INDIVIDUAL SUPERVISOR LIABILITY UNDER TITLE VII AND THE ADEA

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I. INTRODUCTION

For practitioners and judges that deal with allegations of employment discrimination, the question frequently arises whether an individual supervisory employee can, or should, be held personally liable for participating in discriminatory employment practices.[1] Under Title VII of the Civil Rights Act of 1964 (Title VII),[2] and the Age Discrimination in Employment Act of 1967 (ADEA),[3] the answer to this question depends entirely upon the meaning of the term "employer."[4] Employer is defined

1. *See* James D. Douglas, *Personal Liability in Sexual Harassment Cases*, *in* LEGAL PROBLEMS OF MUSEUM ADMINISTRATION 285, 287 (ALI-ABA Course of Study, Mar. 26-27, 1995), *available in* Westlaw, C989 ALI-ABA 285 (recognizing the frequency with which questions concerning personal liability are raised in the context of sexual harassment).

2. 42 U.S.C. §§ 2000e to 2000e-17 (1994) (originally enacted as Pub. L. No. 88-352, 78 Stat. 253 (1964)).

3. 29 U.S.C. §§ 621-633a (originally enacted as Pub. L. No. 90-202, 81 Stat. 602 (1967)).

under both Title VII[5] and the ADEA.[6] An individual defendant who falls outside the definition is not subject to liability.[7]

As a result of the vague language in relevant statutory provisions,[8] and the scarcity of legislative history for Title VII,[9] federal courts have disagreed on whether individual supervisors are included within the definition of employer, and therefore subject to personal liability.[10] Most commentators favor an interpretation of the term that requires individuals be held

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4. An individual must qualify as an employer, as that term is defined, before liability attaches under Title VII of the Civil Rights Act of 1964 (Title VII). 42 U.S.C. § 2000e-2(a). The same is true under the Age Discrimination Employment Act of 1967 (ADEA). 29 U.S.C. § 623(a). *See also* Scott B. Goldberg, Comment, *Discrimination by Managers and Supervisors: Recognizing Agent Liability Under Title VII*, 143 U. PA. L. REV. 571, 575 (1994) (stating that exposure to liability turns upon who is an employer within the meaning of Title VII); Cristopher Greer, Note, *"Who, Me?": A Supervisor's Individual Liability for Discrimination in the Workplace*, 62 FORDHAM L. REV. 1835, 1836 (1994) (noting that the current dispute over individual liability involves the construction given to the statutes' definitions of employer).

5. Under Title VII, "employer" is defined at 42 U.S.C. § 2000e(b).

6. The ADEA's definition of employer is found at 29 U.S.C. § 630(b).

7. *See, e.g.*, Grant v. Lone Star Co., 21 F.3d 649, 651 (5th Cir. 1994) (holding that the district court erred by imposing personal liability on an individual defendant supervisor when the supervisor did not qualify as an employer defined under Title VII); *cf.* EEOC v. AIC Sec. Investigations, Ltd., 55 F.3d 1276, 1279 (7th Cir. 1995) (holding that individuals "who do not independently meet the ADA's [Americans With Disabilities Act] definition of employer," which is substantially identical to that of Title VII and the ADEA, cannot be held liable).

8. *See* 42 U.S.C. § 2000e(b); 29 U.S.C. § 630(b); *see also* Janice R. Franke, *Does Title VII Contemplate Personal Liability for Employee/Agent Defendants?*, 12 HOFSTRA LAB. L.J. 39, 39 (1994) (observing that much confusion resulted from the use of vague language).

9. *See* Phillip L. Lamberson, Comment, *Personal Liability for Violations of Title VII: Thirty Years of Indecision*, 46 BAYLOR L. REV. 419, 426-27 (1994) (noting that because supporters of Title VII feared it might be killed in committee proceedings, the original bill went to only two committees in the House of Representatives before debate on the floor and vote by the Senate and House). Lamberson suggests that, in the haste to pass Title VII, Congress failed to consider carefully its practical effects, including the potential for personal liability of individual supervisors. *See id.*

10. *Compare* Miller v. Maxwell's Int'l Inc., 991 F.2d 583, 588 (9th Cir. 1993) (holding that under the statutory schemes of Title VII and the ADEA, the plaintiff's claims against individual supervisors were properly dismissed by the district court for failure to state a claim), *with* Paroline v. Unisys Corp., 879 F.2d 100, 104 (4th Cir. 1989) (holding 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"), *vacated in part on reh'g*, 900 F.2d 27 (4th Cir. 1990), Jones v. Continental Corp., 789 F.2d 1225, 1231 (6th Cir. 1986) (stating that the law is clear that individuals may be held liable as agents of an employer under Title VII), *and* Owens v. Rush, 636 F.2d 283, 287 (10th Cir. 1980) (holding an individual county sheriff personally liable under Title VII as an agent of the county).

accountable for their discriminatory conduct.[11] This Note follows the emerging view among federal circuit courts of appeal and takes the position that Congress did not intend to allow for personal liability under Title VII or the ADEA. Part I briefly covers the key statutory provisions related to this issue, focusing primarily on the ambiguous definitions of employer. Part II presents the main arguments in favor of individual liability and offers some responses to each of those arguments. Part III discusses and advocates the reasoning followed by several courts that have examined the remedial provisions, statutory structure, and legislative history of both Title VII and the ADEA and concludes that individuals are not subject to liability.

II. KEY STATUTORY PROVISIONS

Because the controversy over individual supervisor liability has its origin in the language of several key statutory provisions, it is necessary to briefly examine those provisions before discussing the cases which interpret them.[12] Title VII provides that:

> It shall be 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 . . . .[13]

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11. *See, e.g.*, Franke, *supra* note 8, at 62 (urging that individual liability is appropriate under Title VII); Goldberg, *supra* note 4, at 574 (concluding that managers and supervisors that unlawfully discriminate should be held personally accountable to their victims); Greer, *supra* note 4, at 1836 (stating that based on the language and purposes behind Title VII and the ADEA, individuals can and should be held liable for employment discrimination); Lamberson, *supra* note 9, at 426-27 (concluding that the legislative history of Title VII supports the imposition of personal liability); Steven K. Sanborn, Note, *Employment Discrimination—* Miller v. Maxwell's International Inc.*: Individual Liability for Supervisory Employees Under Title VII and the ADEA*, 17 W. NEW ENG. L. REV. 143, 170-72 (1995) (arguing forcefully that courts should hold supervisors personally liable for their discriminatory acts under Title VII and the ADEA). *But see* Clara J. Montanari, Comment, *Supervisor Liability Under Title VII: A "Feel Good" Judicial Decision*, 34 DUQ. L. REV. 351, 352 (1996) (arguing against supervisor liability under Title VII).

12. *See* Landreth Timber Co. v. Landreth, 471 U.S. 681, 685 (1985) (citing Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723, 756 (1975), for the proposition that the starting point in any statutory construction case is the language of the statute itself).

13. 42 U.S.C. § 2000e-2(a)(1) (emphasis added).

On its face, this provision only applies to employers.[14] Conversely, and quite obviously, nonemployers are not subject to liability.[15] The term employer is defined under Title VII as "a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, *and any agent of such a person*."[16] The ADEA's definition of an employer is virtually identical to Title VII's, except it includes only persons with twenty or more employees.[17] Congress left the term "agent" undefined in both statutes.

The key to understanding the debate over individual supervisor liability is recognizing that the "and any agent" language can be read in several different ways. A majority of courts have determined that by including agents within the definition of employer Congress merely intended to codify the common law doctrine of respondeat superior.[18] That is the position taken in this Note. Other courts, claiming to give effect to the plain meaning of the statute, have concluded that Congress clearly decided to impose personal liability upon any agent of an employer.[19] A third group of courts, through an unfortunate misapplication of Eleventh Amendment doctrine, have held that while agents are included within the definition, they may be held liable

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14. *See id.*

15. *See id.*

16. *Id.* § 2000e(b) (emphasis added). The definition of employer was amended by Congress in 1972, lowering the requisite number of employees from 25 to 15. Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, 86 Stat. 103 (1972).

17. *See* 29 U.S.C. § 630(b) (1994). For purposes of determining whether individual liability should be imposed, courts tend to treat the ADEA's definition of employer as identical to that of Title VII. *See also* Miller v. Maxwell's Int'l Inc., 991 F.2d 583, 587 (9th Cir. 1993) (stating that the liability schemes under Title VII and the ADEA are essentially the same in aspects relevant to this issue).

18. *See, e.g.*, EEOC v. AIC Sec. Investigations, Ltd., 55 F.3d 1276, 1281 (7th Cir. 1995) (stating that "the actual reason for the 'and any agent' language in the definition of 'employer' [is] to ensure that courts [will] impose *respondeat superior* liability upon employers for the acts of their agents") (citations omitted); Grant v. Lone Star Co., 21 F.3d 649, 652 (5th Cir. 1994) (discussing the Ninth Circuit's conclusion in *Miller* that the purpose of the agent provision is to incorporate respondeat superior into the statutes). The doctrine of respondeat superior merely imposes vicarious liability upon employers for the wrongs of their agents. *See generally* Young B. Smith, *Frolic and Detour*, 23 COLUM. L. REV. 444, 456-60 (1923) (offering a justification for respondeat superior based on social policy).

19. *See, e.g.*, Douglas v. Coca-Cola Bottling Co., 855 F. Supp. 518, 520 (D.N.H. 1994) (concluding that the plain language of Title VII requires imposition of personal liability); Lamirande v. Resolution Trust Corp., 834 F. Supp. 526, 529 (D.N.H. 1993) (giving effect to the plain meaning of 42 U.S.C. § 2000e(b) and concluding that individual supervisors are subject to personal liability).

only in their official capacities.[20] Each of these positions is discussed in detail below.

III. ARGUMENTS IN FAVOR OF INDIVIDUAL LIABILITY

As mentioned in the Introduction, the objective of this Note is to advance the argument that Congress did not intend to allow for personal liability under Title VII or the ADEA. There is, however, a split of authority among the federal courts of appeal as to whether individuals are included within the definition of an employer and thereby subject to liability.[21]

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20. *See, e.g.*, Grant v. Lone Star Co., 21 F.3d at 651-53 (holding that an individual defendant-manager could be sued only in his official capacity); Harvey v. Blake, 913 F.2d 226, 227-28 (5th Cir. 1990) (distinguishing a defendant's individual and official capacity in a suit brought by a public employee against his immediate supervisor).

21. *Compare* Tomka v. Seiler Corp., 66 F.3d 1295, 1313 (2d Cir. 1995) (holding that an employer's agent with supervisory control may not be held individually liable under Title VII), Gary v. Long, 59 F.3d 1391, 1399 (D.C. Cir.), *cert. denied*, 116 S. Ct. 569 (1995) (holding that "while a supervisory employee may be joined as a party defendant in a Title VII action, that employee must be viewed as being sued in his capacity as the agent of the employer, who is alone liable for a violation of Title VII"), Lenhardt v. Basic Inst. of Tech., Inc., 55 F.3d 377, 380-81 (8th Cir. 1995) (using Title VII authority from other circuits to conclude that the definition of employer under the Missouri Human Rights Act does not include individuals), EEOC v. AIC Sec. Investigations, Ltd., 55 F.3d at 1282 (concluding that "individuals who do not otherwise meet the statutory definition of 'employer' cannot be [held] liable under the ADA"), Grant v. Lone Star Co., 21 F.3d at 651-53 (holding that an individual supervisor could be sued only in his official capacity), Miller v. Maxwell's Int'l Inc., 991 F.2d at 588 (holding that under the statutory schemes of Title VII and the ADEA, the plaintiff's claims against the individual defendant supervisors were properly dismissed by the district court for failure to state a claim upon which relief could be granted), *and* Busby v. City of Orlando, 931 F.2d 764, 772 (11th Cir. 1991) (per curiam) (holding that "[i]ndividual capacity suits under Title VII are . . . inappropriate"), *with* Ball v. Renner, 54 F.3d 664, 667 (10th Cir. 1995) (stating that a construction of the "'agent' phrase" which makes "the responsible agent a statutory 'employer' who is prohibited by Section 2000e-2(a) from discriminatory conduct and is rendered liable by Section 2000e-5(f) for violating that prohibition—is eminently sensible as a matter of statutory structure and logical analysis"), Paroline v. Unisys Corp., 879 F.2d 100, 104 (4th Cir. 1989) (holding 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"), *vacated in part on reh'g*, 900 F.2d 27 (4th Cir. 1990), Jones v. Wesco Inv., Inc., 846 F.2d 1154, 1156 n.5 (8th Cir. 1988) (affirming a district court's order holding a company president jointly and severally liable for sexual harassment of an employee), *and* Jones v. Continental Corp., 789 F.2d 1225, 1231 (6th Cir. 1986) (stating that "the law is clear that individuals may be held liable" as agents of an

Therefore, in order to present a balanced view of the issues, this Part covers the major cases and arguments in favor of individual liability.

A. *Justifications for Imposing Individual Liability*

In most cases, Title VII plaintiffs need to name only the institutional employer as defendant in order to assure recovery.[22] Several justifications have been advanced, however, in favor of exposing individual supervisors to liability as well. First, some commentators have suggested that the institutional defendant may be bankrupt, undercapitalized, or otherwise unable to pay a judgment.[23] Second, the threat of personal liability may deter supervisors that would otherwise engage in discriminatory conduct.[24] Finally, an employer's liability under respondeat superior[25] is limited to liability for the conduct of agents that is within the scope of the agents' employment.[26] Arguably, some forms of discriminatory or harassing conduct may be so severe that they fall outside the scope of employment, creating a "liability gap"[27] if the agents are not liable. For these reasons, commentators and some courts, have sought to ensure that individual defendants will remain subject to liability.

One of the primary justifications for sweeping individuals within the scope of Title VII is what several courts perceive as a firm congressional directive to construe the statute broadly:[28]

> Title VII . . . provides . . . a clear mandate from Congress that no longer will the United States tolerate [employment] discrimination. It is, therefore,

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employer under Title VII). The remaining circuits are currently undecided as to whether individuals are included within the definition of an employer.

22. Sanborn, *supra* note 11, at 155-56 (1995).

23. Greer, *supra* note 4, at 1835; Lamberson, *supra* note 9, at 419-21 (using a hypothetical example involving a bankrupt employer to illustrate this point).

24. Hamilton v. Rodgers, 791 F.2d 439, 443 (5th Cir. 1986) (theorizing that the failure to impose personal liability "would encourage supervisory personnel to believe that they may violate Title VII with impunity"); *see also* Douglas L. Williams, *The Typical Case*, *in* INDIVIDUAL LIABILITY AND DEFENDING INDIVIDUAL CO-DEFENDANTS 207, 212 (ALI-ABA Course of Study, Nov. 30, 1989), *available in* Westlaw, C463 ALI-ABA 205.

25. The United States Supreme Court has held that the doctrine of respondeat superior is generally applicable under Title VII. Meritor Sav. Bank v. Vinson, 477 U.S. 57, 72 (1986).

26. *See* Miller v. Bank of Am., 600 F.2d 211, 213 (9th Cir. 1979) (stating that employers are liable under Title VII for discriminatory conduct of their employees when such conduct is within the scope of employment).

27. *See* Sanborn, *supra* note 11, at 243-44 n.6.

28. *See* County of Washington v. Gunther, 452 U.S. 161, 178 (1981) (stating that "[courts must] avoid interpretations of Title VII that deprive victims of discrimination of a remedy, without clear congressional mandate"); Hamilton v. Rodgers, 791 F.2d at 442 (holding that "Title VII should be accorded a liberal interpretation in order to effectuate the purpose of Congress"); Culpepper v. Reynolds Metals Co., 421 F.2d 888, 891 (5th Cir. 1970) (stating that Title VII must be liberally construed by courts).

> the duty of the courts to make sure that the Act works, and the intent of Congress is not hampered by . . . strict construction of the statute and a battle with semantics.[29]

Thus, in *Hamilton v. Rodgers*,[30] the Fifth Circuit Court of Appeals determined that "the definition of 'employer' is . . . broad, including agents of the actual employer."[31] The court went on to state that "[i]n ascertaining the scope of agency. . . Title VII 'should be accorded a liberal interpretation in order to effectuate the purpose of Congress to eliminate the inconvenience, unfairness, and humiliation of . . . discrimination.' " [32]

Accordingly, several federal district courts have examined the relevant provisions of Title VII and the ADEA and determined that the plain language contained in the definition of employer mandates the imposition of personal liability.[33] A minority of federal circuit courts have agreed with this conclusion but have limited liability to those agents with the power to hire, fire, or control staffing assignments.[34]

One may be encouraged to learn that at least some limitations exist. These limitations, however, are minimal. In order to illustrate how minimal they are, the following subpart presents a detailed factual discussion of the case in which the "liability within limits" approach was most notably applied. Subpart C presents additional arguments in favor of individual liability that were raised in a particularly strong dissenting opinion by Judge Parker of the Second Circuit.

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29. Culpepper v. Reynolds Metals Co., 421 F.2d at 891; *see also* Greer, *supra* note 4, at 1837.

30. Hamilton v. Rodgers, 791 F.2d 439 (5th Cir. 1986).

31. *Id.* at 442.

32. *Id.* (citing Rogers v. EEOC, 454 F.2d 234, 238 (5th Cir. 1971)). The Fifth Circuit has since cut back substantially on this decision by holding that individual supervisors are liable in their official capacities only and are not personally liable. *See* Grant v. Lone Star Co., 21 F.3d 649, 652-53 (5th Cir. 1994).

33. *See, e.g.*, Douglas v. Coca-Cola Bottling Co., 855 F. Supp. 518, 520 (D.N.H. 1994) (concluding that the plain language of Title VII requires imposition of personal liability); Lamirande v. Resolution Trust Corp., 834 F. Supp. 526, 529 (D.N.H. 1993) (giving effect to the plain meaning of 42 U.S.C. § 2000e(b) and concluding that individual supervisors are subject to personal liability).

34. *See* Paroline v. Unisys Corp., 879 F.2d 100, 104 (4th Cir. 1989); *see also* Hamilton v. Rodgers, 791 F.2d at 442-43 (holding supervisors in charge of staffing and assignments liable).

B. *Agents with the Power to Hire and Fire:* Paroline v. Unisys Corp.

The case most often cited in favor of the proposition that individuals may be held personally liable for discriminatory employment practices is *Paroline v. Unisys Corp.*[35] In *Paroline*, the district court granted summary judgment in favor of Unisys Corporation and the individual defendant, Edgar L. Moore, on claims arising out of the alleged sexual harassment of Elizabeth Paroline.[36] The United States Court of Appeals for the Fourth Circuit reversed the district court's decision, in part, concluding that the evidence precluded summary judgment on the issue of whether Moore was Paroline's employer under Title VII, and therefore subject to liability.[37]

According to the Fourth Circuit's marshaling of the facts, Moore had a history of sexually harassing his subordinates.[38] On the occasion giving rise to the lawsuit, Moore attempted to kiss Paroline, and he "rubb[ed] his hands up and down her back, despite her demands that he stop."[39] The court concluded that Moore could be held personally liable for such conduct, provided the facts demonstrated that he "serve[d] in a supervisory position and exercise[d] significant control over [Paroline's] hiring, firing or conditions of employment."[40]

This standard, if rigidly applied, would amount to individual liability with limits; specifically, the agent must exercise the essential powers of an employer before liability could attach. The court weakened this standard, however, and determined that Moore "need not have ultimate authority to hire or fire to qualify as an employer, as long as he . . . [had] significant input into such personnel decisions."[41] In addition, the court held that "an employee may exercise supervisory authority," for purposes of Title VII, "even though the company has formally designated another individual as the plaintiff's supervisor."[42] Where "the company's management approves or acquiesces in the employee's exercise of supervisory control over the plaintiff, that employee will hold "employer" status [under] Title VII."[43]

Reversing the district court's grant of summary judgment in favor of Moore, the Fourth Circuit concluded that Paroline had "raised a genuine issue of material fact as to whether Moore exercised sufficient supervisory authority over her to qualify as an employer under Title VII."[44] The court

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35. Paroline v. Unisys Corp., 879 F.2d 100 (4th Cir. 1989).

36. *Id.* at 102.

37. *Id.* at 104.

38. *Id.* at 103.

39. *Id.*

40. *Id.* at 104 (citing York v. Tennessee Crushed Stone Ass'n, 684 F.2d 360, 362 (6th Cir. 1982) (dictum)).

41. *Id.* (citing Tafoya v. Adams, 612 F. Supp. 1097, 1105 (D. Colo. 1985), *aff'd*, 816 F.2d 555 (10th Cir. 1987)).

42. *Id.*

43. *Id.*

44. *Id.*

found that Moore participated in Paroline's initial interview and recommended her for employment with Unisys.[45] In addition, Paroline presented "evidence that Moore personally gave Paroline work assignments on at least one occasion, even though [Unisys] had formally designated [another employee] as Paroline's immediate supervisor."[46] According to the court, "[t]he power to determine work assignments often represents a key element of supervisory authority."[47] The court did not offer any other facts to support its reversal of the district court's decision.

Under the holding of *Paroline*, it appears that a plaintiff will be required to make only a minimal showing that an individual exercised supervisory authority over her, thereby subjecting that individual to personal liability. Thus, the limits, if any, imposed on individual liability under the *Paroline* view, appear to be *de minimus*.

Other courts, also within the context of claimed sexual harassment, have explicitly rejected the *Paroline* "liability within limits" rationale as illogical. In *Grant v. Lone Star Co.*,[48] a defendant branch manager was held personally liable, after a jury trial, for sexual harassment under Title VII.[49] The district court ordered the defendant (in his individual capacity) to pay backpay, damages, and attorney's fees, and the defendant appealed.[50] On appeal, the defendant contended "that as a matter of law, backpay awards under Title VII cannot be assessed against individuals who do not otherwise qualify as employers."[51] The plaintiff, however, argued that a branch manager such as the defendant, with the power "to hire, fire, and discipline also has the power of reinstatement, promotion, and correction of employment records."[52] The plaintiff, as in *Paroline*, concluded that the full panoply of remedies available under Title VII should apply against agents that have complete authority to act in the stead of their employers.[53]

Notwithstanding the plaintiff's argument, the Fifth Circuit Court of Appeals reversed the district court's damage award.[54] The court concluded that the plaintiff's reading of Title VII would result in the treatment of "some

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45. *Id.*
46. *Id.*
47. *Id.* (citing Hamilton v. Rodgers, 791 F.2d 439, 442-43 (5th Cir. 1986)).
48. Grant v. Lone Star Co., 21 F.3d 649 (5th Cir. 1994).
49. *Id.* at 651.
50. *Id.*
51. *Id.*
52. *Id.* at 653.
53. *Id.*
54. *Id.*

employees as both an employer and an employee."[55] The court accordingly rejected such a construction as nonsensical.[56] Faced with similar arguments, other courts have held that there is no justification for differentiating between supervisors with the power to hire and fire and those without such power, because Title VII speaks only of agents.[57] Therefore, one might conclude that the reasoning relied upon in *Paroline* is unsound.

C. *The* Tomka *Dissent*

The dissenting opinion in *Tomka v. Seiler Corp.*,[58] advancing a number of arguments in favor of individual liability,[59] held that "the express language of the statute permits individual liability under Title VII and . . . sound jurisprudence counsels giving that statutory language its full effect."[60] Because Judge Parker wrote a particularly strong dissent in this case, it deserves special treatment.

1. *The Surplusage Argument*

First, the dissent suggested that any reading of the "agent clause" that restricts liability to employer-entities would effectively reduce that clause to mere "surplusage"[61] because, even absent the agent clause, "Title VII would nevertheless permit respondeat superior liability against employer-entities for the acts of their agents under common law liability principles."[62] The dissent argued that, according to established canons of construction, "courts must not construe the language of statute in a manner which renders a provision of that statute mere surplusage."[63]

The majority's response to the surplusage argument was, however, well reasoned; pointing out that the Supreme Court has held that the agent clause does serve an implied independent purpose.[64] In *Meritor Savings Bank v. Vinson*,[65] the United States Supreme Court clearly stated that "Congress' decision to define 'employer' to include any 'agent' of an employer . . . surely evinces an intent to place some limits on the acts of employees for

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55. *Id.*
56. *Id.*
57. Tomka v. Seiler Corp., 66 F.3d 1295, 1315 (2d Cir. 1995).
58. Tomka v. Seiler Corp., 66 F.3d 1295 (2d Cir. 1995).
59. *Id.* at 1318-24 (Parker, J., dissenting).
60. *Id.* at 1318.
61. *Id.* at 1319.
62. *Id.; see also* Meritor Sav. Bank v. Vinson, 477 U.S. 57, 72 (1986) (holding that common-law principles of agency apply in suits under Title VII).
63. Tomka v. Seiler Corp., 66 F.3d at 1319 (citing New York v. Shore Realty Corp., 759 F.2d 1032, 1044 (2d Cir. 1985)).
64. *Id.* at 1316.
65. Meritor Sav. Bank v. Vinson, 477 U.S. 57 (1986).

which employers under Title VII are to be held responsible."[66] From this, the *Tomka* majority reasoned that the agent clause, far from being mere surplusage, serves to ensure that the scope of an employer's vicarious liability will be appropriately limited by common-law agency principles.[67] Specifically, the agent clause limits an entity employer's vicarious liability to liability for the conduct of an agent that is within the scope of his or her employment.[68] Thus, employers may be assured that they will not be held liable under Title VII for extremely egregious conduct of an agent that is found to be entirely outside the purview of the job for which the agent was hired. According to the majority, "What *Meritor* and its progeny conclusively establish is that the agent clause is not mere surplusage, because Congress explicitly chose to apply agency principles to a determination of the scope of an employer's liability."[69]

Not to be outdone, however, the *Tomka* dissent offered quite a different reading of *Meritor*. The *Meritor* Court held "that Congress wanted courts to look to agency principles for guidance" in the interpretation of Title VII.[70] Thus, the *Tomka* dissent made the following observations:

> The [Supreme] Court's direction that we look to traditional agency principles, and to the *Restatement* [*of Agency*] in particular, is instructive. Indeed, the *Restatement* itself prescribes joint and several liability, as opposed to mere respondeat superior liability, for tortious conduct committed against a third party by either an agent alone, or an agent together with that agent's principal. If, as *Meritor* suggests, Congress intended to incorporate traditional agency principles in determining whether an agent's acts implicate Title VII liability, there is no inconsistency in reading the agent clause as evidence that Congress further intended to incorporate these same traditional agency principles with regard to the scope of that liability. Accordingly, I believe Title VII permits employers and their agents to be held jointly and severally liable for the "tortious conduct of an agent or that of agent and principal."[71]

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66. *Id.* at 72.

67. Tomka v. Seiler Corp., 66 F.3d at 1316.

68. *Id.*

69. *Id.*

70. Meritor Sav. Bank v. Vinson, 477 U.S. at 72 (citing RESTATEMENT (SECOND) OF AGENCY §§ 219-237 (1958)).

71. Tomka v. Seiler Corp., 66 F.3d at 1320 (Parker, J., dissenting).

The dissent's argument is, at best, inconclusive. *Meritor* did not deal explicitly with the issue of individual supervisors' liability. In addition, "[a]lthough *Meritor* instructs courts to look to common law agency principles in discussing employer liability, it also cautioned that 'such common law principles may not be transferable in all their particulars to Title VII.' " [72]

2. *Judge Parker's Attack on* Miller v. Maxwell's International Inc. *and Its Progeny*

Miller v. Maxwell's International Inc.[73] is one of the two leading cases against individual liability. Following *Miller*, the Seventh Circuit handed down *EEOC v. AIC Security Investigations, Ltd.*,[74] holding that the availability of remedies such as backpay and reinstatement, prior to 1991, evidenced Congressional intent to limit Title VII liability to employing entities.[75] Judge Parker's dissent takes issue with *Miller* and its progeny for conflicting with established precedent.[76] Judge Parker noted that prior rulings of the Seventh Circuit, as well as the Second Circuit, "found [little] difficulty in holding that an employer and the employer's agents may be held jointly and severally liable for backpay awards."[77] In the 1994 case *Cornwell v. Robinson*,[78] for example, the Second Circuit affirmed, on other grounds, a $175,000 backpay award jointly and severally against the employer and four additional defendants.[79] "Although the defendants apparently did not specifically challenge individual liability in their appeal, the holding suggests that joint and several liability for an award of backpay is not so patently absurd as to justify . . . categorical proscription."[80]

Additionally, the Seventh Circuit in *EEOC v. Vucitech*[81] affirmed a judgment in a Title VII action, holding several individual defendants jointly and severally liable.[82] A unanimous court determined that a "district court can order contribution among parties actually named as defendants in [a] Title VII suit."[83]

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72. *Id.* at 1316 (citing Meritor Sav. Bank v. Vinson, 477 U.S. at 72).

73. Miller v. Maxwell's Int'l Inc., 991 F.2d 583 (9th Cir. 1993).

74. EEOC v. AIC Sec. Investigations, Ltd., 55 F.3d 1276 (7th Cir. 1995).

75. *Id.* at 1281.

76. Tomka v. Seiler Corp., 66 F.3d at 1321 (Parker, J., dissenting).

77. *Id.*

78. Cornwell v. Robinson, 23 F.3d 694 (2d Cir. 1994).

79. *Id.* at 697.

80. Tomka v. Seiler Corp., 66 F.3d at 1231 (Parker, J., dissenting) (citing Cornwell v. Robinson, 23 F.3d at 697).

81. EEOC v. Vucitech, 842 F.2d 936 (7th Cir. 1988).

82. *Id.* at 942.

83. *Id.* (citing *In re* Burlington N., Inc., 810 F.2d 601, 610 (7th Cir. 1986)); *see also* Tomka v. Seiler Corp., 66 F.3d at 1322.

This is perhaps Parker's strongest argument. The mere existence of authority imposing joint and several liability, however, is not sufficient to overcome the clearly expressed congressional intent to the contrary.

IV. ARGUMENTS AGAINST INDIVIDUAL LIABILITY

Several courts have examined the remedial provisions, statutory structure, and legislative history of Title VII and the ADEA and concluded that no personal liability should be imposed. When examining the decisions of these courts, the following interpretive guidelines should be considered. First, legislative intent is the driving principle in every issue of statutory interpretation.[84] Second, "[i]n expounding a statute, [courts] must not be guided by a single sentence or member of a sentence, but [must] look to the provisions of the whole law, and to its object and policy."[85] Finally, courts are bound to apply a statute according to its ordinary meaning, " except in rare cases in which the literal application of a statute will produce a result demonstrably at odds with the intentions of its drafters."[86] When the exception applies, courts should diligently seek to ascertain and adhere to the intentions of the legislature, rather than applying the strict language of the statute.[87]

In *Tomka*, the United States Court of Appeals for the Second Circuit determined that the definition of employer contained in Title VII constitutes a rare exception to the general rule that a statute's plain language is to be given effect.[88] The court stated that:

> While a narrow, literal reading of the agent clause in [Title VII] does imply that an employer's agent is a statutory employer for purposes of [assigning] liability, a broader consideration of Title VII indicates that this interpretation of the statutory language does not comport with Congress' clearly expressed intent in enacting the statute. In particular, . . . the statutory scheme and remedial provisions of Title VII indicate that Congress intended to limit liability to employer-entities with fifteen or more employees. A finding of

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84. *See* United States v. Stone & Downer Co., 274 U.S. 225, 239 (1927) (stating that "[i]n this case, as in every other involving the interpretation of a statute, the intention of Congress is an all-important factor").

85. Kelly v. Robinson, 479 U.S. 36, 43 (1986) (citations omitted).

86. Griffin v. Oceanic Contractors, Inc., 458 U.S. 564, 571 (1982).

87. Tomka v. Seiler Corp., 66 F.3d 1295, 1314 (2d Cir. 1995).

88. *Id.*

> agent liability . . . would lead to results that Congress could not have contemplated.[89]

A. *The Remedial Provisions of Title VII*

1. *Backpay and Reinstatement Prior to 1991*

Several courts, including *Tomka*, have focused on the remedial provisions of Title VII as one of the best indicators that Congress did not contemplate imposing personal liability upon individuals.[90] In *EEOC v. AIC Security Investigations, Ltd.*,[91] the court properly noted that, prior to 1991,[92] a plaintiff's remedies under Title VII were limited to backpay and reinstatement.[93] The court determined that such remedies were appropriate as against an employer-entity, but not against a "mere individual."[94] The EEOC responded to this argument, contending that adding compensatory and punitive damages, via the Civil Rights Act of 1991, made it clear that Congress intended to impose personal liability.[95] While recognizing that such damages may be appropriately obtained against individuals, the court countered that it would be "a long stretch to conclude that Congress silently intended to abruptly change its earlier vision through an amendment to the remedial provisions of the statute alone."[96] Thus including compensatory and punitive damages through the 1991 Civil Rights Act is not strong evidence of congressional intent.

2. *Calibration of Maximum Allowable Damage Awards*

In *Miller*, the United States Court of Appeals for the Ninth Circuit pointed to an even more persuasive argument that the remedial additions

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89. *Id.*; *accord* Miller v. Maxwell's Int'l Inc., 991 F.2d 583, 587 (9th Cir. 1993) (stating that although an interpretation which provides for individual liability is not without merit, the statutory schemes of both Title VII and the ADEA reveal that Congress did not intend to impose individual liability on employees).

90. Tomka v. Seiler Corp., 66 F.3d at 1314; EEOC v. AIC Sec. Investigations, Ltd., 55 F.3d 1276, 1281 (7th Cir. 1995); Grant v. Lone Star Co., 21 F.3d 649, 653 (5th Cir. 1994); Miller v. Maxwell's Int'l Inc., 991 F.2d at 587-88.

91. EEOC v. AIC Sec. Investigations, Ltd., 55 F.3d 1276 (7th Cir. 1995).

92. The remedial provisions of Title VII were amended by the Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended in various sections of 42 U.S.C. § 2000e (1994)).

93. EEOC v. AIC Sec. Investigations, Ltd., 55 F.3d at 1281.

94. *Id.* (citation omitted); *accord* Tomka v. Seiler Corp., 66 F.3d at 1314 (stating that "[c]learly, backpay and reinstatement are equitable remedies which are most appropriately provided by employers, defined in the traditional sense of the word") (citing Padway v. Palches, 665 F.2d 965, 968 (9th Cir. 1982)).

95. EEOC v. AIC Sec. Investigations, Ltd., 55 F.3d at 1281.

96. *Id.*

contained in the 1991 amendments did not signal a shift toward individual liability.[97] Although adding new types of damages, arguably more amenable to application against individuals, the Civil Rights Act of 1991 clearly "calibrated the maximum allowable . . . award to the size of the employer," while retaining an exemption for defendants with less than fifteen employees.[98] For example, maximum liability is currently set at $50,000 "in the case of a [defendant] who has more than 14 but fewer than 101 employees."[99] In addition, a cap was not established for individuals,[100] thus implying that Congress deliberately exempted them.[101]

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97. Miller v. Maxwell's Int'l Inc., 991 F.2d 583, 587-88 n.2 (9th Cir. 1993).

98. *Id.*; Tomka v. Seiler Corp., 66 F.3d at 1315; EEOC v. AIC Sec. Investigations, Ltd., 55 F.3d at 1281.

99. Tomka v. Seiler Corp., 66 F.3d at 1315. 42 U.S.C. § 1981a(b)(3) provides:

> The sum of the amount of compensatory damages awarded under this section . . . and the amount of punitive damages awarded under this section, shall not exceed, for each complaining party—
>
> (A) in the case of a respondent who has more than 14 and fewer than 101 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $50,000;
>
> (B) in the case of a respondent who has more than 100 and fewer than 201 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $100,000; and
>
> (C) in the case of a respondent who has more than 200 and fewer than 501 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $200,000; and
>
> (D) in the case of a respondent who has more than 500 employees in each of 20 or more calendar weeks in the current or preceding calendar year, $300,000.

42 U.S.C. § 1981a(b)(3) (1994) "Respondent" is defined in relevant part by 42 U.S.C. § 2000e(n) (1994) to include employers. *See also* EEOC v. AIC Sec. Investigations, Ltd., 55 F.3d at 1281.

100. 42 U.S.C. § 1981a(b)(3).

101. As stated in *Miller*, "if Congress had envisioned individual liability under Title VII for compensatory and punitive damages, it would have included individuals in this litany of limitations and would have discontinued the exemption for small employers." Miller v. Maxwell's Int'l Inc., 991 F.2d at 588 n.2.

B. *The Structure of Title VII and Legislative History*

1. *Statutory Structure*

Within Title VII's definition of employer, the "and any agent" language is appended by the conjunction "and" to a clause explicitly limiting liability to employers with fifteen or more employees.[102] This limitation reflects congressional intent to strike a balance between eliminating discrimination in employment and protecting smaller employers.[103] In *Miller*, the court determined that Congress provided a safe harbor for small employers "in part because [it] did not want to burden small entities with the costs [of] litigating discrimination claims."[104] Furthermore, the *Miller* court stated that "[i]f Congress decided to protect small entities with limited resources from liability, it is inconceivable that Congress [also] intended to allow civil liability to run against individual employees."[105] Following this line of reasoning, other courts have determined "incongruous" results would occur if business owners employing, for example, ten employees are statutorily immune from suit, while a person who supervises the same number of people, in a company employing twenty or more persons, would be subject to liability.[106] Thus, an interpretation that allows for individual liability would tend to upset the balance established by Congress and would "distort[] the statutory framework."[107]

2. *Legislative History*

The *Tomka* court, upon examination of the relevant legislative history of Title VII, found some support for the conclusion that Congress intended to protect small employers.[108] The court focused primarily on the congressional debate over Title VII's definition of employer and determined that the limitation of liability to employers with fifteen or more employees was motivated, in part, by economic concerns.[109] For example, in debates over a proposal to modify the "minimum employee threshold," Congress explicitly considered the potential burden upon small businesses "forced to comply

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102. 42 U.S.C. § 2000e(b) (1994); Tomka v. Seiler Corp., 66 F.3d at 1314.

103. EEOC v. AIC Sec. Investigations, Ltd., 55 F.3d at 1281.

104. Miller v. Maxwell's Int'l Inc., 991 F.2d at 587; *accord* Birkbeck v. Marvel Lighting Corp., 30 F.3d 507, 510 (4th Cir. 1994) (stating that "[t]he purpose of this provision can only be to reduce the burden of the ADEA on small business").

105. Miller v. Maxwell's Int'l Inc., 991 F.2d at 587.

106. Birkbeck v. Marvel Lighting Corp., 30 F.3d at 510.

107. EEOC v. AIC Sec. Investigations, Ltd., 55 F.3d at 1281.

108. Tomka v. Seiler Corp., 66 F.3d 1295, 1314 (2d Cir. 1995).

109. *Id.* (noting "that in discussions over a proposed change to the minimum employee threshold, the [potential] burdens placed upon a small business [were] . . . explicitly addressed") (citations omitted).

with federal regulations and defend against [ ] Title VII suit[s]."[110] As the court noted, Congress also considered other factors such as "the protection of intimate and personal relations existing in small businesses, potential effects on competition and the economy, and the constitutionality of Title VII under the Commerce Clause."[111] The court stated, however, that "[w]hile these latter reasons do not directly support the proposition that Congress was concerned with the burden of potential liability on small employers, there is a noticeable absence of any mention of agent liability in the floor debates over § 2000e(b)."[112] Furthermore, "most of the comments directed at the minimum employee threshold refer only to employer-entities, implying that Congress did not contemplate agent liability under Title VII."[113] Thus, what little history exists seems to make the structural arguments outlined above more plausible.

Any interpretation of the agent clause which allows for individual supervisor liability necessarily produces a result which is at odds with congressional intent, as expressed through the statutory scheme, to limit liability to employer-entities. Therefore, an employer's agent should not be held individually liable under Title VII.

C. *Individual Versus Official Capacity Suits*

Several courts have sought to eliminate personal liability under Title VII and the ADEA by allowing suits only against individual agents in their "official capacities."[114] Under this view, liability apparently runs against the employer-entity alone, in essentially the same manner as under the doctrine of respondeat superior.[115] Although the end result is acceptable, this author disagrees with this approach for the following reasons.

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110. *Id.* (citations omitted).

111. *Id.* (citations omitted).

112. *Id.*

113. *Id.* (citing 110 CONG. REC. 6566 (1964)). "Coverage [of Title VII] is limited to businesses and labor organizations affecting commerce." 110 CONG. REC. S7212 (remarks of Sen. Clark).

114. *See, e.g.*, Grant v. Lone Star Co., 21 F.3d 649, 651-52 (5th Cir. 1994) (holding that an individual defendant-manager could be sued only in his official capacity).

115. *See, e.g.*, Weiss v. Coca-Cola Bottling Co., 772 F. Supp. 407, 411 (N.D. Ill. 1991); Woods v. Ficker, 768 F. Supp. 793, 800-01 (N.D. Ala. 1991); Rolin v. Escambia County Bd. of Educ., 752 F. Supp. 1020, 1024 (S.D. Ala. 1990).

The official versus individual capacity distinction originally developed in the context of suits against public sector employees.[116] "When a plaintiff sues a municipal officer in the officer's individual capacity for alleged civil rights violations, the plaintiff seeks money damages directly from the individual officer," as opposed to the officer's municipal employer.[117] When sued in an individual capacity, a municipal employee may generally invoke the affirmative defense of qualified immunity.[118] In *Harvey v. Blake*,[119] the United States Court of Appeals for the Fifth Circuit considered whether a city-employed supervisor should be allowed to use the qualified immunity doctrine as a defense in an action for sexual harassment under Title VII.[120] The court initially determined that, because a supervisor's liability must be "premised upon her role as [an] agent of the [municipal entity],"[121] she should be liable only in her official, as opposed to individual, capacity.[122] "Only when a public [employee] is working in an official capacity can that [employee] be said to be an 'agent' of the government."[123] The court concluded that: (1) a Title VII suit against a public employee *must* proceed against that employee in their official capacity only, and (2) "[b]ecause the doctrine of qualified immunity protects a public [employee] from liability for money damages in her individual capacity [alone], the doctrine [has no application] in the Title VII context."[124] The first holding is significant. Courts following *Harvey* hold that under Title VII, supervisors are liable "only as surrogates for their employer."[125] Essentially, this means that individual liability for supervisory employees does not exist.[126]

While the individual versus official capacity distinction may generally make sense in suits against public sector employees, for purposes of determining whether qualified immunity should attach, there would seem to be little justification for extending that distinction to private sector Title VII actions. Nonetheless, in *Grant v. Lone Star Co.*[127] the court stated that "[w]e find no reason to limit the rationale of . . . *Harvey v. Blake* to the realm of

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116. *See, e.g.*, Harvey v. Blake, 913 F.2d 226, 227 (5th Cir. 1990) (distinguishing between a defendant's individual and official capacity in a suit brought by a public employee against his immediate supervisor).

117. Busby v. City of Orlando, 931 F.2d 764, 772 (11th Cir. 1991).

118. *Id.*

119. Harvey v. Blake, 913 F.2d 226 (5th Cir. 1990).

120. *Id.* at 226-27.

121. *Id.* at 227-28.

122. *Id.* (citing Clanton v. Orleans Parish Sch. Bd., 649 F.2d 1084, 1099 (5th Cir. 1981)).

123. *Id.* at 228 (citations omitted).

124. *Id.* (citing Mangaroo v. Nelson, 864 F.2d 1202, 1204 (5th Cir. 1989)).

125. 4 JOSEPH G. COOK & JOHN L. SOBIESKI, JR., CIVIL RIGHTS ACTIONS § 21.09[E], at 21-93 (1997).

126. *Id.*

127. Grant v. Lone Star Co., 21 F.3d 649 (5th Cir. 1994).

public employee disputes."[128] Thus, the Fifth Circuit now holds that private sector employees may not be sued in their "official capacities" unless they meet Title VII's definition of "employer."[129] Although this author agrees with the result (no personal liability), courts should be cautioned against such blind extension of the doctrine that so clearly arose from a different context:

> Although the result reached in *Harvey* on the question of qualified immunity is sound, the reasoning of the court of appeals—and others like it—is not. The distinction between official capacity and personal capacity suits was developed under the eleventh amendment and, properly understood even in that context, focuses not on the capacity in which the defendant *acted* but on the capacity in which the defendant is *being sued.*[130]

Furthermore, the Eleventh Amendment is now moot under Title VII, because Title VII explicitly does away with sovereign immunity by allowing suits against public employers directly.[131] Thus, some commentators have concluded that the difference between official and individual capacity is more formal than substantive.[132] "The state itself can [now] be sued directly and held liable because Congress has set aside its eleventh amendment immunity, thus negating any necessity [for] suing individual state employees in their official capacity."[133] Therefore, one may conclude that, even with respect to public sector disputes, the distinction between individual and official capacity is unnecessary. It makes little sense to extend this essentially meaningless doctrine to public sector disputes under Title VII.

V. CONCLUSION

Although a minority of circuit courts have found that the plain language in Title VII's definition of employer indicates congressional intent to impose personal liability on individual supervisors, the structure and remedial provisions of Title VII establish that the opposite is true. Congress limited Title VII liability to employers with fifteen or more employees, thereby indicating an intent to protect small entities from becoming embroiled in costly litigation. As stated by the Ninth Circuit in *Miller v. Maxwell's International Inc.*, it is inconceivable that a Congress concerned

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128. *Id.* at 653.
129. *Id.*
130. *See* COOK & SOBIESKY, *supra* note 125, § 21.09[E], at 21-95.
131. *Id.*
132. *Id.*
133. *Id.*

with protecting small employers would simultaneously allow civil liability to run against individual employees.[134]

David J. Hanus

134. Miller v. Maxwell's Int'l Inc., 991 F.2d 583, 587 (9th Cir. 1993).