrop of federal litigation under Title VII, Iowa federal district courts encountered litigation over whether supervisory employees can be held individually liable for employment discrimination under the ICRA.[29] As seen in *Bales v. Wal-Mart Stores, Inc.*, the United States District Court for the Southern District of Iowa, Judge Celeste F. Bremer, compared Title VII and its use of the term employer with the ICRA and its use of the term person.[30] Notwithstanding the glaring differences between the two statutes, the Court allowed itself to use Title VII as strong guidance for interpreting the ICRA.

Another Title VII section may also be contributing to the over-reliance on federal law when interpreting the ICRA. As quoted above, Title VII contains a small-business exclusion for employers with fewer than fifteen employees.[31] The ICRA also contains a small-business

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Supervisors individually liable

. . . Continued from page 23

exclusion, somewhat similar to that found in Title VII. Specifically, the unfair employment practices section (section 216.6) states that the section "shall not apply to any employer who regularly employs less than four individuals."[32] Even though the two statutes both have small-business exclusions, the application of the ICRA's small-business exclusion should in no way depend on the application of Title VII's small-business exclusion.

On the issue of the small-business exclusions, the ICRA differs substantially from Title VII. Title VII states that only employers can be held liable for employment discrimination. On the other hand, the ICRA makes a clear distinction between employers and persons and allows complaints to be made against both employers and persons. Title VII's small-business exclusion is contained in the definition of employer itself. The ICRA's small-business exclusion is not contained in any definitions. And, of course, the ICRA contains no "small-person" exclusion.

It is important to note that the ICRA's small-business exclusion is not found in the remedies section that authorizes claims by any aggrieved person against the person or employer guilty of the discrimination. The ICRA's small-business exclusion is found only in section 216.6, the unfair employment practices section, and states that it applies only to that section, not the entire chapter. Therefore, the small-business exclusion does not prohibit complaints under section 216.15 against persons, which includes supervisors. The term employer is used in section 216.6(1)(c), while the term person is used in section 216.6(1)(a). Because employer is only used in section 216.6(1)(c) and not in section 216.6(1)(a), the small-business exclusion simply cannot apply to section 216.6(1)(a) because the exclusion applies only to employers, not persons. In addition, the small-business exclusion cannot apply to the remedies section (216.15) because the exclusion explicitly states that it applies only to section 216.6.

Title VII substantially differs from the ICRA when individual liability is the issue. In addition, Title VII substantially differs from the ICRA in the application of the small-business exclusion. Using Title VII as guidance when analyzing either issue makes little sense.[33] Although the courts have not relied on the small-business exclusion as a reason to hold that individuals cannot be held liable under the ICRA for employment discrimination, the courts should make sure that they do not use Title VII as guidance when interpreting the ICRA's use of the small-business exclusion.

The bottom line is that Title VII's small-business exclusion should never be used to wrongly interpret the ICRA's small-business exclusion. Over-reliance on Title VII should not continue to be a stumbling block to correctly deciding cases under the ICRA.

The Confusion

In addition to the confusion caused by relying on Title VII at the expense of the ICRA's plain language, the earliest problem began in 1991 when the Court said regarding Iowa Code section 601A.6(1)(a)[34]: "Obviously, only the employer, and not third parties, can discharge an employee. Moreover, we hold that the language "otherwise discriminate in employment" pertains only to employers. Therefore, acts of third parties are not "unfair or discriminatory practices" for purposes of section 601A.16(1), and actions against such third parties are not preempted by chapter 601A."[35] Although the Court seemed to transform the ICRA's use of the term *person* into the use of the term *employer*, the Court apparently wanted to save an otherwise time-barred complaint from being preempted as an untimely civil rights claim.

In a 1997 case, the Court again discussed the use of the term *person* in the ICRA. This time the Court said that the use of the term *person* instead of employer "extends the prohibition of the [discriminatory] act to some situations in which a person guilty of discriminatory conduct is not the actual employer of the person discriminated against."[36] Once the Court noted the difference between *person* and *employer* and stopped relying on Title VII on this issue, the ICRA's plain language started to shine through brightly. Now that the Court has issued its Vivian opinion, supervisors can be held individually liable for their discriminatory acts under Iowa Code section 216.6(1)(a).

The Aftermath

Now that the question of whether only employers can be held liable under the ICRA has been answered, litigation may expand to include lawsuits against individual employees. In addition, I believe we also may see employment discrimination suits against employers with fewer than four employees because the ICRA's small-business exclusion does not apply to section 216.6(1)(a) or section 216.15, the remedies section. As the term *person* includes partnerships, associations and corporations, an unfair employment practice under section 216.6(1)(a) by one of these entities – even if they employ less than four employees – can result in an employment discrimination suit against them under section 216.15. The small-business exclusion, as written, simply does not apply to these situations.

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This article expresses the views of Tory L. Lucas and does not reflect or represent the views of the Department of Defense, the United States Air Force or The Iowa State Bar Association.

[1]Vivian v. Madison, 601 N.W.2d 872, 872 (Iowa 1999).

[2]42 U.S.C. ß 2000e et seq.

[3]Iowa Code chapter 216.

[4]Vivian, 601 N.W.2d at 872.

[5]Id.

[6]Id. at 872-73.

[7]Id. at 873. In all fairness, the Court did not simply read the ICRA and distinguish it from Title VII. The Court spent seven pages discussing two of its prior decisions, the ICRA's meager legislative history, a recent Iowa federal district court decision holding that no individual liability could attach under the ICRA, California cases involving their Fair Housing and Employment Act, and the New York Human Rights Law. Although it made for interesting read-

ing, the ICRA's plain language and traditional statutory construction principles would have allowed the Court to rule after two pages that supervisory employees can be held individually liable under Iowa Code section 216.6(1).

[8]See, e.g., Bales v. Wal-Mart Stores, Inc., 972 F. Supp. 483 (S.D. Iowa 1997), aff'd without addressing ICRA claim, 143 F.3d 1103 (8th Cir. 1998); Vivian, 601 N.W.2d at 873-74; King v. Iowa Civil Rights Comm'n, 334 N.W.2d 598, 601 (Iowa 1993).

[9]Vivian, 601 N.W.2d at 873.

[10]Iowa Code ß 216.6(1)(a) (emphasis added).

[11]Id. at § 216.2(11).

[12]Id. at § 216.11 (emphasis added).

[13]Id. at § 216.15 (emphasis added); see also id. at § 729.4(1) & (3) (criminal statute making it a simple misdemeanor for a "person or employer [to] discriminate in the employment of individuals because of race, religion, color, sex, national origin, or ancestry") (emphasis added).

[14]Id. at § 216.2(7) (defining employer as "the state of Iowa or any political subdivision, board, commission, department, institution, or school district thereof, and every other person employing employees within the state").

[15]See, e.g., Iowa Code ß 216.6(1)(c) ("It shall be an unfair or discriminatory practice for any employer . . . to directly or indirectly advertise or in any other manner indicate or publicize that individuals of any particular age, race, creed, color, sex, national origin, religion, or disability are unwelcome, objectionable, not acceptable, or not solicited for employment or membership unless based on the nature of the occupation.") (emphasis added).

[16]Marcus v. Young, 538 N.W.2d 285, 289 (Iowa 1995) (citations omitted); see also Franklin Mfg. Co. v. Iowa Civil Rights Comm'n, 270 N.W.2d 829, 832 (Iowa 1978) (citations omitted) ("Where language is clear and plain, there is no room for construction.").

[17]As seen already, the definition of person does not include employer. Iowa Code § 216.2(11). However, the term employer includes "every other person employing employees within the state." Id. at § 216.2(7) (emphasis added).

[18]State v. Hatter, 414 N.W.2d 333, 337 (Iowa 1987).

[19]The Iowa Supreme Court has also stated that when "considering legislative enactments we should avoid strained, impractical or absurd results." Franklin Mfg. Co., 270 N.W.2d at 831 (citations omitted). If person is read out of the statute in order for it to mean employer, we will have completely strained the plain language in order to reach an absurd result.

[20]Marcus, 538 N.W.2d at 289; see also Hatter, 414 N.W.2d at 337.

[21]Iowa Code § 216.18.

[22]Marcus, 538 N.W.2d at 289 (citations omitted); Franklin Mfg. Co., 270 N.W.2d at 831.

[23]Again, we can make assumptions and presumptions all day long about what the Iowa Legislature meant to do or what they should have done, but what they actually did in the ICRA is clear. Person and employer are separate and distinct entities under the ICRA. Person includes individuals, which must include supervisors. By interpreting the ICRA this way, we give meaning to all the terms used in the statute and satisfy the statute's own rule of construction.

[24]42 U.S.C. § 2000e-2(a) (1994) (emphasis added).

[25]Id. at § 2000e(b).

[26]Id. at § 2000e(a).

[27]Bales v. Wal-Mart Stores, Inc., 143 F.3d 1103, 1111 (8th Cir. 1998); Haynes v. Williams, 88 F.3d 898, 901 (10th Cir. 1996); Cross v. Alabama, 49 F.3d 1490, 1504 (11th Cir. 1995); Gary v. Long, 59 F.3d 1391, 1399 (D.C. Cir.), cert. denied, 516 U.S. 1011 (1995); Greenlaw v. Garrett, 59 F.3d 994, 1001 (9th Cir. 1995); Tomka v. Seiler Corp., 66 F.3d 1295, 1313 (2d Cir. 1995); Williams v. Banning, 72 F.3d 552, 555 (7th Cir. 1995); Grant v. Lone Star Co., 21 F.3d 649, 653 (5th Cir.), cert. denied, 513 U.S. 1015 (1994).

[28]See, e.g., Tracy L. Gonos, A policy analysis of individual liability – The case for amending Title VII to hold individual persons liable for their illegal discriminatory actions, 2 N.Y.U. J. Legis. & Pub. Pol'y 266 (1998/1999).

[29]See Bales, 972 F. Supp. at 489 (stating that the "federal courts in this district have split in unpublished decisions over whether a plaintiff can proceed with claims against individual defendants in their individual capacities under the ICRA, where the defendants are supervisory employees").

[30]Id. at 489-90.

[31]42 U.S.C. § 2000e(b).

[32]Iowa Code § 216.6(6)(a).

[33]I understand that the ICRA was enacted after Title VII and most likely was meant to mimic the federal legislation. Notwithstanding, the Iowa Legislature did not mimic the federal legislation. If the Legislature indeed intended to mimic Title VII, they could have copied Title VII to show that intent. They did not.

[34]"Chapter 601A of the Iowa Code was transferred to chapter 216 in Code 1993." Vivian, 601 N.W.2d at 875.

[35]Grahek v. Voluntary Hosp. Coop. Ass'n of Iowa, 473 N.W.2d 31, 35 (Iowa 1991).

[36]Sahai v. Davies, 557 N.W.2d 898, 901 (Iowa 1997); see also id. at 903 (Lavorato, Justice Dissenting) (stating that the "majority concedes, as it must, that persons other than employers may be held liable under Iowa Code 216.6(1)(a)" because the "statute is abundantly clear on this point").

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