Florida Law Review

Volume 49 | Issue 5 Article 3

December 1997

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DISCRIMINATION BY SUPERVISORS: PERSONAL LIABILITY UNDER FEDERAL EMPLOYMENT DISCRIMINATION STATUTES

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I. INTRODUCTION

Over the past several decades Congress has sought to eliminate discrimination in the workplace through a series of statutes that impose liability on employers for their discriminatory employment practices.[1]

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1. *See, e.g.*, Equal Pay Act of 1963, 29 U.S.C. § 206(d) (1994) (prohibiting discrimination against women with respect to wages); Civil Rights Act of 1964 tit. VII, 42 U.S.C. § 2000e to 2000e-17 (1994) (prohibiting discrimination in employment on basis of race, color, religion, sex, or national origin); Age Discrimination in Employment Act of 1967, 29 U.S.C. §§ 621-634 (1994) (protecting persons age 40 and over from discrimination based on age); Rehabilitation Act of 1973, 29 U.S.C. §§ 701-795 (1994) (prohibiting disability-based discrimination); Americans with Disabilities Act of 1990, 42 U.S.C. §§ 12101-12213 (1994) (prohibiting discrimination against qualified individuals with disabilities on the basis of disability); Civil Rights Act of 1991, Pub. L. No. 102-166, 105 Stat. 1071 (codified as amended in scattered sections of 2 U.S.C., 29 U.S.C. & 42 U.S.C.) (modifying and strengthening protections of Title VII, ADA and other statutes); Family and Medical Leave Act of 1993, 29 U.S.C. §§ 2601-19,

Courts have struggled for almost as long to define the exact contours of this legislation in order to carry congressional intentions into practice. Because a company only can act through its employees, it has been almost universally accepted by courts that Congress intended for employers to be liable for the discriminatory conduct of their agents.[2] Absent vicarious liability, the victim of employment discrimination would have recourse only against the discriminating actor in his or her individual capacity—a result that, in most cases, would foreclose any meaningful relief for the victim and, therefore, do little to actually deter workplace discrimination.

Oddly enough, one of the questions currently dividing courts is whether agents who discriminate can be held liable in an individual capacity ("supervisor liability") under the current legislative scheme. Most of the circuit courts which have faced the question of supervisor liability thus far have concluded that agents cannot be held individually liable.[3] A substantial number of courts and commentators, however, have reached the opposite conclusion, pointing to the dual purposes of compensation and deterrence embodied in anti-discrimination statutes.[4] Because most claims under federal anti-discrimination statutes are brought directly against the employer, the issue of supervisor liability has arisen in relatively few cases so far. The question of personal

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2651-54 (1994) (protecting against discrimination on basis of need for family and medical leave).

2. The Supreme Court has observed: "[C]ourts have consistently held employers liable for the discriminatory discharges of employees by supervisory personnel, whether or not the employer knew, should have known, or approved of the supervisor's actions." Meritor Sav. Bank v. Vinson, 477 U.S. 57, 70-71 (1986).

3. *See, e.g.*, Tomka v. Seiler Corp., 66 F.3d 1295, 1313 (2d Cir. 1995) (holding that a supervisor is not individually liable under Title VII); EEOC v. AIC Sec. Investigations, Ltd., 55 F.3d 1276, 1279 (7th Cir. 1995) (holding that a supervisor is not individually liable under ADA); Williams v. Banning, 72 F.3d 552, 555 (7th Cir. 1995) (holding that a supervisor is not individually liable under Title VII); Smith v. Lomax, 45 F.3d 402, 403 n.4 (11th Cir. 1995) (stating that supervisors are not individually liable under ADEA or Title VII); Birbeck v. Marvel Lighting Corp., 30 F.3d 507, 510-11 (4th Cir. 1994) (holding that a supervisor is not individually liable under ADEA); Grant v. Lone Star Co., 21 F.3d 649, 653 (5th Cir. 1994) (holding that a supervisor is not individually liable under Title VII); Miller v. Maxwell's Int'l, Inc., 991 F.2d 583, 588 (9th Cir. 1993) (stating that a supervisor is not individually liable under ADEA or Title VII); Sauers v. Salt Lake City County, 1 F.3d 1122, 1125 (10th Cir. 1993) (stating that a supervisor is not individually liable under Title VII).

4. *See, e.g.*, Paroline v. Unisys Corp., 879 F.2d 100, 104 (4th Cir. 1989) (holding that a supervisor may be an employer under Title VII), *rev'd in part on other grounds*, 900 F.2d 27 (4th Cir. 1990) (en banc); Jones v. Continental Corp., 789 F.2d 1225, 1231 (6th Cir. 1986) (stating that individuals may be held liable under Title VII and § 1981); Dreisbach v. Cummins Diesel Engines, Inc., 848 F. Supp. 593, 597 (E.D. Pa. 1994) (holding that a supervisor may be individually liable under Title VII).

liability has generated new interest, however, with the passage of the Civil Rights Act of 1991 (1991 CRA)[5] which makes compensatory and punitive damages available in certain cases involving intentional discrimination.[6] As employers scramble to defend themselves against compensatory and punitive damages, the resulting assault on vicarious liability will undoubtedly force the issue of personal liability into the spotlight and require courts to determine exactly what role individual liability is to play in the enforcement of federal employment discrimination laws.

Although imposing liability on both the employer entity and the supervisor actually responsible for the discrimination may indeed deter individuals from engaging in such conduct while expanding the sources from which a victim could recover, other policy considerations, particularly the inherent conflict between vicarious and personal liability, counsel against holding supervisors individually liable for their discriminatory actions. This Article explores the debate surrounding supervisor liability under federal employment discrimination statutes, focusing primarily on the conflicting policy arguments which will likely play a greater role in resolving this issue than the ambiguous language and virtually nonexistent legislative histories of the statutes themselves. Part II addresses the federal anti-discrimination statutes individually and the approaches taken by various courts in analyzing the issue of supervisor liability under each statute. Part III attempts to weigh the competing policies that bear on the issue of supervisor liability and concludes that holding supervisors personally liable for their actions is counterproductive to the goal of eradicating discrimination in the workplace. Finally, Part IV of this Article calls on Congress to create a uniform statutory approach to supervisor liability in order to prevent well meaning courts from inadvertently undermining the exclusive protections afforded by federal law to victims of employment discrimination.

5. Pub. L. No. 102-166, 105 Stat. 1071 (1994) (codified as amended in scattered sections of 2 U.S.C., 29 U.S.C. & 42 U.S.C.).

6. The 1991 Civil Rights Act amends Title VII and the ADA to permit recovery of compensatory and punitive damages in cases of intentional discrimination. *See* 42 U.S.C. § 1981a(a)(2) (1994). The statute places caps on the amount of damages recoverable, ranging from $50,000 to $300,000 depending on the size of the employer. *See* 42 U.S.C. § 1981a(b)(3) (1994).

II. THE STATUTES

A. *Title VII*

The issue of supervisor liability has thus far arisen most often under Title VII of the Civil Rights Act of 1964[7] which prohibits employers from discriminating against individuals on the basis of "race, color, religion, sex or national origin."[8] The Act defines an "employer" as "a person engaged in an industry affecting commerce who has fifteen or more employees . . . and any agent of such a person."[9] It is this "agent" language which lies at the heart of the debate over personal liability for supervisors. Only "employers" are prohibited from discriminating and, thus, only statutorily defined employers can be held liable under Title VII. Courts upholding supervisor liability read the inclusion of "agents" in Title VII's liability section as indicating a desire to hold agents individually liable for their own discriminatory acts.[10] Those opposing this liability, on the other hand, contend that this language is simply a codification of the respondeat superior doctrine included to ensure that employers would be held vicariously liable for the acts of their agents.[11] While neither of these interpretations finds express support in Title VII's legislative history, both positions draw convincingly from the statutory language and policies reflected in Title VII.

The courts which oppose supervisor liability under Title VII reject the "plain meaning" approach urged by proponents as inappropriate given that the agent language contained in the definition of employer is capable of more than one meaning.[12] In support of their position, opponents of supervisor liability point to the fact that this agent language has generally served as the basis for holding employers vicariously liable for the acts of their agents under Title VII. Indeed, the Supreme Court has agreed that by using the term "agent" in the

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7. 42 U.S.C. §§ 2000e to 2000e-17 (1994).

8. *Id.* § 2000e-2(a).

9. *Id.* § 2000e(b).

10. *See, e.g., Jones*, 789 F.2d at 1231 ("[T]he law is clear that individuals may be held liable . . . as 'agents' of an employer under Title VII."); Griffith v. Keystone Steel & Wire Co., 858 F. Supp. 802, 805-06 (C.D. Ill. 1994) ("the law of agency recognizes individual liability for agents. . . . [I]ndividual employees may be held liable under Title VII."); Lamirande v. Resolution Trust Corp., 834 F. Supp. 526, 528 (D.N.H. 1993) ("The plain language of Title VII clearly impose [sic] individual liability upon '*any agent of*' and 'employer.'").

11. *See, e.g., AIC*, 55 F.3d at 1281 ("[T]he actual reason for the 'and any agent' language in the definition of 'employer' was to ensure that courts would impose respondeat superior liability upon employers for the acts of their agents."); *Miller*, 991 F.2d at 587 (stating that the obvious purpose is to impose respondeat superior liability on employers).

12. *See, e.g., AIC*, 55 F.3d at 1281; *Miller*, 991 F.2d at 587.

statutory definition of employer, "Congress wanted courts to look to agency principles for guidance in th[e] area" of employer liability.[13] It is true that courts have universally adopted the view that Title VII incorporates the vicarious liability doctrine of respondeat superior[14] which makes a master liable for the torts of his servants committed while acting in the scope of their employment.[15] Recognition that Title VII's use of "agent" was intended to incorporate the principle of respondeat superior alone, however, does not entirely resolve the issue of personal liability for agents. At common law, agents are individually liable for their own torts notwithstanding the fact that their employers also might be held vicariously liable.[16] Title VII claims are not common-law claims,[17] however, and the issue of supervisor liability must, therefore, turn on whether Congress intended Title VII's definition of employer to create only a vicarious liability scheme or also to impose individual liability on agents themselves.[18] Congress' intent, however, is not easy to discern and as a result, there is a judicial split of authority with each side claiming to uphold congressional will.

1. Opponents of Supervisor Liability

Courts which have rejected the imposition of supervisor liability find congressional support for this view from four main areas. First, the limited definition of an "employer" under Title VII is incongruous with supervisor liability.[19] Second, the administrative requirements of Title VII are most appropriate when applied to business entities rather than individuals.[20] Third, the remedial scheme of Title VII makes more sense when there is no supervisor liability.[21] Finally, the legislative history of the Title is entirely silent on the issue of supervisor liability.[22]

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13. *Meritor*, 477 U.S. at 72.

14. *See, e.g., id.* at 70-71 (noting that courts have routinely applied vicarious liability principles to hold employers liable under Title VII).

15. *See* RESTATEMENT (SECOND) OF AGENCY § 219(1) (1958).

16. *See* RESTATEMENT (SECOND) OF AGENCY § 343 (1958).

17. *See Meritor*, 477 U.S. at 72 (recognizing that "common law [agency] principles may not be transferable in all their particulars to Title VII").

18. At least one court has relied on the "and any agent" language used in Title VII's definition of "employer" as a basis for rejecting supervisor liability. "The use of the conjunctive word 'and,' as opposed to the disjunctive word 'or,' supports the argument that Congress merely intended to incorporate respondeat superior into the statute." Johnson v. Northern Indiana Pub. Serv. Co., 844 F. Supp. 466, 469 (N.D. Ind. 1994).

19. *See infra* text accompanying notes 23-26.

20. *See infra* text accompanying notes 27-30.

21. *See infra* text accompanying notes 31-40.

22. *See infra* text accompanying notes 41-53.

The courts which have rejected supervisor liability under Title VII have done so primarily by reading the Act's agent provision in conjunction with other language in the statute that indicates a lack of desire on the part of Congress to hold agents individually liable for their discriminatory actions.[23] Perhaps the strongest argument against supervisor liability is found in Title VII's "employer" definition itself. By excluding employers with fewer than fifteen employees from Title VII's coverage,[24] Congress sought in part to protect small businesses from the costs associated with litigation and complying with the many administrative requirements of Title VII.[25] In light of these concerns, it is, in the words of the Ninth Circuit, "inconceivable that Congress intended to allow civil liability to run against individual employees."[26]

Similarly, the administrative requirements imposed on employers under Title VII lend support to the conclusion that the agent language was included in the definition of "employer" for the purpose of codifying respondeat superior rather than extending liability to agents in their individual capacity.[27] Section 709(c) requires every employer to keep certain records of its employment practices.[28] Section 711 also

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23. *See, e.g., Miller*, 991 F.2d at 587.

24. *See* 42 U.S.C. § 2000e(b) (1994). As originally enacted, the 1964 Act applied only to employers with 25 or more employees. *See* Civil Rights Act of 1964, Pub. L. No. 88-352, § 701(b), 78 Stat. 241, 253. The 1964 Act was amended in 1972 to expand its coverage to those employers with fifteen or more employees. *See* Equal Employment Opportunity Act of 1972, Pub. L. No. 92-261, § 2(2), 86 Stat. 103, 103.

25. *See AIC*, 55 F.3d at 1281 ("That limitation struck a balance between the goal of stamping out all discrimination and the goal of protecting small entities from the hardship of litigating discrimination claims."); *Birbeck*, 30 F.3d at 510 (recognizing that purpose of similar provision in the ADEA "can only be to reduce the burden of ADEA on small businesses").

26. *Miller*, 991 F.2d at 587. This reasoning has been widely followed by other courts. *See, e.g.*, Caplan v. Fellheimer Eichen Braverman & Kaskey, 882 F. Supp. 1529, 1532 (E.D. Pa. 1995); Crawford v. West Jersey Health Sys., 847 F. Supp. 1232, 1237 (D.N.J. 1994); Saville v. Houston County Healthcare Auth., 852 F. Supp. 1512, 1524 (M.D. Ala. 1994).

27. *See, e.g.*, Clara J. Montanari, *Supervisor Liability Under Title VII: A "Feel Good" Judicial Decision*, 34 DUQ. L. REV. 351, 361-62 (1996) (arguing use of "employer" throughout Title VII is inconsistent with supervisor liability).

28. Civil Rights Act of 1964, § 709(c), 42 U.S.C. § 2000e-8(c) (1994). Section 709(c) states, in pertinent part:

> [E]very employer . . . subject to this subchapter shall (1) make and keep such records relevant to the determinations of whether unlawful employment practices have been or are being committed, (2) preserve such records for such periods, and (3) make such reports therefrom, as the [Equal Opportunity Employment] Commission shall prescribe by regulation or order. . . . The Commission shall, by regulation, require each employer . . . subject to this subchapter which controls an apprenticeship or other training program to maintain such records as are reasonably necessary to carry out the purpose of this subchapter, including, but not limited to,

requires employers to post notices of Title VII's provisions in the workplace and provides penalties for the failure to do so.[29] If an agent is an "employer" for purposes of Title VII's liability provision, it would seem to follow that an agent is also an employer for all other purposes where that term is used. While an individual supervisor could certainly be expected to keep records of his own employment practices, a supervisor obviously cannot be held responsible for not posting notices on his employer's property. In fact, the language of Section 711—"[e]very employer . . . shall post . . . upon *its* premises . . . a notice"—clearly indicates that this notice requirement is aimed at entities, not individual supervisors.[30]

Opponents of supervisor liability also look to the original remedial provisions of Title VII as supporting the view that individual supervisors are not proper parties for liability under Title VII. Section 706(g) provides for the enjoinment of unlawful practices and "such affirmative action as may be appropriate, which may include, but is not limited to, reinstatement or hiring of employees, with or without back pay. . . ."[31] Although the Supreme Court has never directly addressed the issue, the majority of lower courts have interpreted section 706(g) as providing only for equitable relief; that is, this provision has been construed as excluding compensatory and punitive damages.[32] Reinstatement and hiring are remedies that only the employer entity itself can provide.

> a list of applicants who wish to participate in such program, including the chronological order in which such applications were received, and shall furnish to the Commission, upon request, a detailed description of the manner in which persons are selected to participate. . . .

Id. § 2000e-8(c).

29. Civil Rights Act of 1964, § 711, 42 U.S.C. § 2000e-10 (1994). Section 711 states, in pertinent part:

> (a) Every employer . . . shall post and keep posted in conspicuous places upon its premises where notices to employees, applicants for employment, and members are customarily posted a notice to be prepared or approved by the Commission setting forth excerpts from or, summaries of, the pertinent provisions of this subchapter and information pertinent to the filing of a complaint.
> (b) A willful violation of this section shall be punishable by a fine of not more than $100 for each separate offense.

Id. § 2000e-10.

30. *Id.* § 2000e-10(a) (emphasis added).

31. Civil Rights Act of 1964 § 706(g), 42 U.S.C. § 2000e-5(g)(1) (1994).

32. *See, e.g., Jones*, 789 F.2d at 1232. The 1991 CRA's addition of compensatory and punitive damages to Title VII would seem to endorse this reading of § 706(g). *See* 42 U.S.C. § 1981a(a)(1) (1994).

Although backpay is certainly a form of damages that could be imposed directly on individual agents, the language of section 706(g) was borrowed from the National Labor Relations Act[33] under which agents had not been held personally liable for backpay. Because the relief initially available under Title VII was interpreted to include only remedies that were outside of an individual agent's capacity to provide, most courts have been fairly comfortable concluding that Congress did not intend for agents to be held personally liable under Title VII.[34]

As proponents of supervisor liability are quick to point out, the punitive and compensatory damages made available under Title VII by 1991 CRA are the types of remedies for which individual agents could be held responsible.[35] Those that refuse to recognize individual liability under Title VII respond that nothing in the 1991 CRA or its legislative history supports the view that damages were expanded under Title VII for the purpose of creating individual liability for supervisors.[36] Rather, the fact that Congress chose to cap punitive damages based on the size of the employer suggests quite the opposite.[37] Caps on punitive

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33. *See* 29 U.S.C. §§ 151-169 (1994). 29 U.S.C. § 160(c) states that an employer engaged in unfair labor practices shall "take such affirmative action including reinstatement of an employee with or without back pay. . . ." *See also Meritor*, 477 U.S. at 75 n.1 (Marshall, J., concurring); Albemarle Paper Co. v. Moody, 422 U.S. 405, 419 (1975).

34. *See, e.g., AIC*, 55 F.3d at 1281; Grant v. Lone Star Co., 21 F.3d 649, 653 (5th Cir. 1994); *see also* Friend v. Union Dime Sav. Bank, No. 79 Civ. 5450, 1980 WL 227, at *4 (S.D.N.Y. Aug. 18, 1980) (relying on interpretation of NLRA to reject supervisor liability under Title VII and ADEA).

35. *See, e.g.*, Bridges v. Eastman Kodak Co., 800 F. Supp. 1172, 1180 (S.D.N.Y. 1992) (allowing supervisor liability under Title VII based on addition of compensatory and punitive damages), *overruled by* Tomka v. Seiler Corp., 66 F.3d 1295, 1313 (2d Cir. 1995); *see also* Christopher Greer, Note, *"Who, Me?": A Supervisors' Individual Liability for Discrimination in the Workplace*, 62 FORDHAM L. REV. 1835, 1846 (1994) ("Imposing liability on such individuals for their own acts . . . corresponds with Congress's desire to provide increased remedies and protections under Title VII . . . .").

36. *See AIC*, 55 F.3d at 1281 ("It is a long stretch to conclude that Congress silently intended to abruptly change its earlier vision [as to liability] through an amendment to the remedial portions of the statute alone."); Smith v. Capitol City Club, 850 F. Supp. 976, 980 (M.D. Ala. 1994) (rejecting addition of damages as sufficient basis for inferring individual liability); *see also* Montanari, *supra* note 27, at 365-68 (finding no basis in legislative history of 1991 CRA for inferring congressional intent to hold agents individually liable under Title VII).

37. The limits imposed on damages for intentional discrimination under Title VII are:

> (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;
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> (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 calen-

damages were included so that awards under Title VII would bear some logical relation to the employer's wealth and ability to pay.[38] Because a supervisor's wealth bears absolutely no relationship to the size of his employer, imposing liability on supervisors would result in the illogical possibility that a supervisor for a large company could be saddled with higher punitive damages than the owner of a smaller business.[39] If Congress intended to impose liability on supervisors, it would make little sense to use the employer's size as the measure of damages. By tying punitive damages to the employer's size, opponents of supervisor liability argue, Congress implicitly acknowledged that such damages would be imposed only on business entities and business owners.[40]

The courts that read the agent language in Title VII's definition of employer as merely incorporating vicarious liability rely on the fact that there is no mention of individual liability for agents in the legislative histories of either the original Act or its several amendments.[41] Considering the extent of the debates surrounding the impact that Title VII would have on businesses, it is reasonable to presume that Congress would also have discussed the Act's effect on individual supervisors if Congress had intended or anticipated supervisor liability.[42] Moreover, where the term "employer" is used throughout the debates, it most often

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dar 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).

38. *See* H.R. REP. NO. 102-40(I), at 73 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 611 (noting that greater punitive damages should be assessed against larger and wealthier employers).

39. The private plaintiff took an even more ridiculous position in *AIC*, suggesting that because § 1981a(b)(3) only addresses employers with 15 or more employees, Congress intended no cap at all on individual liability for damages under the 1991 CRA. *See AIC*, 55 F.3d at 1281 n.6. The court rejected this argument. *See id.*

40. *See, e.g., AIC*, 55 F.3d at 1281; *Miller*, 991 F.2d at 587 n.2; *Saville*, 852 F. Supp. at 1524.

41. *See, e.g., Grant*, 21 F.3d at 653 (reasoning that absence of supervisors in Title VII's list of potential defendants indicates intent to exclude individual supervisors from liability where nothing in statute or legislative history suggests otherwise and Congress specifically included individuals among those to be held liable in other civil rights statutes such as § 1983); *Miller*, 991 F.2d at 587-88 n.2 (noting that if Congress sought to impose individual liability under Title VII Congress would have made reference to individuals in the damages provisions of 1991 CRA).

42. For a discussion of the legislative histories of Title VII and the 1991 CRA and the absence of any reference to individual liability for supervisors, see Montanari, *supra* note 27, at 360-67.

connotes a business entity rather than an individual.[43] While it is indeed the statutory definition of "employer" that is central to the issue of supervisor liability, it is nonetheless significant that nothing in Congress' use of the term "employer" during Title VII legislative debates suggests an intent to hold supervisors individually liable as employers under the Act.

Congress' failure to explain what exactly it intended by including "agent" in Title VII's definition of employer may, as several courts have suggested,[44] be explained by the relationship between Title VII and the National Labor Relations Act (NLRA).[45] The NLRA's definition of "employer," which includes "any person acting as an agent of an employer,"[46] was a direct response by Congress to the perceived inadequacies of the original language of the Act, which had defined an employer to include any person "acting in the interest of an employer."[47] Under the earlier version employers were held liable for the actions of employees who had acted outside the scope of their duties.[48] Simultaneously, it also was conceivable that this language would permit an employer to escape liability for the actions of an employee on the theory that the employee had not acted in the employer's interest.[49] Thus, by modifying the NLRA to include "agents," Congress made clear its intent to incorporate the ordinary rule of agency law which makes employers liable for the actions of employees acting within the actual or apparent scope of their authority.[50] While courts accordingly have interpreted the agent language of the NLRA as providing for vicarious liability, courts also have long interpreted the limited remedies available under the NLRA as precluding individual liability for agents.[51] Because

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43. *See id.* at 363-65 (enumerating uses of term "employer" throughout debates that are inconsistent with any congressional intent to apply that term to individuals).

44. *See, e.g., Friend*, No. 79 Civ. 5450, 1980 WL 227, at *4 (recognizing that "and any agent" language of Title VII was borrowed from NLRA under which agents are not held individually liable). *But see Bridges*, 800 F. Supp. at 1180 (imposing individual liability without reference to *Friend*), *overruled by* Tomka v. Seiler Corp. 66 F.3d 1295, 1313 (2d Cir. 1995).

45. *See* 29 U.S.C. §§ 151-169 (1994).

46. *Id.* § 152(2).

47. National Labor Relations Act, ch. 372, § 2, 49 Stat. 449, 450 (1935).

48. *See* H.R. CONF. REP. NO. 510, 80th Cong., 1st Sess. (1947), *reprinted in* 1947 U.S.C.C.A.N. 1135, 1137 ("[T]he Board has on numerous occasions held an employer responsible for the acts of subordinate employees and others although not acting within the scope of any authority from the employer, real or apparent.").

49. *See* 93 CONG. REC. 6858-59 (1947) (statement of Sen. Taft).

50. *See id.* at 6859 ("This restores the law of agency as it has been developed at common law.") (statement of Sen. Taft).

51. *See* Gary W. Florkowski, *Personal Liability Under Federal Labor and Employment Laws: Implications for Human Resources Managers*, 14 EMP. REL. L.J. 593, 594 (1989) (noting

Title VII was enacted against the well established backdrop of the NLRA and adopted not only its agent language but also its remedial provisions, many courts find the absence of any reference to individual liability in Title VII's legislative history unremarkable; having incorporated the NLRA's liability scheme into Title VII, Congress simply did not anticipate that individual liability for agents would ever be an issue under Title VII.[52]

2. Proponents of Supervisor Liability

Although the courts which have opposed liability for supervisors have strong arguments in their favor, those which uphold this type of liability are not without support. In an attempt to show that Congress intended supervisor liability under Title VII, these courts rely on three primary arguments. Initially, the plain language of the statute is broad enough to include liability for individuals as well as business entities.[53] In addition, imposing supervisor liability would promote the twin policy goals of Title VII.[54] Finally, inclusion of punitive and compensatory damages in the remedial scheme of Title VII is evidence that individuals and businesses would be held responsible under the statute.[55]

Proponents of individual liability for supervisors also are not at all troubled by the absence of any reference to individual liability in the legislative histories of Title VII or its subsequent amendments. Legislative history, is after all, a method of determining congressional intent where such intent is not discernible from the statutory language itself. Thus, the lack of any indication that Congress intended otherwise favors giving the definition of "employer" its plain meaning.[56] Because that definition includes "any agent of such a person," agents are statutorily defined employers and are according to supporters of individual liability, therefore, parties to whom liability attaches under Title VII.[57] Moreover, proponents argue, this agent language would be

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that although NLRA's language could be interpreted to support individual liability, courts "have reflected little willingness to adopt this perspective").

52. *See, e.g., Friend*, No. 79 Civ. 5450, 1980 WL 227, at *4 (drawing on NLRA's legislative history to reject individual liability under Title VII and ADEA).

53. *See infra* text accompanying notes 56-59.

54. *See infra* text accompanying notes 60-65.

55. *See infra* text accompanying notes 66-70.

56. *See, e.g.*, Ball v. Renner, 54 F.3d 664, 667 (10th Cir. 1995).

57. *See, e.g.*, Paroline v. Unisys Corp., 879 F.2d 100, 104 (4th Cir. 1989) (reading definition of "employer," which includes agency language, as enumeration of liable parties), *rev'd in part on other grounds*, 900 F.2d 27 (4th Cir. 1990) (en banc); *Jones*, 789 F.2d at 1231 ("[T]he law is clear that individuals may be held liable for violations of § 1981, and as 'agents' of an employer under Title VII.") (citations omitted).

redundant if read merely as making an employer liable for the conduct of its agent.[58] Because an employer entity, such as a corporation, can only act through its agents, common law agency principles would impose liability on employers for the acts of their agents even absent the agent language in Title VII. Thus argue proponents of supervisor liability, Congress' decision to define agents as employers only makes sense if read to impose individual liability on agents as statutorily defined employers.[59]

The argument most often put forth in support of imposing Title VII liability on individual supervisors is that doing so would further Title VII's twin goals[60] of eliminating employment discrimination[61] and compensating victims of such discrimination.[62] Placing liability directly on individual supervisors who discriminate against their subordinates seems to be a fairly effective way of pressuring supervisors not to engage in such activity. While the effectiveness of Title VII obviously depends on encouraging business entities to monitor their employment practices and prevent discrimination on the part of management,[63] the fear of individual liability would provide an additional and necessary check against insufficient or insincere monitoring by the business entity.[64] Moreover, in today's mobile workforce, many management personnel are more likely to respond to the threat of a lawsuit than to the threat of a reprimand from their employer. Individual liability also would provide the victim of discrimination with an additional party against whom to seek recovery. Although conventional wisdom suggests that full recovery is more likely to come from a business entity than a potentially judgment-proof supervisor, in situations such as the entity's

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58. *See, e.g., Ball*, 54 F.3d at 667.

59. *See id.*

60. *See Albemarle*, 422 U.S. at 421 (noting that the "central statutory purposes" of "eradicating discrimination" and "making persons whole . . . for past discrimination").

61. *See, e.g.*, Garcia v. ELF Atochem N. Am., 28 F.3d 446, 451 (5th Cir. 1994) (concluding that deterrence requires "hold[ing] liable those with power over the plaintiff which exceeds that of mere co-workers"); Hamilton v. Rodgers, 791 F.2d 439, 443 (5th Cir. 1986) (reasoning that not imposing individual liability "would encourage supervisory personnel to believe that they may violate Title VII with impunity").

62. *See, e.g.*, Johnson v. University Surgical Group Assocs., 871 F. Supp. 979, 986 (S.D. Ohio 1994) (concluding that expanded liability is more consistent with goal of making plaintiff whole than limiting those against whom plaintiff can recover); Vakharia v. Swedish Covenant Hosp., 824 F. Supp. 769, 785-86 (N.D. Ill. 1993) (noting that individual liability would be only avenue for relief where employer entity has gone bankrupt).

63. This simple truth is apparent in Congress' decision to impose liability under Title VII on employers rather than persons.

64. *See, e.g.*, Jendusa v. Cancer Treatment Ctrs. of Am., Inc., 868 F. Supp. 1006, 1012 (N.D. Ill. 1994) (suggesting that employers "more often than not" fail to discipline supervisors even after a jury finds that the supervisor discriminated).

bankruptcy or dissolution, relief would be foreclosed unless the victim could recover directly from the individual supervisor.[65]

Supporters of individual liability also look upon the compensatory and punitive damages added to Title VII by the 1991 CRA as indicative of an intent to make agents liable for their own conduct.[66] Not only are these tort-like remedies the kind that individuals can be expected to pay,[67] as between the employer entity and the discriminating agent, fairness favors imposing liability on the more culpable party.[68] Even under the common law, the doctrine of respondeat superior does not absolve an agent of liability or prevent a victim from proceeding directly against him.[69] Similarly, proponents contend, interpreting the agent language in Title VII's definition of employer literally so as to create individual liability for agents is not only not at all inconsistent with Congress' intent to codify respondeat superior, but also makes the most efficient use of the deterrent and penal aspects of damages.[70]

B. *The Age Discrimination in Employment Act*

The Age Discrimination in Employment Act (ADEA)[71] makes it unlawful for an employer "to fail or refuse to hire or to discharge any individual or otherwise discriminate against any an individual with respect to his compensation, terms, conditions, or privileges of employ-

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65. *See, e.g., Vakharia*, 824 F. Supp. at 785-86.

66. *See, e.g., Bridges*, 800 F. Supp. at 1180, *overruled by* Tomka v. Seiler Corp., 66 F.3d 1295, 1313 (2d Cir. 1995); Greer, *supra* note 35, at 1846-47.

67. *See supra* note 39 and accompanying text (explaining that equitable relief initially available under Title VII led many courts to conclude that only employers and not individuals were liable under Title VII).

68. *See* Scott B. Goldberg, Comment, *Discrimination by Managers and Supervisors: Recognizing Agent Liability Under Title VII*, 143 U. PA. L. REV. 571, 589 (1994) ("[B]lameworthiness theory of tort liability also requires that victims be allowed to sue agents who discriminate [under Title VII].").

69. *See* RESTATEMENT (SECOND) OF AGENCY § 343 (1958).

70. This view is supported by Congress' desire to strengthen Title VII through the 1991 CRA which states:

> The Congress finds that—
>
> (1) additional remedies under Federal law are needed to deter unlawful harassment and intentional discrimination in the workplace;
>
> . . . .
>
> (3) legislation is necessary to provide additional protections against unlawful discrimination in employment.

Civil Rights Act of 1991, Pub. L. No. 102-166, § 2, 105 Stat. 1071, 1071 (1991).

71. *See* 29 U.S.C. §§ 621-634 (1994).

ment, because of such individual's age. . . ."[72] When originally passed in 1967, the ADEA borrowed its definition of "employer" from Title VII with minor differences related only to the size of the employers that fell within the Act's coverage.[73] Thus, under the ADEA, an employer is defined as "a person engaged in an industry affecting commerce who has twenty or more employees . . . [and] any agent of such a person. . . ."[74] The similarities between the employer definitions in the ADEA and Title VII have led most courts and commentators to analyze the issue of supervisor liability in the same manner under both Acts.[75] Because the ADEA borrowed its enforcement provisions not from Title VII, but from the Fair Labor Standards Act of 1938 (FLSA),[76] however, several courts and commentators have relied on the parallels between the ADEA and the FLSA as a basis for distinguishing between Title VII and the ADEA for purposes of individual liability.[77]

The FLSA, which defines "employer" to include "any person acting directly or indirectly in the interest of an employer in relation to an employee,"[78] has long been interpreted by courts as imposing personal liability on individual supervisors.[79] Because the Supreme Court has noted that the specific and selective incorporation of the FLSA's remedy and procedural provisions into the ADEA evidenced a congressional intent to adopt existing interpretations of those provisions into the ADEA,[80] some courts have extended the FLSA's imposition of personal liability on supervisors as "employers" to the ADEA despite the very different definitions of "employer" used in each statute.[81] For these courts, the ADEA's incorporation of the FLSA's enforcement scheme is more important in unraveling the issue of supervisor liability under the ADEA than its definition of "employer" which, although borrowed

72. *Id.* § 623(a)(1). The protection under this statute is limited to individuals who are at least 40 years of age. *Id.* § 631(a).

73. *Compare id.* § 630(b) *with* 42 U.S.C. § 2000e(b) (1994).

74. 29 U.S.C. § 630(b).

75. *See, e.g., AIC*, 55 F.3d at 1279-80; *Birkbeck*, 30 F.3d at 510-11; *Miller*, 991 F.2d at 587-88; Matthews v. Rollins Hudig Hall Co., 874 F. Supp. 192, 194 n.1 (N.D. Ill. 1995).

76. *See* 29 U.S.C. §§ 201-219 (1994).

77. *See, e.g.*, House v. Cannon Mills Co., 713 F. Supp. 159, 160-62 (M.D.N.C. 1988); *Miller*, 991 F.2d at 589-90 (Fletcher, J., dissenting).

78. 29 U.S.C. § 203(d) (1994).

79. *See, e.g.*, Donovan v. Sabine Irrigation Co., 695 F.2d 190, 194-95 (5th Cir. 1983); Hodgson v. Royal Crown Bottling Co., 324 F. Supp. 342, 347 (N.D. Miss. 1970), *aff'd*, 465 F.2d 473 (5th Cir. 1972); Shultz v. Chalk-Fitzgerald Constr. Co., 309 F. Supp. 1255, 1257 (D. Mass. 1970).

80. *See* Lorillard v. Pons, 434 U.S. 575, 582 (1978).

81. *See, e.g., Miller*, 991 F.2d at 589 (Fletcher, J., dissenting); *House*, 713 F. Supp. at 161-62.

from Title VII, is viewed at best as ambiguous with regard to individual liability for agents.

The courts which read the ADEA as imposing supervisor liability also have relied on the fact that the remedial scheme of the ADEA is much broader than that of Title VII as originally enacted. Prior to the 1991 CRA, damages were not available under Title VII; rather, relief under Title VII was originally limited to equitable remedies such as reinstatement and backpay.[82] The ADEA, on the other hand, provided from its inception for liquidated damages in cases involving willful violations.[83] Thus, while the remedies once available under Title VII were arguably not the type of relief that supervisors could be expected to provide,[84] the same was not true of the ADEA. Noting this distinction, several courts have reasoned that while Title VII's limited remedial scheme might very well suggest that Congress did not intend for supervisors to be held individually liable under Title VII, the ADEA's broader scope of relief is much more consistent with the imposition of individual liability.[85] For these courts, the additional fact that the ADEA's damages provision was borrowed directly from the FLSA, which holds supervisors directly liable for their own conduct, is conclusive evidence of a congressional intent to create a similar liability scheme under the ADEA.[86]

Those courts which have refused to hold supervisors individually liable under the ADEA have rejected the ADEA-FLSA comparisons and have drawn instead on the similarities between the ADEA and Title VII.[87] Although Congress borrowed the ADEA's remedy and procedural provisions from the FLSA, Congress did not similarly adopt the FLSA's definition of "employer" but instead modeled the ADEA's liability provision on the agent language found in Title VII.[88] Thus, these courts reason, reliance on FLSA case law should be limited to those provisions that were specifically incorporated into the ADEA.[89] In other words, Congress could have easily adopted the FLSA's definition of "employer" so as to make clear its intent to incorporate the

82. *See supra* text accompanying notes 36-39 (describing original remedial scheme of Title VII).

83. *See* 29 U.S.C. § 626(b) (1994).

84. *See supra* text accompanying notes 37-40 (explaining link made by courts between Title VII relief provisions and congressional intent regarding individual liability for supervisors).

85. *See, e.g., Miller*, 991 F.2d at 589 (Fletcher, J., dissenting); *House*, 713 F. Supp. at 160.

86. *See, e.g., Miller*, 991 F.2d at 589 (Fletcher, J., dissenting); *House*, 713 F. Supp. at 160.

87. *See, e.g., Miller*, 991 F.2d at 588 n.3.

88. *See, e.g., id.*

89. *See, e.g., id.*

FLSA's liability scheme into the ADEA. Instead, Congress chose to borrow Title VII's definition of "employer" which was in turn modeled on the NLRA.[90] Whereas liability under the FLSA "is predicated not on the existence of an employer-employee relationship" but on an individual's willful conduct in relation to the employee,[91] the NLRA has long been understood to hold employers vicariously liable for the conduct of their agents but not to impose individual liability on the agents themselves.[92] Therefore, if Congress' adoption of the FLSA's enforcement provisions is viewed as an intent to incorporate the existing interpretations of these provisions into the ADEA, Congress' use of the employer definition found in the NLRA and Title VII must similarly be understood as a conscious decision not to make agents individually liable under the ADEA.[93]

The courts that reject supervisor liability under the ADEA because of its similarity to Title VII are not bothered by the fact that the two statutes vary in their scopes of relief. While the ADEA provides for liquidated damages that are not available under Title VII, the ADEA and Title VII are now much closer in terms of the relief they provide as a result of the 1991 CRA, which has made compensatory and punitive damages available under Title VII.[94] Thus, the original remedial differences between the ADEA and Title VII are no longer (if indeed they ever were) viewed by courts as a proper basis for distinguishing between the two statutes with regard to liability.[95] Additionally, in drafting the 1991 CRA, Congress limited the damages available under Title VII by reference to employer size without mentioning individuals or discontinuing Title VII's exemption for small employers.[96] Because

90. *See supra* text accompanying notes 45-52 (explaining link between Title VII and NLRA).

91. Wanamaker v. Columbian Rope Co., 740 F. Supp. 127, 135 (N.D.N.Y. 1990) (quoting Shultz v. Chalk-Fitzgerald Const. Co., 309 F. Supp. 1255, 1257 (D. Mass. 1990)).

92. *See supra* text accompanying notes 49-61 (describing legislative history of NLRA and its impact on Title VII case law).

93. *See, e.g., Miller*, 991 F.2d at 588 n.3 (refusing to apply FLSA liability scheme to ADEA where ADEA did not incorporate relevant FLSA provisions); *Bridges*, 800 F. Supp. at 1180 (interpreting Title VII liability provision by reference to ADEA), *overruled by* Tomka v. Seiler Corp., 66 F.3d 1295, 1313 (2d Cir. 1995).

94. *See* 42 U.S.C. § 1981a(a)(1) (1994) (permitting recovery of compensatory and punitive damages in cases of intentional discrimination under Title VII).

95. *See, e.g., Miller*, 991 F.2d at 588 n.3 (stressing that as a result of CRA 1991 "the liability schemes under Title VII and the ADEA are essentially the same in aspects relevant to th[e] issue [of relief]"). *But see id.* at 589 n.1 (Fletcher, J., dissenting) (contending that "ADEA still affords more expansive relief possibilities" than Title VII given damages caps applicable under Title VII).

96. *See supra* note 37 (setting forth Title VII's damages provision as amended by 1991

this damages scheme suggests that Congress did not intend to make agents individually liable for damages under Title VII, these courts reason, the prior availability of similar damages under the ADEA does not, by itself, indicate that Congress intended to hold agents individually liable under the ADEA.[97] Rather, for these courts, Congress' treatment of damages under Title VII reinforces the conclusion that the agent language of Title VII and the ADEA should be interpreted in the same way—namely, as precluding individual liability for agents.[98]

C. *The Americans with Disabilities Act*

The Americans with Disabilities Act of 1990 (ADA)[99] forbids a "covered entity" from discriminating in regard to employment decisions against qualified individuals with disabilities.[100] A "covered entity" is defined under the statute as "an employer, employment agency, labor organization, or joint labor-management committee."[101] An "employer," in turn, is defined as "a person engaged in an industry affecting commerce who has 15 or more employees . . . and any agent of such person."[102] Although enacted in 1990,[103] the ADA did not become effective until July 1992[104] and as a result, has thus far generated few judicial opinions directly addressing supervisor liability. It is proper to assume, however, that most courts will analyze the issue of individual liability in the same manner under both statutes because the ADA's definition of "employer" mirrors the language found in Title VII.[105]

CRA).

97. *See, e.g., Miller*, 991 F.2d at 587-88.

98. *See id.* Although this reasoning is sound, it also could be argued that by capping damage under Title VII but not the ADEA, Congress was seeking to draw further distinctions between their enforcement schemes rather than expressing an intent to treat individuals the same under both Acts.

99. *See* 42 U.S.C. §§ 12101-12213 (1994).

100. More specifically, the Act states that "[n]o covered entity shall discriminate against a qualified individual with a disability because of the disability of such individual in regard to job application procedures, the hiring, advancement, or discharge of employees, employee compensation, job training, and other terms, conditions, and privileges of employment." *Id.* § 12112(a).

101. *Id.* § 12111(2).

102. *Id.* § 12111(5)(A).

103. *See* Americans with Disabilities Act of 1990, Pub. L. No. 101-336, 104 Stat. 327.

104. *See* Americans with Disabilities Act of 1990, § 108, 104 Stat. at 337.

105. *Compare AIC*, 55 F.3d at 1282 (rejecting supervisor liability under ADA) *and* Williams v. Banning, 72 F.3d 552, 555 (7th Cir. 1995) (rejecting supervisor liability under Title VII) *with Jendusa*, 868 F. Supp. at 1010 (recognizing supervisor liability under ADA) *and Vakharia*, 824 F. Supp. at 784 (recognizing supervisor liability under Title VII). *See also supra* pt. II.A. (explaining courts' treatment of individual liability under Title VII).

Unlike the ADEA, which adopted Title VII's "employer" definition but borrowed its enforcement provisions from the FLSA, the ADA also adopted its remedy and procedural provisions directly from Title VII.[106] Accordingly, courts routinely have relied more heavily on Title VII case law when interpreting the ADA than when interpreting the ADEA.[107] Therefore, while the availability of liquidated damages under the ADEA has been viewed by some courts as a justification for imposing individual liability under the ADEA,[108] the absence of similar damages under the original version of the ADA will likely lead courts to reject Title VII case law and individual liability under the ADA on the theory that by providing only for equitable remedies that employer entities could grant, Congress did not intend to extend liability to agents.[109]

As in the Title VII context,[110] both opponents and supporters of supervisor liability under the ADA point to the changes wrought by the 1991 CRA as endorsing their positions. Proponents of supervisor liability contend that in adding compensatory and punitive damages to the remedies available under the ADA, Congress included damages that individuals could be expected to pay so as to make clear its intent that agents should be held directly liable under the ADA.[111] Opponents, on the other hand, look to the fact that the 1991 CRA caps damages by employer size as evidence that Congress did not intend to extend liability to individuals who would otherwise be exposed to unlimited liability under this scheme.[112] Although the ADA became effective only after the 1991 CRA was passed, the ADA was enacted prior to the 1991 CRA.[113] Thus, as in the case of Title VII, most courts probably will reject the notion that Congress sought to silently alter the ADA's definition of "employer" by simply amending its remedial provisions through the 1991 CRA.[114]

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106. *See AIC*, 55 F.3d at 1280 n.1.

107. *See supra* text accompanying notes 86-98 (explaining courts' use of ADEA-FLSA link as basis for distinguishing Title VII precedent when addressing supervisor liability under ADEA).

108. *See supra* text accompanying notes 86-98.

109. *See, e.g., AIC*, 55 F.3d at 1281 (rejecting supervisor liability under ADA in part because available remedies are only type obtainable from employer entity); *see also supra* text accompanying notes 31-34 (explaining courts' reliance on Title VII's limited equitable relief as basis for rejecting supervisor liability).

110. *See supra* text accompanying notes 35-40, 66-70 (describing impact of 1991 CRA on debate over supervisor liability under Title VII).

111. *See, e.g., Jendusa*, 868 F. Supp. at 1015.

112. *See, e.g., AIC*, 55 F.3d at 1281.

113. *Id.* at 1281 n.5.

114. *Id.*

D. *The Family Medical Leave Act*

The Family Medical Leave Act of 1993 (FMLA)[115] requires covered employers to provide "eligible" employees with up to twelve weeks of unpaid leave per year when the employee is unable to work because of a "serious health condition"[116] and prohibits employers from discriminating against or otherwise interfering with the rights of individuals under the Act.[117] "Employer" is defined under the FMLA as "any person engaged in commerce or in any industry or activity affecting commerce who employs 50 or more employees,"[118] but also includes "any person who acts, directly or indirectly, in the interest of an employer to any of the employees of such employer. . . ."[119] This latter language was modeled on that contained in the FLSA, which has long been interpreted as imposing individual liability on supervisors.[120] While FMLA's minimum employee threshold could be read as a rejection of individual liability as is done in the Title VII context,[121] Congress' decision to borrow the FLSA provision rather than Title VII's "agent" language has led most courts to follow FLSA case law and hold supervisors individually liable under the FMLA as well.[122]

E. *Sections 1981 and 1983*

Sections 1981 and 1983 establish statutory causes of actions for certain violations based on the United States Constitution. Because section 1981 and section 1983 are viewed as creating statutory torts,[123]

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115. *See* Pub. L. No. 103-3, 107 Stat. 6 (codified in scattered sections of 5 U.S.C. & 29 U.S.C.).

116. 29 U.S.C. § 2612(a)(1)(D) (1994). The FMLA also mandates employee leave for the birth or adoption of a child and for purposes of giving care to an immediate family member with a serious health condition. *See id.* § 2612(a)(1)(A)-(C).

117. *See id.* § 2615.

118. *Id.* § 2611(4)(A)(i).

119. *Id.* § 2611(4)(A)(ii)(I).

120. *See, e.g.*, Brocke v. Hamad, 867 F.2d 804, 808 n.6 (4th Cir. 1989); Donovan v. Agnew, 712 F.2d 1509, 1511 (1st Cir. 1983).

121. *See supra* text accompanying notes 29-31 (explaining inconsistency between holding individuals liable and excusing small businesses from statutory commands); *see also* Frizel v. Southwest Motor Freight, Inc., 906 F. Supp. 441, 449 (E.D. Tenn. 1995) (relying on similarities between FMLA and Title VII as justification for rejecting individual liability under FMLA).

122. *See, e.g.*, Waters v. Baldwin County, 936 F. Supp. 860, 863 (S.D. Ala. 1996); Knussman v. Maryland, 935 F. Supp. 659, 664 (D. Md. 1996); Johnson v. A.P. Prods., Ltd., 934 F. Supp. 625, 628 (S.D.N.Y. 1996); Freemon v. Foley, 911 F. Supp. 326, 332 (N.D. Ill. 1995); *see also* 29 C.F.R. § 825.104(d) 1998) (Department of Labor regulation stating that individuals acting in interest of employer are individually liable under FMLA).

123. *See, e.g.*, Al-Khazraji v. St. Francis College, 784 F.2d 505, 518 (3d Cir. 1986), *aff'd*, 481 U.S. 604 (1987).

the circuit courts have applied general tort principles to these statutes. Thus, in contrast to the federal anti-discrimination statutes specific to the employment context, it is fairly well established that individuals can be held personally liable under section 1981 and section 1983.[124] Although section 1981 and section 1983 reach much farther than the mere employer-employee relationship, these statutes merit a brief discussion here because they are applicable to certain types of employment discrimination.

Section 1981 prohibits discrimination on the basis of race in the formation and enforcement of contracts.[125] Because even at-will employment is a contractual relationship,[126] section 1981 provides a private cause of action for both public and private sector employees[127] who are subjected to race-based discrimination in the workplace. Although section 1981 and Title VII are for the most part interchangeable in cases involving race-based discrimination,[128] section 1981

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124. *See, e.g., Jones*, 789 F.2d at 1231 (stating that individuals may be held liable under § 1981); *Al-Khazraji*, 784 F.2d at 518 (holding that individuals may be held liable under § 1981); Musikiwamba v. ESSI, Inc., 760 F.2d 740, 748 (7th Cir. 1985) (stating that § 1981 "is aimed at rectifying individual acts of discrimination"); Faraca v. Clements, 506 F.2d 956, 959 (5th Cir. 1975) (holding that an individual may be held liable under § 1981). *Cf.* Monell v. Department of Social Servs., 436 U.S. 690-91 (1978) (holding that a municipality qualifies as a person under § 1983 and may be held liable).

125. *See* 42 U.S.C. § 1981 (1994). The statute provides:

> (a) Statement of equal rights.
>
> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishments, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.
>
> (b) "Make and enforce contracts" defined.
>
> For purposes of this section, the term "make and enforce contracts" includes the making, performance, modification, and termination of contracts, and the enjoyment of all benefits, privileges, terms, and conditions of the contractual relationship.
>
> (c) Protection against impairment.
>
> The rights protected by this section are protected against impairment by nongovernmental discrimination and impairment under color of State law.

Id.

126. *See, e.g.*, Hishon v. King & Spalding, 467 U.S. 69, 74 (1984) ("[T]he contract of employment may be written or oral, formal or informal; an informal contract of employment may arise by the simple act of handing a job applicant a shovel and providing a workplace.").

127. *See* Johnson v. Railway Express Agency, Inc., 421 U.S. 454, 459-60 (1975).

128. In response to Patterson v. McLean Credit Union, 491 U.S. 164, 176-77 (1989), which

differs from Title VII in several important aspects. Most significant for purposes here, while Title VII is usually interpreted as imposing liability only on employers and not their agents,[129] individual supervisors can be held directly liable under section 1981.[130] Additionally, whereas Title VII's coverage is limited to employers with fifteen or more employees,[131] there is no minimum number of employees required to trigger section 1981's application. Section 1981 also extends to all contractual relationships and thus, unlike Title VII, applies to partnerships and subcontractor relationships.[132] Perhaps more important for the supervisor who faces personal liability, damages under section 1981 are not subject to any caps such as those applicable under Title VII.[133] Despite these and other advantages over Title VII,[134] section 1981 is not utilized as often as Title VII to challenge race-based discrimination in the workplace.

Section 1983 creates a statutory cause of action for infringements of constitutional rights under color of state law.[135] Although with regard

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severely restricted the degree of overlap between § 1981 and Title VII, Congress added paragraphs (b) and (c) to § 1981 through the 1991 CRA so as to make clear that § 1981 reaches as far as Title VII with regard to the terms and conditions of employment. *See* H.R. REP. NO. 102-40(i), at 89-93 (1991), *reprinted in* 1991 U.S.C.C.A.N. 549, 627-31; *see also* Civil Rights Act of 1991, Pub. L. No. 102-166, § 101, 105 Stat. 1071, 1071-72.

129. *See supra* note 3 (listing courts which have rejected supervisor liability under Title VII).

130. *See, e.g., Jones*, 789 F.2d at 1231; *Al-Khazraji*, 784 F.2d at 518, *aff'd*, 481 U.S. 604 (1987); Musikiwamba v. ESSI, Inc., 760 F.2d 740, 748 (7th Cir. 1985); *Faraca*, 506 F.2d at 959.

131. *See* 42 U.S.C. § 2000e(b) (1994).

132. *See* Runyon v. McCrary, 427 U.S. 160, 169-74 (1976).

133. *See supra* text accompanying notes 37-39 (explaining that although damages are capped under Title VII, damages against supervisors might be unlimited because the caps arguably do not apply or would be based on the size of the supervisors' employers).

134. Because there is no federal agency charged with enforcing § 1981, those bringing § 1981 claims do not have to jump through the many procedural hoops required for Title VII claims. Moreover, plaintiffs probably are not required to exhaust state remedies as a precondition to bringing their § 1981 suits. *See* Patsy v. Board of Regents, 457 U.S. 496, 516 (1982) (rejecting exhaustion requirements in § 1983 cases in large part because § 1983, like § 1981, arose from Civil Rights Act of 1871).

135. *See* 42 U.S.C. § 1983 (1994). The statute provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, [or] suit in equity. . . .

Id.

to employment discrimination there is a great deal of overlap between section 1983 and the other anti-discrimination statutes discussed here, the protections offered by section 1983 are at once both broader and narrower than its counterparts. In addition to gender, race, age and disability-based discrimination, for instance, section 1983 potentially reaches all discrimination, including that based on weight, ethnicity, political views and sexuality.[136] Because constitutional analysis applies to claims brought under section 1983, however, the degree of protection afforded by section 1983 is very different from that provided by other anti-discrimination statutes. For example, under section 1983, employment practices which discriminate on the basis of race are subjected to strict scrutiny, the most demanding test applied by courts.[137] Age-based employment decisions, on the other hand, are shown much greater deference and require only a rational relation to the ends sought to be achieved in order to survive attack under section 1983.[138]

While these varying degrees of scrutiny explain to some extent why section 1983 is seldom used to challenge employment discrimination that falls within the ambit of other statutes, the more obvious reason is that section 1983 only applies to discrimination by persons acting under the color of state law: state actors.[139] "Persons" within the meaning of the statute include all natural persons and, thus, individual supervisors are subject to personal liability under section 1983.[140] Public officials, however, often can escape liability for damages under the public-official immunity doctrine.[141] Nonetheless, for the victim of discrimination

136. *See, e.g.*, Steffan v. Aspin, 8 F.3d 57, 70 (D.C. Cir. 1993) (finding that military's discrimination based on individual's status as admitted homosexual violates equal protection); Dahl v. Secretary of Navy, 830 F. Supp. 1319, 1337 (E.D. Cal. 1993) (finding military restriction on homosexuals violative of equal protection).

137. *Cf.* Boutros v. Canton Reg'l Transit Auth., 997 F.2d 198, 202-03 (6th Cir. 1993) (explaining the elements of § 1983 action for national origin discrimination); Trautvetter v. Quick, 916 F.2d 1140, 1149 (7th Cir. 1990) (discussing when sexual harassment violates equal protection under § 1983); Crawford v. Western Elec. Co., 614 F.2d 1300, 1315 (5th Cir. 1980) (describing plaintiff's burden of proof for § 1981 racial discrimination claim).

138. *See* Massachusetts Bd. of Retirement v. Murgia, 427 U.S. 307, 312 (1976); *see also* Hatten v. Rains, 854 F.2d 687, 692 n.7 (5th Cir. 1988) (noting that while Equal Protection Clause provides little protection from discrimination on basis of age, elderly are not without protection by referring to congressional enactment of ADEA).

139. *See* 42 U.S.C. § 1983.

140. *Cf. Monell*, 436 U.S. at 690-91. Legal persons such as municipalities and other local governments are also liable under § 1983 but only for their acts as entities; vicarious liability does *not* apply under § 1983. *See id.* at 690-91, 694. In contrast to municipalities, states themselves are immune from suit in federal court under § 1983 as a result of the Eleventh Amendment. *See* Will v. Michigan Dept. of State Police, 491 U.S. 58, 66 (1989).

141. *See* Scheuer v. Rhodes, 416 U.S. 232, 247-48 (1974) (recognizing immunity depending on "scope of discretion and responsibilities of the office and all the circumstances as they

who is able to mount a section 1983 claim successfully, doing so may be preferable to pursuing the same claim under Title VII or the ADA because money damages are not subject to any caps under section 1983.[142]

III. THE POLICY ARGUMENTS

As is evident from the preceding discussion, the question of whether agents should be personally liable under federal anti-discrimination statutes is a complicated one not easily resolved by reference to principles of statutory construction alone. While statutory language itself does not readily provide the answer, neither do the legislative histories of the various statutes nor their historical underpinnings shed definitive light on what Congress intended with respect to individual liability. The search for a solution, therefore, must include a careful examination of the often conflicting policies reflected in these statutes and the impact supervisor liability would have on their effectiveness in eliminating workplace discrimination. While at first glance the twin goals of deterrence and compensating victims would seem to support extending liability to supervisors in their individual capacity, imposing such liability would, in all likelihood, result in *less* protection for victims of employment discrimination in the long run.

Contrary to the position taken by several courts and commentators, however, the policy arguments made in support of individual liability are not so easily dismissed.[143] Imposing liability on supervisors for their own conduct would indeed expand the sources of recovery available to victims of employment discrimination[144] and in the case of the bankrupt company, might provide the *only* source of compensation.[145] Individual liability also would increase the deterrent effect of

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reasonably appeared at the time of the action on which liability is sought to be based"). In the context of employment discrimination, the protection enjoyed by public officials is generally limited to a qualified immunity. *See id.* The barrier to recovery created by qualified immunity is much lower where only equitable relief is sought against a public official. *See, e.g.*, Kentucky v. Graham, 473 U.S. 159, 169 n.18 (1985); Pulliam v. Allen, 466 U.S. 522, 537-38 (1984).

142. If supervisors are individually liable under Title VII and ADEA, the issue of damage caps is still problematic because the 1991 CRA caps damages based on the number of employees. Thus, damages against a supervisor may be based on the size of that supervisor's employer or may in fact be unlimited because the caps arguably do not apply. *See supra* text accompanying notes 35-40 (describing debate over 1991 CRA's damages provision).

143. *See, e.g., AIC*, 55 F.3d at 1282 (recognizing value of the increasing number of potential defendants so as to increase deterrence and encourage suits in marginal cases but rejecting individual liability nonetheless as inconsistent with the balance struck by Congress between omni-liability and societal costs).

144. *See Johnson*, 871 F. Supp. at 986.

145. *See, e.g., Vakharia*, 824 F. Supp. at 784-86.

anti-discrimination statutes in many cases. As is evident from the existing case law, not all employers are diligent in monitoring discrimination and punishing the inappropriate conduct of supervisors.[146] Even if this were not the case, common sense suggests that in at least some circumstances, the mere threat of being reprimanded by their employer will not be sufficient to force agents to modify their behavior.[147] In these situations, imposing individual liability may be the only way to combat discrimination in the workplace.

On the other hand, individual liability for supervisors is not nearly as critical to achieving the goals of deterrence and compensation as some proponents suggest.[148] Even where the fear of disciplinary action by the employer is insufficient to prevent inappropriate behavior, an employer who is held vicariously liable for the conduct of its agent can sue the agent at common law for breach of the duties of care and loyalty.[149] Statutory liability for agents, therefore, is not truly necessary as a financial deterrent to prevent agents from discriminating against their subordinates. Juries also may be more reluctant to attach liability or award adequate damages when the defendant is an individual than when the defendant is an employer entity. Thus, the availability of supervisor liability may reduce the likelihood that victims as a group will be fully compensated for their injuries.

The only situation in which a successful plaintiff might otherwise be foreclosed from recovering under federal anti-discrimination statutes absent individual liability is where the employer entity has dissolved or is in bankruptcy.[150] In many such cases, the victim still may be able to recover from the principles of the entity under the corporation law concept of veil-piercing.[151] Even where recovery from the entity or its principles is not available, the inability to bring an action directly

146. *See, e.g., Jendusa*, 868 F. Supp. at 1012 (noting that even after a jury finds that a supervisor discriminated, the employer "more often than not" fails to reprimand the supervisor).

147. For instance, supervisors who are highly valued by their employer, qualified for pensions, or already planning to leave the employer may have little fear of being reprimanded. *See id.* at 1012 n.8.

148. *See, e.g., id.* at 1012 (describing monetary penalty as "essential" to deterring discriminatory conduct of supervisors).

149. *See* RESTATEMENT (SECOND) OF AGENCY § 399 (1958).

150. *See, e.g., Vakharia*, 824 F. Supp. at 784-86.

151. In appropriate circumstances, veil-piercing would enable the victim to recover from the owners of the dissolved or bankrupt entity in their personal capacities. *See, e.g.*, White Oak Coal Co., 318 N.L.R.B. 732, 732 (1995) (concluding that piercing the corporate veil is appropriate where "(1) the shareholder and corporation have failed to maintain separate identities, and (2) adherence to the corporate structure would sanction a fraud, promote injustice, or lead to an evasion of legal obligations"); *see also Saville*, 852 F. Supp. at 1525 (leaving open the possibility of supervisor liability where employer is bankrupt or corporate veil-piercing is necessary).

against an individual supervisor under anti-discrimination statutes does not automatically foreclose all prospects of recovery for the victim. Actions under state law[152] and, in certain cases, section 1981 and section 1983[153] often will allow victims to pursue claims against individuals that cannot be brought under Title VII or its companion statutes.

Moreover, even if federal anti-discrimination laws provided the sole basis for recovery, imposing individual liability on agents would do little to solve the problem posed by the bankrupt entity. These agents, who are most likely to be only mid-level managers and perhaps even jobless as a result of their employers' bankruptcy, often will themselves be judgment proof. While it is true that not every individual supervisor will file bankruptcy in order to avoid a judgment, this seems as, if not more, likely than the employer going bankrupt in the first instance. In short, holding supervisors individually liable for damages under anti-discrimination statutes rarely will be necessary to compensate fully the victim of discrimination and where it is "necessary," the imposition of supervisor liability is unlikely to achieve this goal.

Although the threat of personal liability would certainly deter some inappropriate conduct on the part of supervisors that cannot be prevented merely by imposing vicarious liability on their employers, individual liability is likely to result in an overall net *decrease* in statutory compliance. The fear of personal liability and of simply having to defend oneself against charges of discrimination will create enormous pressure on supervisors to avoid making or implementing personnel decisions adverse to those viewed as likely candidates for filing discrimination charges.[154] The foreseeable result of individual liability, therefore, is that supervisors as a group would be more, not less, inclined to make employment decisions based on statutorily protected characteristics such as race, sex, and age.

Although it could be argued that such "overcompensation" already occurs to some degree under a scheme where only the employer entity itself is exposed to liability, the danger of overcompensation is not

152. Any number of contract and tort theories, such as interference with contract rights and intentional infliction of emotional distress, may be available to challenge conduct that would also fall under the rubric of federal anti-discrimination statutes. *See, e.g., Saville*, 852 F. Supp. at 1540-42 (finding sexual harassment in workplace presented jury question on assault and battery and invasion of privacy claims).

153. *See supra* text accompanying notes 123-42 (explaining overlap between § 1981 and § 1983 and employment discrimination statutes).

154. *See, e.g.*, Archer v. Globe Motorists Supply Co., 833 F. Supp. 211, 214 (S.D.N.Y. 1993) (noting that excessive concerns with liability have chilling effect on performance and lead to impaired efficiency).

nearly as great as it would be if supervisors also were faced with personal liability. Because a corporation is in the business of making profits, its concern with efficiency and, ultimately, its bottom line generally will prevent the corporation from hiring, promoting, or failing to discipline an employee out of fear of discrimination claims by that employee. Moreover, unlike the individual supervisor, a corporation usually has the resources to determine the exact extent of its obligations under federal anti-discrimination statutes. It is true that even if supervisors were individually liable for their own conduct, the threat of vicarious liability would force employers to educate and monitor their agents so as to guard against the dangers of overcompensation. If, however, supervisors will fear individual liability more than reprisal from their employer, as proponents of supervisor liability claim,[155] it is also true that these same supervisors will be more concerned with their own self-preservation than with serving the employers' interests and bottom-line. Thus, personal liability would tend to undercut, rather than support, the overarching purpose of federal equal opportunity policy—putting an end to employment decisions based on statutorily protected characteristics.

Personal liability for individual supervisors also would impose the type of financial burdens that Congress sought to avoid when it limited the coverage of anti-discrimination statutes to employers with fifteen,[156] twenty,[157] and fifty[158] or more employees and tied damages to employer size.[159] While it is true that liability would only attach to a supervisor if that supervisor's employer has the requisite number of employees,[160] the size of the employer has absolutely nothing to do with the wealth of the supervisor.[161] If individual supervisors who

155. *See, e.g., Jendusa*, 868 F. Supp. at 1012 (claiming that monetary penalty is necessary to deter supervisors from discriminating because employers will not or cannot provide adequate disciplinary response).

156. *See* Civil Rights Act of 1964 tit. VII, 42 U.S.C. § 2000e(b) (1994); Americans with Disabilities Acts, 42 U.S.C. § 12111(5)(A) (1994).

157. *See* Age Discrimination in Employment Act of 1967, 29 U.S.C. § 630(b) (1994).

158. *See* Family and Medical Leave Act of 1993, 29 U.S.C. § 2611(4)(A)(i) (1994).

159. *See supra* note 37 (quoting 1991 CRA damage provision which caps compensatory and punitive damages by employer size for purposes of Title VII and ADA).

160. Only employers with the requisite number of employees are subject to the statutes' prohibitions. Thus, even if "agents" are treated as statutorily defined "employers" for purposes of liability, only those agents of entities which satisfy the threshold number of employees could be held liable under the statutes. *See supra* notes 156-58 and accompanying text.

161. *See, e.g.*, Verde v. City of Philadelphia, 862 F. Supp. 1329, 1334 (E.D. Pa. 1994) ("A corporation's ability to pay can be estimated by its size and the number of its employees; an individual's ability to pay cannot be estimated by the size of his employer."). This, of course, would not be true where the agent is in fact the alter ego of the employer entity, i.e., the owner

discriminate are to be held personally liable, why should liability be limited only to those who work for entities employing a certain number of people? Moreover, why should a supervisor who works for a large company face greater exposure to damages than one who works for a smaller firm? Whatever purpose Congress sought to achieve by limiting liability and damages in reference to an employer's size simply cannot be served by imposing individual liability on the agents of employers.[162]

Of the many policy reasons that counsel against imposing personal liability on agents, the one most often overlooked by courts is the very real risk that doing so consequently will reduce employers' incentives to see that their agents comply with federal anti-discrimination statutes. Rather than prohibiting *persons* from discriminating as it has done in other contexts,[163] Congress chose to enforce its employment discrimination statutes by attaching liability only to statutorily defined employers. This choice reflects a recognition on the part of Congress that employers are in the best position to ensure that statutory demands are met[164] and to provide the remedies necessary to cure the effects of discriminatory employment practices.[165] Supervisor liability threatens to undermine the vicarious liability scheme which forms the core of federal employment discrimination policy because extending liability to agents in their individual capacities is likely to reduce the amount of damages and liability to which employers are exposed.

Individual liability would weaken the deterrent effects of vicarious liability if courts, viewing both the employer entity and its agent as proper parties for liability, begin to apportion damages between the two. While at common law joint tortfeasers were jointly and severally liable for damages, the modern trend has been to allow contribution so that

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of the company. Even so, individual liability would not be necessary in this case to make the agent/owner feel the impact of a damage award because any damages assessed against the entity by virtue of vicarious liability will necessarily be felt by its owner. *See AIC*, 55 F.3d at 1282 n.8. Additionally, where the agent is the alter ego of the entity, corporate veil-piercing would prevent the agent/owner from escaping liability in many cases. *See supra* note 151 and accompanying text (describing requirements for piercing corporate veil).

162. This point has led many courts to reject individual liability. *See, e.g.*, *Birkbeck*, 30 F.3d at 510; *Miller*, 991 F.2d at 587; Barb v. Miles, Inc., 861 F. Supp. 356, 359 (W.D. Pa. 1994); *Saville*, 852 F. Supp. at 1524.

163. *See, e.g.*, 42 U.S.C. § 1983 (1994). *See also supra* notes 139-40 and accompanying text (describing scope of "persons" under § 1983).

164. *See Miller*, 991 F.2d at 588 ("An 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.").

165. *See Grant*, 21 F.3d at 653 (stressing importance of equitable relief such as reinstatement in remedying workplace discrimination).

each party is liable only for his share of damages.[166] In states which follow apportionment, the common-law treatment of damages is usually only modified where the joint tortfeasers are each *directly* liable for the injury, not when one of the parties is merely vicariously liable for the tort of another.[167] Although liability for employers under Title VII and its companion statutes is based on vicarious liability, several courts extending individual liability to agents have nevertheless ruled that apportioning damages between the employer and agent is proper.[168]

None of the federal anti-discrimination statutes specifically provide for apportionment of damages.[169] However, apportionment seems particularly likely given that one of the principle arguments made in support of individual liability is that the agent who actually discriminates is more blameworthy than the employer and should be liable for damages.[170] Although this reasoning is certainly appropriate in other contexts,[171] its application to liability for employment discrimination would allow an employer to avoid at least a portion of damages whenever the discrimination could be attributed to one or more of its agents. Additionally, because punitive damages are available only in cases involving intentional discrimination,[172] apportionment and its emphasis on blameworthiness might well enable employers to escape punitive damages altogether.[173] The likely impact of apportionment,

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166. *See* W. PAGE KEETON ET AL., PROSSER AND KEETON ON THE LAW OF TORTS § 50, at 336-38 (5th ed. 1984).

167. *See, e.g.*, CAL. CIV. CODE § 1431.2 (West 1998); *see also* KEETON ET AL., *supra* note 166, § 52, at 346 (noting that no rationale exists for applying apportionment to situations involving vicarious liability).

168. *See, e.g.*, *Jendusa*, 868 F. Supp. at 1016 (ADA); Hamilton v. Rodgers, 791 F.2d 439, 445 (5th Cir. 1986) (Title VII).

169. *See* Northwest Airlines v. Transport Workers Union, 451 U.S. 77, 94-95 (1981) (holding that no right to contribution exists under Title VII or the Equal Pay Act).

170. *See, e.g.*, Bishop v. Okidata, Inc., 864 F. Supp. 416, 424 (D.N.J. 1994); Strzelecki v. Schwarz Paper Co., 824 F. Supp. 821, 829 n.3 (N.D. Ill. 1993).

171. Under general agency principles, an employer held vicariously liable for the actions of its agent can usually seek indemnity from the agent. *See* KEETON ET AL., *supra* note 166, § 51, at 341-42.

172. *See* 42 U.S.C. § 1981a(a)(1) (1994).

173. At least one employer has already made this argument, although unsuccessfully. *See* Preston v. Income Producing Management, 871 F. Supp. 411, 413-15 (D. Kan. 1994). *But see* RESTATEMENT (SECOND) OF AGENCY § 217C (1958) (stating employer vicariously liable for punitive damages only if employee was employed in managerial capacity and acted within scope of his employment); Mitchell v. Keith, 752 F.2d 385, 390 (9th Cir. 1985) (refusing to hold employer vicariously liable for punitive damages under § 1981 unless discriminating supervisor was at managerial level). *See also infra* text accompanying notes 181-86 (explaining possibility that employer entities may be able to escape vicarious liability for damages altogether under 1991 CRA).

therefore, would be to relieve much of the pressure that encourages employers to prevent their agents from engaging in discriminatory conduct. At the very least, because individual supervisors are more prone to being judgment-proof than employers, apportionment of damages will reduce the chances of full compensation for the victims of discrimination.

Far more dangerous than leading to the apportionment of damages, however, is the possibility that individual liability for agents will cause courts to reexamine the role of vicarious liability under federal anti-discrimination laws. Although the status of vicarious liability would appear to be well protected at least under Title VII by the Supreme Court's endorsement of the doctrine in *Meritor Savings Bank v. Vinson*,[174] the *Meritor* Court also stated that Congress' use of " 'agent' . . . surely evinces an intent to place some limits on the acts of employees for which employers under Title VII are to be held responsible."[175] This language, which could be read simply as an acknowledgment by the Court that vicarious liability does not arise simply by virtue of an employer-employee relationship,[176] instead has been used by most circuits as a basis for rejecting vicarious liability altogether in at least one context. In cases involving hostile work environment claims,[177] courts have been particularly reluctant to hold employers liable for the improper conduct of their agents, ruling instead that only direct liability can attach to employers in these cases.[178] Although there appears to be no reason to treat vicarious liability differently in hostile work environment cases than in other situations,[179] courts have strained to apply additional concepts, such as

174. 477 U.S. 57, 72 (1986).

175. *Id.*

176. Under respondeat superior, the employer is only liable for the torts of his servants committed while acting *"in the scope of their employment."* RESTATEMENT (SECOND) OF AGENCY § 219(1) (1958) (emphasis added). Thus, an employer is not automatically liable for all of the conduct of its employees; *see infra* note 182 and accompanying text (defining that conduct which is within agents' scope of employment).

177. A hostile work environment exists when unwelcome conduct of a proscribed nature is "sufficiently severe or pervasive 'to alter the conditions of [the victim's] employment and create an abusive working environment.' " *Meritor*, 477 U.S. at 67 (quoting Henson v. Dundee, 682 F.2d 897, 904 (11th Cir. 1982)).

178. *See* Frederick J. Lewis & Thomas L. Henderson, *Employer Liability for "Hostile Work Environment" Sexual Harassment Created by Supervisors: The Search for an Appropriate Standard*, 25 U. MEM. L. REV. 667, 674-75, 687-730 (1995) (surveying cases and finding that most circuits hold employer liable only when it knew or should have known of harassment and failed to correct it).

179. *See Meritor*, 477 U.S. at 77 (Marshall, J., concurring) (finding "no justification for a special rule, to be applied *only* in 'hostile environment' cases").

notice and reporting requirements, to avoid imposing liability on employers.[180] The recent addition of compensatory and punitive damages to the remedies available under Title VII and the ADA may make courts even more reluctant to hold employers vicariously liable for the unlawful conduct of their employees.[181]

Under a statutory scheme that relies only on vicarious liability for enforcement, a court can avoid imposing liability on an employer for the otherwise unlawful conduct of its employee only by determining that the employee was not acting as an "agent" of the employer.[182] Although such a determination would place the conduct outside of the statute's coverage and, therefore, leave the victim of discrimination without a remedy under that statute, courts are not free to rewrite agency law entirely. Thus, even a court that is reluctant to impose vicarious liability on an employer is bound to a large degree by agency principles to hold the employer liable for the conduct of those employees who are *clearly* agents of the employer. In a world where agents are individually liable for their own conduct, however, those courts seeking to exonerate the employer may be inclined to rethink or even abandon vicarious liability. Courts could allow employers to escape liability in many cases by drawing distinctions between direct and indirect liability rather than tinkering with the definition of "agent."[183] While the result in these

180. *See* Kauffman v. Allied Signal, Inc., 970 F.2d 178, 183-84 (6th Cir. 1992) (noting different standards used for hostile work environment than for other types of employment discrimination).

181. *See supra* note 173 (explaining hesitance of some courts to hold employers vicariously liable for punitive damages).

182. Under agency law, an employer can only be held vicariously liable for the conduct of an agent acting within the scope of his employment. *See* RESTATEMENT (SECOND) OF AGENCY § 219 (1958). An agent's conduct is within the scope of employment if "(a) it is of the kind he is employed to perform; (b) it occurs substantially within the authorized time and space limits; [and] (c) it is actuated, at least in part, by a purpose to serve the master. . . ." RESTATEMENT (SECOND) OF AGENCY § 228(1)(a)-(c) (1958). Thus, courts unwilling to impose liability on employers for the conduct of agents often will conclude that the agent was not acting within the scope of his employment when the discrimination took place. This occurs particularly in cases involving sexual harassment. *See, e.g.*, Jackson v. Kimel, 992 F.2d 1318, 1322 (4th Cir. 1993) (noting that North Carolina courts "have consistently held that sexual harassment and similar conduct are not in furtherance of the employer's business; rather, in most cases, the conduct is deemed to be for the perpetrator's own licentious purposes").

183. This already has occurred in the context of hostile work environment claims where courts have abandoned vicarious liability and imposed liability on the employer only when the employer knew or should have known of the agents' conduct and failed to correct it; thus, only direct liability can attach in these cases. *See supra* notes 177-80 (discussing separate standards used in hostile work environment cases). Of course, vicarious liability is not always necessary to hold an employer responsible for the action of its employees. Where the employer knows of and fails to prevent or cure the discrimination, the employer is directly liable, not simply

courts might be that more conduct is attributed to agents and, thus, actionable under anti-discrimination statutes, reducing the availability of vicarious liability would be devastating to victims of employment discrimination.

Because individual agents are far more likely than employer entities to be judgment proof, the victim that is only permitted to recover against the agent may be left without much hope of a full recovery.[184] Moreover, money damages are not always the appropriate remedy, and individual agents are simply not in a position to provide the reinstatement, hiring, and promotion that may be necessary to cure the effects of workplace discrimination. Most importantly, however, the employer that is not faced with vicarious liability has little incentive to deter inappropriate behavior that cannot be attributed directly to the employer itself. Such a liability scheme would in fact encourage employers to actually avoid discovering discrimination so as to protect themselves from direct liability.

Even if vicarious liability were not abandoned entirely, the availability of individual liability would almost certainly lead courts to distinguish between individual and employer liability for some purposes. For instance, the 1991 CRA states that in Title VII and ADA claims "against a *respondent who engaged* in unlawful intentional discrimina-

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vicariously liable. *See, e.g.*, Tomka v. Seiler Corp., 66 F.3d 1295, 1305 (2d Cir. 1995). The employer also will be directly liable when it endorses or ratifies the discriminatory actions of its agents. *See, e.g.*, Patterson v. P.H.P. Healthcare Corp., 90 F.3d 927, 944 (5th Cir. 1996), *cert. denied*, 117 S. Ct. 767 (1997).

184. A growing number of companies are purchasing "Employment Practices Liability Insurance" (EPLI) to protect themselves from discrimination suits. Most EPLI policies cover both the company and its individual supervisors. *See* Susan A. Bocamazo, *Companies Buy Insurance for Discrimination*, 96 LAW. WKLY USA 335 (1996). Thus, in some cases, the victim of discrimination that is only permitted to proceed against the supervisor still may be able to recover something as a result of the employer's EPLI. Policy coverage, however, varies by carrier and many EPLI policies do not cover intentional discrimination. *See id.* Because compensatory and punitive damages, the only type of relief an individual supervisor could be expected to provide, are typically only available in cases involving intentional discrimination, *see, e.g., infra* text accompanying note 185, limits on EPLI coverage may still prevent EPLIs from offering much hope of a full recovery to victims of discrimination. Moreover, many states prohibit insurance coverage for deliberately wrongful acts altogether, *see* Bocamazo, *supra*, and even where such coverage is permitted some policies will cover the employer for intentional acts but not individual supervisors. *See* Sally Roberts, *Maturing EPL Market Offering Enhanced Cover*, BUS. INS., June 9, 1997, at 14. Despite their limitations, EPLI policies are becoming increasingly important to employers if for no other reason than that they will generally cover defense costs even if the insurance company does not have to indemnify the policy holders. *See* Bocamazo, *supra*. Unfortunately for many employees subjected to discrimination on the job, the result of EPLI coverage will be that claims will be defended more vigorously without providing a pool of funds for paying those claims that succeed.

tion . . . the complaining party may recover compensatory and punitive damages . . . from *the* respondent."[185] Because personal liability for agents under these statutes must be premised on the notion that agents are themselves statutorily defined "employers,"[186] an employer entity might very possibly be able to avoid vicarious liability for compensatory and punitive damages simply by arguing that it is not *the* employer for purposes of the 1991 CRA's damage provision. Although vicarious liability is probably well enough entrenched under the employment discrimination statutes to avoid a wholesale abandonment, supervisor liability certainly will provide employers with fresh ammunition with which to defend themselves against vicarious liability. The length to which many courts have already gone to avoid holding employers liable for the conduct of their agents guarantees that these arguments will find more than a few sympathetic ears.

IV. THE NEED FOR A UNIFORM STATUTORY APPROACH TO SUPERVISOR LIABILITY

Regardless of one's position on the issue, the question of whether individual agents should be subject to personal liability under federal anti-discrimination laws is a complex one that requires careful analysis and a willingness to balance the legitimate needs of victims, employers, and supervisors alike. While courts have applied themselves to the question of supervisor liability with a great deal of earnestness and ingenuity over the past three decades, because the resolution of this issue must ultimately turn on public policy considerations, courts are ill-equipped to resolve the ambiguities surrounding Congress' intentions. By focusing primarily on statutory language, legislative history and other tools of interpretation, courts have not only reached conflicting conclusions regarding the same statutes but also have read the various anti-discrimination statutes as incorporating different liability schemes. Thus, while a majority of circuits have interpreted the language in Title VII as precluding individual liability for agents,[187] courts have been more willing to allow individual liability under the ADEA[188] and the FMLA[189] based on the various differences between these statutes and

185. 42 U.S.C. § 1981a(a)(1) (emphasis added).

186. Only "employers" are prohibited from discriminating and, thus, only if agents are "employers" can they be held liable under the various statutes. *See generally supra* pt. II.

187. *See supra* note 3 (listing circuits which have rejected individual liability under Title VII).

188. *See supra* text accompanying notes 75-86 (noting distinctions between Title VII and ADEA and courts' inclination to treat individual liability differently under each statute).

189. *See supra* text accompanying notes 120-22 (explaining courts' rationale for treating

Title VII. Whether intended by Congress or not, the result is a statutory scheme that exposes supervisors to personal liability for certain types of discrimination but not for others and, therefore, sends a dangerous message to employers, their agents, and the victims of employment discrimination. The time has come for Congress to step forth and declare its intentions as to supervisor liability in a less elusive manner.

Thus far Congress has prohibited employment discrimination based on a range of factors—from race, gender, and religion[190] to age,[191] disabilities,[192] and the need for medical leave[193] and has given no indication that it views one of these types of discrimination as any more or less onerous than the others. Indeed, there is no justifiable policy reason for allowing a victim of one form of discrimination to recover against an individual supervisor when other similarly situated victims cannot. Conversely, a supervisor should not escape personal liability for what is clearly unlawful discrimination merely because he or she targets a particular victim. And yet, under the present scheme, a supervisor who willfully discriminates against an individual on the basis of race, for instance, is less likely to be held personally liable than if he chooses instead to discriminate on the basis of age.

Although this situation may not actually encourage discrimination in the workplace, it definitely sends a signal to supervisors that certain forms of discrimination will be more tolerated than others. Moreover, because the availability of individual liability inevitably reduces to some degree the pressure on employers to ensure that statutory commands are obeyed by their agents,[194] treating individual liability differently under the various federal statutes can only lead to a situation in which certain types of discrimination are monitored by employers less vigorously than others. The obvious losers in both instances are the potential victims of employment discrimination.

The courts, however, are not entirely to blame for creating a federal anti-discrimination scheme that treats some forms of discrimination differently than others. After all, Congress employed different language and enforcement methods in the various statutes and has provided no hint as to what it intended with regard to individual liability. Because courts have little choice but to approach the issue of liability as a matter of statutory interpretation, only Congress can address this issue with the

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individual liability differently under Title VII and FMLA).

190. *See* 42 U.S.C. § 2000e-2 (1994).

191. *See* 29 U.S.C. § 623(a)(1) (1994).

192. *See* 42 U.S.C. § 12112(a) (1994).

193. *See* 29 U.S.C. § 2612(a)(1)(D) (1994).

194. *See supra* text accompanying notes 162-83 (explaining how individual liability will undermine effectiveness of vicarious liability as means of enforcing anti-discrimination statutes).

finality and speed necessary to resolve the disparities between these statutes that threaten to undermine the federal goal of eradicating workplace discrimination.

In short, Congress should enact legislation so as to create a uniform approach to individual liability under Title VII, the ADA, the ADEA, and the FMLA. Whether Congress endorses individual liability or not, a uniform standard would at least have the merit of treating the proscribed forms of discrimination in the same manner. The better solution, of course, would be to reject individual liability under all of the statutes specific to employment discrimination so as to avoid relaxing the pressures on employers that are so necessary to the enforcement of these statutes.[195] State law actions and section 1981 and section 1983 claims will remain to fill many of the gaps where recourse against an individual supervisor is the only remedy available to the victim of discrimination because of an employer's insolvency or dissolution.[196]

It is true that the availability of individual liability under state laws, section 1981 and section 1983 is to a certain degree inconsistent with the uniform approach to liability proposed here, but individual liability under these laws does not pose the same problems as now exist under the employment discrimination statutes. In the first place, state laws and section 1981 and section 1983 exist independently of the federal employment discrimination statutes and although applicable to workplace discrimination, extend much farther than the employment context. Thus, the presence of individual liability under these laws does not detract from a system that treats all forms of *employment* discrimination alike for purposes of *federal law*.

Moreover, altering liability rules under state law and particularly section 1981 and section 1983 would have severe impacts for other classes of plaintiffs, and yet allowing individual liability under these laws would not interfere with a scheme that relied solely on vicarious liability for enforcing federal anti-discrimination policy in the workplace. Sections 1981 and 1983 and state laws are not widely used to challenge discriminatory employment practices.[197] Although the inability to recover against an individual supervisor under Title VII and its counterparts may lead to a greater reliance on alternative theories, state laws and especially section 1981 and section 1983 are of limited

195. *See id.*

196. *See supra* text accompanying notes 123-42, 153 (explaining how state laws and § 1981 and § 1983 can be used to challenge discriminatory employment practices).

197. *See supra* text accompanying notes 123-42 (explaining some of reasons why § 1981 and § 1983 are of limited use to victims of employment discrimination).

applicability and will in no way operate to supplant the federal statutes specific to employment discrimination. More importantly though, the presence of individual liability under state law, section 1981 and section 1983 will not weaken the deterrent effect of vicarious liability under the federal employment statutes because employers will not be able to predict with any certainty under which law a particular employee might choose to pursue his or her claim. Rather, in situations where state law and the constitutionally based actions might apply, the possibility of individual liability under these laws would operate as an additional deterrent upon supervisors without simultaneously relieving any of the pressures on employers to prevent workplace discrimination as would occur if individual liability also were accepted under the federal employment statutes. While the many complications of maintaining overlapping and often times contradictory federal and state systems to address employment discrimination are quite beyond the scope of this Article, it is at least clear that a uniform approach to individual liability under the various federal employment discrimination statutes is necessary in order to make clear to employers, their agents, and employees alike that all of the proscribed forms of discrimination are equally intolerable as a matter of federal policy.

V. CONCLUSION

The issue of individual liability for supervisors under Title VII, the ADA, the ADEA, and the FMLA must be resolved once and for all. Holding supervisors personally liable for discrimination under these statutes places unrealistic burdens on supervisors and provides employers with the incentive and means with which to escape the vicarious liability which has long been the principle basis for enforcing federal employment discrimination policy. With almost no guidance from Congress, the courts which have struggled with the question of individual liability have thus far failed to reach a consensus with regard to any of the individual statutes.

Worse still, forced to treat the issue of liability as purely a matter of statutory construction, the courts often have read the various discrimination statutes as encompassing different liability schemes. The result is a system of federal laws which holds supervisors personally liable for certain forms of discrimination and allows them to escape liability for others. Such a scheme can only serve to weaken the overall goal of eliminating discrimination in the workplace that Congress has sought to achieve through Title VII and its companion statutes. The problems posed by individual liability under these statutes are by no means trivial ones that simply pit the interests of supervisors against those of victims seeking to recover for injuries caused by discrimination. Rather, the

question of whether or not supervisors should be personally liable for their discriminatory conduct is integrally tied up with the basic issue of how to best maximize the enforcement of federal anti-discrimination policy while minimizing the social and economic costs of such a policy. Because even well-intentioned courts are ill-equipped to strike the necessary balance, sooner or later Congress must step forth and finally resolve the debate over individual liability. Hopefully, Congress will demonstrate the same wisdom it has shown in seeking to eliminate workplace discrimination by taking the initiative sooner rather than later and rejecting individual liability under all of the federal employment statutes.